

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 13, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

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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. 2008AP2892-CR

Cir. Ct. No. 2007CT2735

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THEODORE E. COERPER,

DEFENDANT-APPELLANT.

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

¶1 ANDERSON, P.J.¹ Theodore E. Coerper appeals from a judgment of conviction for operating a motor vehicle while intoxicated, third offense.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

Coerper argues the circuit court erred when it denied his motion to suppress because the arresting officer lacked reasonable suspicion to make a traffic stop. We disagree and affirm the judgment.

¶2 Investigative traffic stops are subject to the constitutional reasonableness requirement. *State v. Post*, 2007 WI 60, ¶12, 301 Wis. 2d 1, 733 N.W.2d 634. The question we must answer is whether the State has shown that there were “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant” the intrusion of the stop. *Terry v. Ohio*, 392 U.S. 1, 21 (1968). The burden of establishing that an investigative stop is reasonable falls on the State. *Post*, 301 Wis. 2d 1, ¶12. The determination of reasonableness is a commonsense test. *Id.*, ¶13.

¶3 The crucial question is whether the facts of the case would warrant a reasonable police officer, in light of his or her training and experience, to suspect that the individual has committed, was committing, or is about to commit a crime. *Id.* This commonsense approach balances the interests of the State in detecting, preventing, and investigating crime and the rights of individuals to be free from unreasonable intrusions. *Id.* The reasonableness of a stop is determined based on the totality of the facts and circumstances. *Id.*

¶4 In *Post*, our supreme court addressed whether there was reasonable suspicion for an investigative stop when a driver was observed weaving within a single lane. *Id.*, ¶2. The court held that weaving within a single traffic lane does not alone give rise to the reasonable suspicion necessary to conduct an investigative stop of a vehicle. *Id.*, ¶38. However, after examining the totality of the circumstances, it also held that the police officer did have reasonable suspicion

and that the stop did not violate Post's constitutional right to be free from unreasonable searches and seizures. *Id.*

¶5 At the suppression hearing, Sergeant Bradley Bautz of the town of Oconomowoc Police Department testified that on November 21, 2007, at approximately 11:35 p.m., he was on his way to back up another officer. As he approached a roundabout,² he observed a silver-colored Buick stopped on a street twenty to thirty feet away from the roundabout. As Bautz entered the roundabout, the Buick started moving slowly toward the roundabout.

¶6 Bautz described this roundabout as a circular intersection having three entrances. He testified that vehicles entering the roundabout must yield the right-of-way to vehicles that are traveling counterclockwise in the roundabout.

¶7 Continuing his description of Coerper's driving, Bautz testified Coerper did not appear to stop before entering the roundabout and that when he was in the roundabout, Coerper "seemed like [he] wasn't going to yield the right of way to me." Because Coerper attracted his attention, Bautz continued to

² Modern roundabouts were developed in the United Kingdom in the 1960s and now are widely used in many countries. The modern roundabout is a circular intersection with design features that promote safe and efficient traffic flow. At roundabouts in the United States, vehicles travel counterclockwise around a raised center island, with entering traffic yielding the right-of-way to circulating traffic. In urban settings, entering vehicles negotiate a curve sharp enough to slow speeds to about fifteen to twenty miles per hour; in rural settings, entering vehicles may be held to somewhat higher speeds (thirty to thirty-five miles per hour). Within the roundabout and as vehicles exit, slow speeds are maintained by the deflection of traffic around the center island and the relatively tight radius of the roundabout and exit lanes. Slow speeds aid in the smooth movement of vehicles into, around, and out of a roundabout. Drivers approaching a roundabout must reduce their speeds, look for potential conflicts with vehicles already in the circle, and be prepared to stop for pedestrians and bicyclists. Once in the roundabout, drivers proceed to the appropriate exit, following the guidance provided by traffic signs and pavement markings.

Insurance Institute for Highway Safety, *Q&As: Roundabouts* (Jan. 2009), available at <http://www.iihs.org/research/qanda/roundabouts.html> (last visited Apr. 27, 2009).

observe him, in his rearview and side mirrors, after he exited the roundabout. Bautz saw Coerper enter the roundabout and stop. At this time another vehicle entered the roundabout behind Coerper and both vehicles remained stopped for five to eight seconds. Coerper finally started moving, and both he and the other vehicle exited the roundabout and headed east.

¶8 Bautz turned his squad around and began to follow Coerper and the other car. As this little convoy headed east, Bautz watched Coerper “weaving between [his] lane of traffic and the [unmarked] parking lane and at times was half in the lane of traffic and half in that parking lane kind of straddling it, kind of weaving back and forth.”

¶9 Bautz watched as Coerper executed a left-hand turn. He described the road and Coerper’s driving at the suppression hearing:

At that point, there’s two southbound lanes, two northbound lanes separated by a concrete median. The vehicle went to make a left turn to go onto the eastbound on ramp to Sawyer Road. Umm, there is a little bump out turn lane to go left onto the on ramp. It is marked with a white line. The silver vehicle was straddling between the southbound lane and that turn lane to go eastbound onto the on ramp for Highway 16.

When asked if Coerper was able to negotiate the left-hand turn, Bautz replied, “I did see that the vehicle did turn left. It made an extremely wide left-hand turn where the passenger side tires of the vehicle went up to the far southern pavement markings for that ramp.”

¶10 Once Coerper was southbound, Bautz got behind him and watched as he was “weaving between the center lane and the fog line.” Believing the driver could be intoxicated or impaired, Bautz conducted a traffic stop.

¶11 In reviewing a circuit court’s denial of a motion to suppress evidence, this court applies a “two-step standard of review to questions of constitutional fact.” *State v. Williams*, 2001 WI 21, ¶18, 241 Wis. 2d 631, 642, 623 N.W.2d 106. Reasonable suspicion for an investigatory stop is a constitutional fact because it relates to the constitutional protections against unreasonable searches and seizures by the Fourth Amendment of the United States Constitution and article I, section 11 of the Wisconsin Constitution. *Williams*, 241 Wis. 2d 631, ¶18. The court in *Williams* established a two-step standard of review with regard to questions of constitutional fact. The first step in the two-step standard of review is to “review the circuit court’s findings of historical fact, and uphold them unless they are clearly erroneous.” *Id.* The second step is to “review the determination of reasonable suspicion de novo.” *Id.*

¶12 If the only erratic driving Bautz observed was Coerper’s approach to the roundabout and journey through the roundabout, we would hold in an instant that while erratic, his driving did not rise to the level of giving Bautz reasonable suspicion to conduct a traffic stop. The Insurance Institute for Highway Safety tells us that roundabouts are purposefully designed to reduce traffic speeds and warns, “[d]rivers approaching a roundabout must reduce their speeds, look for potential conflicts with vehicles already in the circle, and be prepared to stop for pedestrians and bicyclists.” Insurance Institute for Highway Safety, *Q&As: Roundabouts* (Jan. 2009), available at <http://www.iihs.org/research/qanda/roundabouts.html> (last visited Apr. 27, 2009).

¶13 The Wisconsin Department of Transportation brochure for motorists offers some general rules for driving in a roundabout:

Slow down. Watch for traffic signs.

Yield to pedestrians and bicyclists as you enter and exit the roundabout.

Look left and yield to traffic already in the roundabout.

Once in the roundabout, you have the right-of-way. Keep your speed low within the roundabout.

Turn right onto your destination street.

Wisconsin Department of Transportation, *All About The Roundabout* (Feb. 2006), <http://www.dot.wisconsin.gov/safety/motorist/docs/roundabout-brochure.pdf> (last visited Apr. 27, 2009). Based on Bautz's testimony, we conclude that Coerper's driving before and through the roundabout did not rise to the level of reasonable suspicion.

¶14 But, whether the officer had reasonable suspicion requires us to consider the totality of the circumstances. There are a number of "building blocks" we must consider in deciding if the totality of the circumstances equation supports a finding of reasonable suspicion. *State v. Allen*, 226 Wis. 2d 66, 74-75, 593 N.W.2d 504 (Ct. App. 1999). In *Allen*, we considered an officer's training and experience to be one of the "building blocks." *Id.* at 74. Here, Bautz is a sergeant and testified to having conducted other OWI stops. Another building block is the time of day, *id.* at 74-75; here, it was 11:35 p.m.

¶15 We will now consider Coerper's driving after he had negotiated the roundabout. We do not begin with a blank canvas; we already have two "building blocks" of the totality of the circumstances equation: (1) the time of day (it was 11:30 p.m. near bar closing time) and (2) the officer's training and experience. After the roundabout, Bautz was one vehicle behind Coerper and watched him "weaving between [his] lane of traffic and the [unmarked] parking lane and at

times was half in the lane of traffic and half in that parking lane kind of straddling it, kind of weaving back and forth.”

¶16 Coerper makes much of the fact that Bautz did not testify that his weaving was the typical S-type weaving that he has seen in other OWI stops. And he points out that Bautz does not tell us how far his vehicle weaved back and forth or how many times. There is no magic formula that an officer can apply and have an answer that the weaving he is observing is the result of alcohol impairment. In fact, in *Post* the supreme court declined Post’s suggestion that lateral movements, weaving within a single lane, “must be erratic, unsafe, or illegal in order to generate reasonable suspicion.” *Post*, 301 Wis. 2d 1, ¶23. It is not whether the weave can be described as an “S type” or a sine wave, it is that the driver is unable to drive in a straight line that raises suspicions in the reasonable officer.

¶17 But, there are more “building blocks” to the totality of the circumstances equation we must consider. When Coerper negotiated a left-hand turn, he swung so far to his right that the passenger side tires touched or crossed the pavement markings indicating the far right side of the lane. This is more evidence that Coerper was having difficulty maintaining a straight line. The Wisconsin Motorist’s Handbook suggests that in making a left-hand turn, a driver turn into the same lane he is turning from. Wisconsin Department of Transportation, *Motorists’ Handbook*, 21 (Jan. 2009) <http://www.dot.wisconsin.gov/drivers/docs/e-handbook.pdf> (last visited Apr. 27, 2009).

¶18 Finally, once Coerper completed the turn and Bautz was still behind him, he continued to weave, now between the center line and the fog line. Obviously, Coerper was incapable of driving a straight line.

¶19 When we put all the building blocks together, we have a police sergeant on patrol near bar closing time and his attention is attracted to a car in a roundabout. He begins to follow the car after it exits the roundabout and watches it weave left and right, at times straddling the line between the driving lane and parking lane. The driver makes a left turn and swings so far to his right that he touches or crosses the painted lines marking the right end of the on-ramp. Finally, once the driver has completed the turn, he immediately begins to weave between the center line and the fog line.

¶20 We conclude that when all of the “building blocks” we have identified are plugged into the totality of the circumstances equation, a reasonable police officer would suspect that Coerper’s inability to drive a straight line could be the result of alcohol impairment. Therefore, we affirm.

By the Court.—Judgment affirmed.

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

