

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 30, 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. 2009AP174-CR

Cir. Ct. No. 2007CT1435

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DOMINIC M. GUERINO,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County:
RICHARD T. BECKER, Judge. *Affirmed.*

¶1 VERGERONT, J.¹ Guerino appeals from a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant (OWI) in

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(g) and (3) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

violation of WIS. STAT. § 346.63(1)(a), second offense. He contends the arresting officer did not have reasonable suspicion to stop his vehicle and therefore the circuit court should have granted his motion to suppress evidence. We conclude the circuit court properly denied the motion. Accordingly, we affirm.

BACKGROUND

¶2 Guerino was arrested for OWI after his vehicle was stopped by Officer Adam Behnke, a patrol officer for the City of Brookfield Police Department. At the hearing on Guerino's motion to suppress evidence, the officer testified to the circumstances of the traffic stop as follows. He was on duty at approximately 2:00 a.m. on November 24, 2006, driving westbound on Capitol Drive, when he observed a vehicle exiting the parking lot of a tavern at a high rate of speed. He observed that the vehicle was preparing to make a right, which would be a westbound turn onto Capitol Drive. The officer was in the center lane of the three-westbound lanes. The vehicle failed to yield to his squad car, which forced the officer to hit the breaks rapidly, and he stopped in the center lane. After he braked, the other vehicle stopped as well, three-fourths of the way in the right lane and perpendicular to the squad car. The officer explained that he had to activate his breaks to avoid a collision with the vehicle.

¶3 The officer testified that he then allowed the vehicle to pull in front of him and they both continued westbound on Capitol Drive. The officer believed that the driver of the vehicle had been operating the vehicle in an unsafe manner and initiated a traffic stop. The driver identified himself as Guerino.

¶4 On cross-examination the officer acknowledged that he had omitted reference in his report to the vehicle coming out of the tavern parking lot at a high rate of speed, but he did not alter his testimony on that observation. He denied

that he had applied his brakes in response to the vehicle using its brakes and denied that they braked simultaneously. He insisted that he had stopped to avoid a collision and that his braking did avoid a collision. The officer added that the vehicle did not stop upon exiting the parking lot, but simply came right out of the parking lot onto Capitol Drive. He also testified that as he observed the vehicle it was “coming across the right lane.”

¶5 The officer also acknowledged on cross-examination that, as he followed the vehicle for about nine blocks before he made the traffic stop, he did not observe unsafe driving and did not recall speeding. He did not see the vehicle weave and he saw the vehicle signal to make a left-hand turn. The officer pointed out that the driver of the vehicle was aware that he was right behind the vehicle. The officer conceded he did not give Guerino a citation for an unsafe turn.

¶6 Guerino and the passenger in his vehicle on that night also testified. Guerino testified as follows. As he was pulling out of the tavern parking lot and making a right turn, there was an officer in a vehicle directly in front of his. The officer slammed on his brakes and, when he did that, Guerino slammed on his brakes. He was surprised that the person was a police officer and also surprised that the person slammed on his brakes. When he completed the turn he was still in the right lane. The officer slowed down his vehicle so he could change lanes to go behind Guerino’s vehicle. Guerino did not feel that he had done anything improper and he denied that he had almost collided with the officer’s vehicle. He was going at most ten or twelve miles an hour. Because he saw the officer’s vehicle when he looked to the left and knew it was in the center lane, he felt it was safe to make a turn into the right lane. After the officer stopped him, the officer did not tell him that he had pulled Guerino over because of his driving as he came out of the tavern parking lot. On cross-examination Guerino acknowledged that

he had been in the tavern two and a half to three hours and had had “probably five” tap beers, but he denied that the beers affected his ability to recall the incident.

¶7 The passenger testified that Guerino yielded before he pulled out on Capitol Drive; he did not pull out right away from the parking lot. Guerino was going five-to-ten miles an hour, accelerating. From his position it did not appear that there was going to be a collision with the officer’s vehicle. Guerino slammed on his brakes after he made the turn into the right lane and the reason was that he was startled upon seeing the squad car, because it is startling to see a squad car when you are coming out of a bar at closing time. Guerino put his breaks on first. The passenger acknowledged that he had had four or five beers during the three hours he was at the tavern and that he himself could not have been driving a vehicle that night.

¶8 The circuit court denied the motion to suppress. The court noted the discrepancy in the testimony on who hit the brakes first. The court reasoned that there was no logical explanation why Guerino would hit his brakes if he was making a proper right turn, especially given that he testified he saw the other vehicle coming in the center lane as he was pulling out of the parking lot. The court also reasoned that it was difficult to understand why Guerino would slam on his brakes if he was making a perfectly correct turn into the right lane. The court found the officer’s testimony to be “by far” more credible. Based on the officer’s observations, the court concluded he had the requisite reasonable suspicion to stop the vehicle.

DISCUSSION

¶9 On appeal Guerino renews his contention that the officer did not have reasonable suspicion to believe he was operating a motor vehicle under the influence of an intoxicant.

¶10 The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures, and an investigative stop is a seizure within the meaning of the Fourth Amendment. *State v. Post*, 2007 WI 160, ¶10, 301 Wis. 2d 1, 733 N.W.2d 634. In order to be lawful, an investigative detention must be supported by a reasonable suspicion, grounded 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. 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.*

¶11 In reviewing the circuit court's determination, we accept the circuit court's findings of historical fact unless they are clearly erroneous, and we review de novo the application of those facts to the constitutional standard. *See State v. Post*, 2007 WI 60, ¶8, 301 Wis. 2d 1, 733 N.W.2d 634.

¶12 We agree with the circuit court that there were specific and articulable facts to support a reasonable suspicion that Guerino was operating his vehicle while under the influence of an intoxicant. The officer saw a vehicle exiting the parking lot of a tavern at closing time. This provides a reasonable basis for suspecting that the driver of the vehicle has been consuming alcohol. The offense of OWI requires proof that a person's ability to drive has been impaired by the consumption of alcohol. *See WIS JI—CRIMINAL 2663*. This means that the

“person has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.” *Id.* The officer’s observations of Guerino’s manner of exiting the parking lot provide a reasonable basis to suspect that he consumed a sufficient amount of alcohol to impair his ability to drive safely. The officer testified that Guerino left the parking lot at a high rate of speed, was three-quarters into the right lane and perpendicular to his squad car, and he, the officer, had to brake to avoid a collision. As the fact finder it was the role of the circuit court to resolve the conflicts in the testimony, and we accept those credibility determinations. *See State v. Schmidt*, 2004 WI App 235, ¶14, 277 Wis. 2d 561, 691 N.W.2d 379. Here the circuit court found the officer’s testimony more credible than that of Guerino and his passenger.

¶13 The fact that the officer did not observe any further unsafe driving during the time he followed Guerino is not inconsistent with the officer’s testimony on his observations of Guerino’s driving when he exited the parking lot. It is undisputed that Guerino was aware that the officer was following him and it is reasonable to infer that he took particular care to drive safely. In any event, that subsequent safe driving does not preclude the circuit court from crediting the officer’s testimony on Guerino’s driving when he exited the tavern parking lot.

CONCLUSION

¶14 We conclude the circuit court properly denied Guerino’s motion to suppress evidence. Accordingly, we affirm the judgment of conviction.

By the Court.—Judgment affirmed.

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

