

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 21, 2009

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. 2008AP1594-CR

Cir. Ct. No. 2007CT248

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JON L. KEPPEL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County:
LEE S. DREYFUS, JR., Judge. *Affirmed.*

¶1 ANDERSON, P.J.¹ Jon L. Keppen appeals from the denial of his motion to suppress evidence challenging the reasonable suspicion supporting an

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.

investigative traffic stop that turned into his being charged with his third offense operating a motor vehicle while intoxicated. We affirm because we conclude that under the totality of the circumstances, a reasonable police officer would suspect that Keppen was operating under the influence of an intoxicant.

¶2 An amended criminal complaint charged Keppen with operating a motor vehicle while intoxicated, third offense, and operating a motor vehicle with a prohibited alcohol concentration, third offense. After his motion to suppress challenging the reasonable suspicion to conduct an investigatory stop was denied, Keppen entered a guilty plea to the OWI third-offense charge and the court imposed the appropriate penalties. Keppen now appeals the denial of his motion to suppress.

¶3 The sole issue on appeal is whether the arresting officer had reasonable suspicion to conduct an investigatory stop. To justify an investigatory stop, the police must have a reasonable suspicion, grounded in specific articulable facts, and reasonable inferences from those facts, that an individual is violating or has violated the law. *State v. Colstad*, 2003 WI App 25, ¶8, 260 Wis. 2d 406, 659 N.W.2d 394. “The question of what constitutes reasonable suspicion is a commonsense 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.” *State v. Young*, 212 Wis. 2d 417, 424, 569 N.W.2d 84 (Ct. App. 1997). Whether reasonable suspicion existed for an investigatory stop is a question of constitutional fact. *State v. Williams*, 2001 WI 21, ¶18, 241 Wis. 2d 631, 623 N.W.2d 106. We will uphold the trial court’s findings of fact unless clearly erroneous, WIS. STAT. § 805.17(2), but we review de novo whether those facts meet the constitutional standard. *Williams*, 241 Wis. 2d 631, ¶18.

¶4 City of Waukesha Police Officer Jeffrey Wittenberger testified that at approximately 2:38 a.m. on Saturday, January 27, 2007, he was driving his marked squad car eastbound on Woodburn Road in the city of Waukesha. He observed a parked vehicle facing west on Woodburn, just east of the intersection with Willowood Drive, approximately one hundred yards from Sharkey's Bar and Grill, a popular tavern on Friday and Saturday nights. He saw a male in dark clothing, later identified as Keppen, standing in the open driver's door smoking a cigarette. The individual flicked the cigarette away and got into his vehicle. As Wittenberger got close to the vehicle, Keppen looked toward the officer and appeared to notice the squad car. The officer related that "based on his facial expression and his mannerisms and movement at that point he appeared surprised to see me." Wittenberger went on to state, "He appeared to be turning the [parking] lights off and exiting the vehicle in a hurried manner. And he closed the door and then quickly walked around the back of the vehicle and up onto the sidewalk."

¶5 Wittenberger drove past Keppen and at Woodburn's intersection with Grandview Boulevard, he made a U-turn and drove northwest on Woodburn, back toward Keppen and the parked vehicle. When the officer saw Keppen again, he had some difficulty walking, he was staggering, somewhat unsteady and was leaning to the sides, appearing to have trouble with his balance. Wittenberger stopped his squad, rolled down his passenger side window and asked Keppen if he was all right; Keppen responded that he was. The officer asked Keppen if he wanted the officer to call a cab for him because, under the totality of the circumstances, Keppen had a guilty look; the officer suspected that he had just come from Sharkey's Bar and Grill. Keppen answered that he already had one coming. During this thirty second to one minute conversation, Wittenberger

noticed that Keppen's speech was slurred. Because it was odd that a person who had a cab coming would not wait in his car on a cold night, the officer asked Keppen a second time if he was sure a cab was coming; Keppen said he was sure.

¶6 Wittenberger rolled up the passenger side window and continued northeasterly on Woodburn until he could see his squad car and conduct surveillance on Keppen. The officer used a set of binoculars to watch Keppen, who did not return to his vehicle for ten minutes. While waiting for Keppen to return to the area, Wittenberger checked on the vehicle registration and found that the vehicle was registered to two individuals at a Spring Hill Road address approximately one and one-half miles from his current location.

¶7 When Keppen returned to the vehicle, he initially walked around the vehicle and sat in the vehicle, but he did not stay; at least two different times he would exit and "walk towards the rear of the vehicle and somewhat into the shadows." Wittenberger kept up the surveillance of Keppen for one-half hour and testified:

It appeared he was starting and shutting [the vehicle] off. I would not say with absolute certainty that's the case. The reason I say that, the lights appeared to be flickering on and off. And in my experience when someone starts their car, particularly when it's cold, sometimes the battery doesn't turn right away. If it has automatic lights, they will briefly flicker when it comes on.

¶8 Eventually, Keppen started driving in the northwest direction he was parked on Woodburn but at the intersection with Willowood, he turned right onto Willowood, a dead-end street, not a through street. Wittenberger testified that he observed Keppen "traveling in an extremely slow manner" on Willowood. Wittenberger also testified that Keppen was driving slightly left of the centerline,

partially in the wrong lane. It was at this point that Wittenberger activated his emergency lights and stopped Keppen.

¶9 Keppen also testified at the hearing. In a thorough oral decision, the circuit court summarized the evidence it had heard and concluded:

I'm satisfied [Wittenberger] certainly had reasonable suspicion to have pursued the investigation when he did, to have made the traffic stop once Mr. Keppen put the vehicle in motion. For those reasons I will deny the motion at this time.

¶10 Reasonable suspicion exists when facts and circumstances known to the officer would lead a reasonable officer to conclude that the defendant committed a crime. *State v. Post*, 2007 WI 60, ¶13, 301 Wis. 2d 1, 733 N.W.2d 634. Reasonableness is measured objectively by the totality of the circumstances. *See id.* Moreover, “police officers are not required to rule out the possibility of innocent behavior before initiating a brief stop.” *State v. Anderson*, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990).

¶11 The totality of the circumstances supports the finding that Wittenberger had reasonable suspicion to conduct an investigatory stop of Keppen:

Wittenberger observed Keppen parked on a public street within one hundred yards of a popular tavern in the early morning hours of a Saturday.

Keppen was observed only eight minutes after bar closing time. *See State v. Allen*, 226 Wis. 2d 66, 74-75, 593 N.W.2d 504 (Ct. App. 1999) (Time of day is a factor to be considered in the totality of the circumstances.).

Keppen appeared surprised to see the officer.

Keppen turned off the vehicle's parking lights, hurriedly exited the vehicle and quickly walked onto the sidewalk.

Keppen was staggering as he walked and had trouble with his balance.

Wittenberger asked Keppen twice if he could call him a cab. He asked because he had a guilty look. Both times Keppen said he had a cab coming.

It was a cold night and, if Keppen had a cab coming, he should have been waiting for it in his car, not walking on the sidewalk.

During their brief conversation, Wittenberger noticed that Keppen's speech was slurred.

Wittenberger put the vehicle under surveillance and Keppen did not return for ten minutes.

Wittenberger determined that the vehicle was registered to an address one and one-half miles from its location.

When Keppen returned to the car, he got in and out of the car several times.

He appeared to start and stop the car several times.

When Keppen finally started driving, he turned down a dead-end street.

Keppen drove at ten miles per hour or slower in a twenty-five mile per hour speed zone.

Keppen drove left of the centerline, he was more in the southbound lane than the northbound lane he should have been in.

¶12 We roundly reject Keppen's argument that Wittenberger did not have reasonable suspicion to conduct an investigatory stop and affirm the circuit court's denial of Keppen's motion to suppress.

By the Court.—Judgment affirmed.

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

