

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**June 3, 2008**

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. 2007AP2863-CR**

**Cir. Ct. No. 2007CT468**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-APPELLANT,**

**V.**

**DENNIS J. ZINGSHIEM,**

**DEFENDANT-RESPONDENT.**

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APPEAL from an order of the circuit court for Eau Claire County:  
WILLIAM M. GABLER, Judge. *Reversed and cause remanded for further proceedings.*

¶1 BRUNNER, J.<sup>1</sup> The State appeals an order granting Dennis Zingshiem's motion to suppress the results of his field sobriety tests. The State

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

argues the circuit court applied the wrong standard when it ruled that the officer did not have probable cause to perform field sobriety tests. We agree and therefore reverse and remand for further proceedings.

### **BACKGROUND**

¶2 On July 18, 2007, Zingshiem received a citation for operating a motor vehicle while under the influence—third offense, and operating a motor vehicle with a prohibited alcohol concentration—third offense. Zingshiem filed a motion to suppress the results of the field sobriety tests. The court held a hearing on Zingshiem’s motion on November 15.

¶3 At the hearing, officer Chad Dachel testified that shortly after 1:09 a.m. he observed a vehicle cross the center line of State Street in Fall Creek. He observed the vehicle deviate within its own lane, drift over the fog line, and cross the center line a second time. Dachel then stopped the vehicle.

¶4 Dachel testified Zingshiem fumbled through his wallet to produce his driver’s license. Zingshiem also struggled to use complete sentences while speaking with Dachel. Zingshiem denied drinking and Dachel did not observe an odor of intoxicants. Dachel then performed a modified horizontal nystagmus test while Zingshiem was seated in his vehicle and observed that Zingshiem’s eyes were glassy.

¶5 Dachel asked Zingshiem to step out of the vehicle to perform standardized field sobriety tests. As a result of the field sobriety testing, Dachel arrested Zingshiem for operating a vehicle while under the influence of an intoxicant.

¶6 At the conclusion of the motion hearing, the court granted Zingshiem's motion to suppress the results of the field sobriety tests finding:

Mr. Zingshiem had supposedly glassy eyes at 1:10 in the morning. Many people who are tired, and presumably anybody would be tired at 1:10 in the morning, many people have glassy eyes.

The fact that Officer Dachel noticed some limited fumbling supposedly with the driver's license, not using complete sentences, and having glassy eyes, in the absence of other findings, cannot support a probable cause request that Mr. Zingshiem step out of the car and perform the field sobriety tests.

### DISCUSSION

¶7 The State argues the order granting Zingshiem's motion to suppress should be reversed because the circuit court applied the wrong standard when it ruled that the officer did not have probable cause to perform field sobriety tests. When reviewing a trial court's ruling on a motion to suppress, we uphold the court's findings of fact unless they are clearly erroneous. *See State v. Waldner*, 206 Wis. 2d 51, 54, 556 N.W.2d 681 (1996). However, whether those facts satisfy the constitutional standard is a question of law we review without deference. *Id.*

¶8 In order to lawfully conduct a traffic stop, an officer must have reasonable suspicion that the motorist has committed a violation. *State v. Rutzinski*, 2001 WI 22, ¶14, 241 Wis. 2d 729, 623 N.W.2d 516. Reasonable suspicion depends on whether an officer's suspicion is grounded in "specific, articulable facts and reasonable inferences from those facts" indicating the individual committed or is committing an offense. *Waldner*, 206 Wis. 2d at 56 (citation omitted). When determining whether reasonable suspicion exists, an officer need not rule out the possibility of innocent behavior. *State v. Anderson*, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990). An officer need not observe

unlawful conduct; rather, the officer must consider the totality of the circumstances and draw reasonable inferences about the cumulative effect. *Waldner*, 206 Wis. 2d at 58. If, during a traffic stop, the officer gains additional information creating a reasonable suspicion the driver is impaired, the officer may administer field sobriety tests. See *State v. Colstad*, 2003 WI App 25, ¶19, 260 Wis. 2d 406, 659 N.W.2d 394.

¶9 In this case, after Dachel stopped Zingshiem, he observed Zingshiem fumble through his wallet and struggle to use complete sentences while talking. While Zingshiem denied drinking and Dachel was not able to smell an odor of intoxicants as Zingshiem was sitting in his car, Dachel did observe that Zingshiem's eyes were glassy. The circuit court incorrectly applied the probable cause standard to these facts and noted the possibility of other innocent reasons for the incomplete sentences and glassy eyes. Under the reasonable suspicion standard, the officer need not rule out the possibility of innocent behavior. *Anderson*, 155 Wis. 2d at 84. Under these facts, it was reasonable for Dachel to investigate further whether Zingshiem was impaired from lack of sleep, a health condition, alcohol, drugs, or something else before allowing him to continue operating his vehicle.

*By the Court.*—Order reversed and cause remanded for further proceedings.

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

