

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 29, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP1151

STATE OF WISCONSIN

Cir. Ct. Nos. 2006TR7274
2006TR7442

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY J. HOARD,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sauk County:
JAMES EVENSON, Judge. *Reversed and cause remanded.*

¶1 VERGERONT, J.¹ Timothy Hoard appeals the judgment of conviction for operating a motor vehicle with a prohibited alcohol concentration in

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

violation of WIS. STAT. § 346.63(1)(b). He contends the circuit court erred in denying his motion to suppress evidence and his motion for reconsideration because, he asserts, the arresting officer did not have reasonable suspicion to stop his vehicle. We agree the arresting officer did not have reasonable suspicion. We therefore reverse the judgment of conviction and remand to the circuit court for further proceedings consistent with this opinion.

BACKGROUND

¶2 At the hearing on Hoard’s motion to suppress evidence, the arresting officer, Michael Marquardt, a trooper with the Wisconsin State Patrol, testified as follows. At approximately 8 p.m. on the evening of August 24, 2006, he was on duty in his squad car at a location on Highway 23 in Sauk county that was under construction. The area under construction was approximately six or seven miles in length, was graveled, and had barricades and “Road Closed” signs at all the entrances. There had been reports of people operating their vehicles on the closed portion of the highway and the evening before an accident had occurred when a vehicle had “jumped all—the Dell Creek Bridge because it was not completed yet.”

¶3 If people can get to their homes only by driving on the area of construction, they are allowed to do that and the signs permit that. The only people that would need to do that were the residents on Pickerel Slough Road; there were five or six homes there. Trooper Marquardt and his partner were checking vehicles to make sure they lived there; if they didn’t, the officers would redirect them.

¶4 Trooper Marquardt observed a red pickup truck that “did a slalom through the barricades so it could get onto State Highway 23.”² He stopped the vehicle with the intention of speaking to the driver to ascertain whether he was supposed to be on the road; if not, then it was likely he was going to receive a warning for that. The officer approached the vehicle and explained to the driver, who identified himself as Hoard, that he was stopping him on a closed highway, at which point, Hoard informed the officer that he lived on “Pickerel Slough Road which was ‘just down a ways’ on the highway.” The officer asked for Hoard’s identification to confirm his address, because sometimes people that he stopped in situations such as this lie about their addresses. Hoard’s driver’s license confirmed that he lived on Pickerel Slough Road.

¶5 The officer noticed that Hoard had a distinctive slur to his speech, his eyes were red, bloodshot and watery, and his face was flush; the officer could smell intoxicants coming from the inside of the vehicle.

¶6 The circuit court concluded that, even though it ultimately turned out that Hoard resided at an address which permitted him to travel into the closed area, it was reasonable for the officer to stop him to determine whether he did live in that area, particularly with the complaints that had been received. The court reasoned that, had Hoard not shown the signs that led to the citation for a violation of WIS. STAT. § 346.63(1), he would have been allowed to continue since he lived in the area. If the officer had determined he did not live in the area, he would have been cited or given a warning for driving there. The court concluded that the fact

² Although Trooper Marquardt used the word “slalom,” he testified on cross-examination that he did not observe anything suspicious or improper about Hoard’s driving.

that the officer saw the vehicle go into the closed area provided a reasonable basis for the stop.

¶7 The circuit court denied Hoard's motion to reconsider its decision, confirming its conclusion that, when the officer saw a vehicle enter the area closed to all but residents who needed that access to their homes, it was reasonable for him to stop the vehicle in order to determine if the vehicle was lawfully on the closed road. The court noted that the officer could have perhaps run a license check before the stop to determine if the vehicle was lawfully on the closed road but the officer could also obtain the same information through the minimal intrusion of a stop before running a license check. The court acknowledged that stopping the vehicle was an intrusion but it was not an unreasonable intrusion. The court reasoned that "this is a case where if Mr. Hoard did not live within the closed area, there would be no basis to challenge the stop."

¶8 The court subsequently found Hoard not guilty of operating a motor vehicle under the influence of an intoxicant in violation of WIS. STAT. § 346.63(1)(a) but guilty of operating with a prohibited alcohol concentration in violation of § 346.63(1)(b).

DISCUSSION

¶9 On appeal, Hoard renews his argument that the officer did not have reasonable suspicion to believe that he was committing a traffic offense when the officer stopped him because the officer did not have reasonable suspicion to believe that he did not live at one of the addresses whose residents were permitted to travel on the closed road.

¶10 The temporary detention of individuals during the stop of an automobile by the police constitutes a “seizure” of “persons” within the meaning of the Fourth Amendment.³ *Whren v. United States*, 517 U.S. 806, 809-10 (1996). An automobile stop is thus subject to the constitutional imperative that it not be “unreasonable” under the circumstances. *Id.* at 810. A traffic stop is generally reasonable if the officers have probable cause to believe that a traffic violation has occurred, *id.*, or have grounds to reasonably suspect a violation has been or will be committed. *See Berkemer v. McCarty*, 468 U.S. 420, 439 (1984) (citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975)).

¶11 A traffic stop based on reasonable suspicion requires the officer to have “a reasonable suspicion, rounded in specific articulable facts and reasonable inferences from those facts, that an individual is or was violating the law. *State v. Colstad*, 2003 WI App 25, ¶8, 260 Wis. 2d 406, 659 N.W. 2d 394 (citation omitted). The question of what constitutes reasonable suspicion is a common sense test: under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience. *Id.* Reasonableness is measured against an objective standard taking into account the totality of the circumstances. *State v. Richardson*, 156 Wis. 2d 128, 139, 456 N.W.2d 830 (1990).

³ Both the Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution guarantee the right of citizens to be free from unreasonable searches and seizures. In general, the Wisconsin Supreme Court follows the United States Supreme Court’s interpretation of the search and seizure provision of the Fourth Amendment in construing the same provision of the state constitution. *State v. Fry*, 131 Wis. 2d 153, 171-72, 388 N.W.2d 565 (1986).

¶12 When the facts are undisputed, whether they establish reasonable suspicion justifying the stop presents a question of law, which we review de novo. *Colstad*, 260 Wis. 2d 406, ¶8.

¶13 WISCONSIN STAT. § 86.06 provides for a penalty when a person, without “lawful authority” travels on any portion of a highway closed for construction by barriers. Section 86.06.⁴ There is no dispute in this case that a person who could get to his or her residence only by traveling on the closed portion of Highway 23 has “lawful authority” within the meaning of the statute. On the facts of this case, a person who lived on Pickerel Slough Road would have lawful authority. The issue therefore is whether the arresting officer had reasonable suspicion to believe that Hoard did not live on Pickerel Slough Road.

⁴ WISCONSIN STAT. § 86.06 reads as follows:

(1) Whenever any highway is impassable or unsafe for travel or during the construction or repair of any such highway and until it is ready for traffic the authorities in charge of the maintenance or construction thereof may keep it closed by maintaining barriers at each end of the closed portion. The barriers shall be of such material and construction and so placed as to indicate that the highway is closed and shall be lighted at night.

(2) Any person who, without lawful authority, removes, takes down, alters the position of, destroys, passes over or beyond any barrier so erected, or travels with any vehicle upon any portion of a highway closed by barriers as in this section provided, or walks or travels in any manner upon the materials placed thereon as part of the repair or construction work, shall be liable to a fine of not less than \$10 nor more than \$100, or to imprisonment not less than 10 nor more than 60 days, or both, and in addition thereto shall be liable for all damages done to the highway, said damages to be recovered by such governmental agency.

¶14 The officer’s testimony in this case may suggest that he did not think he needed reasonable suspicion with respect to each vehicle he stopped, but could stop all vehicles driving onto or on the area under construction to ask where they lived. However, because the standard for reasonable suspicion is an objective one, our inquiry is whether, under all the facts and circumstances, notwithstanding this officer’s beliefs or actual motivation, a reasonable officer could suspect that Hoard was driving on the construction area without lawful authority.

¶15 The facts known to the arresting officer were that there had been problems with people who were driving on the constructed area, which the court evidently reasonably understood to mean people who did not have the lawful authority to do so. In addition, the officer knew that there were five or six homes whose residents could lawfully drive on this portion of the highway. However, the testimony discloses no facts known to the officer and no reasonable inferences from facts known to him that would provide a basis for reasonably suspecting that Hoard did not live in one of those homes. The fact that unauthorized persons had been driving on that section on previous days does not create a reasonable inference that Hoard was unauthorized. While there were likely not many people who were authorized—since there were only five or six homes on Pickerel Slough Road—we see no reasonable basis in this record for inferring that Hoard was not lawfully driving on the road.

¶16 The State may be suggesting that *State v. Griffin*, 183 Wis. 2d 327, 515 N.W.2d 535 (Ct. App. 1994), supports a stop in this case to inquire whether Hoard was lawfully on the road. We do not agree. In *Griffin* the officer stopped a vehicle that did not have registration plates but instead had a sign reading “license applied for” and contained the name of the car dealer. 138 Wis. 2d at 329-30. While it is unlawful to operate a vehicle that does not display license plates once

they have issued, while awaiting issuance one may operate a vehicle if application for registration and certificate of title has been made and the fees paid. *Id.* at 331-32. A person may, but need not, purchase and display a temporary plate, which states on it the expiration date of the temporary plate. *Id.* at 332. We concluded that the stop of this vehicle was supported by reasonable suspicion. *Id.* at 333-34. We observed that there was testimony from a police detective in the auto theft squad that he had personally recovered many stolen vehicles displaying this type of sign; the arresting officer drew the inference that the sign could easily be affixed to a stolen vehicle; there was no temporary plate displaying identifying information and an expiration date; and there was no way for the officers to tell whether the application had been made and fees paid without stopping the vehicle. *Id.*

¶17 Important to our analysis in *Griffin* was the testimony on the link between the “license applied for signs” and stolen vehicles and the lack of a temporary plate which, though not required, was an option. These are specific and articulable facts that justified stopping that vehicle. We see no specific and articulable facts in this case that would lead a reasonable officer to suspect Hoard did not live in one of the homes whose residents could lawfully use the highway. In addition, unlike in *Griffin*, the officers here had alternative means of determining whether Hoard was lawfully on the road: the officer could follow Hoard to see if he turned off on Pickerel Slough Road or observe whether he exited the closed area. *See id.* at 334.

¶18 The State argues that the officer did not need to rule out innocent behavior, and that is true *when there is a “reasonable inference of wrongful conduct [that] can be objectively discerned.”* *State v. Anderson*, 155 Wis. 2d 77, 84, 454 N.W. 2d 763 (1990) (emphasis added). However, we do not see here facts

that give rise to a reasonable inference of wrongful conduct. If the State means that driving on a construction area that is barricaded with a “road closed” sign always give rise to a reasonable inference of wrongful conduct regardless of the facts regarding who has a right to lawfully travel on that area, we disagree. There must be some specific and articulable facts that give rise to a reasonable inference of a lack of “lawful authority,” in the words of the statute. For example, it may be that when the closed-off area has only businesses and the businesses are not open, an officer could reasonably suspect that a vehicle entering the closed area was not lawfully driving into that area.

¶19 To the extent the State is suggesting that, because the intrusion is minimal, the stop was reasonable, that is not the law. The intrusion involved in traffic stops generally may be described as minimal, but they nonetheless must be supported by reasonable suspicion. *See Berkemer* 468 U.S. at 439; *see also Griffin*, 183 Wis. 2d at 330-31.⁵

¶20 We note that the circuit court stated that if Hoard had not lived within the closed area, he could not challenge the stop. We disagree. The analysis of the lawfulness of a traffic stop does not depend on what the officer learns after the stop but on whether, at the time of the stop, the officer had reasonable suspicion for making the stop. Thus, whether the Hoard was or was not lawfully driving in the closed are, the analysis of the lawfulness of the stop is the same.

⁵ The State refers in its argument to the incident the evening before when a car “jumped” the bridge under construction but does not explain what this has to do with reasonably suspecting Hoard’s vehicle of not being lawfully on the construction area. The State does not develop an argument under the caretaker exception, for which reasonable suspicion is not required. *See State v. Ziedonis*, 2005 WI App 249, ¶14, 287 Wis. 2d 831, 707 N.W.2d 565. We therefore do not consider a safety motive for the stop.

CONCLUSION

¶21 Because the officer did not have reasonable suspicion to stop Hoard's vehicle, the circuit court erred in denying Hoard's motion to suppress. We therefore reverse the judgment of conviction and remand to the circuit court for further proceedings consistent with this opinion.

By the Court.—Judgment reversed and cause remanded.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

