

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**January 16, 2002**

Cornelia G. Clark  
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. 01-1982-CR**

**Cir. Ct. No. 01-CT-16**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-APPELLANT,**

**v.**

**MICHAEL A. MARSHALEK,**

**DEFENDANT-RESPONDENT.**

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APPEAL from an order of the circuit court for Washington County:  
LEO F. SCHLAEFER, Reserve Judge. *Affirmed.*

¶1 SNYDER, J.<sup>1</sup> The State appeals the trial court's order granting Michael A. Marshalek's motion to suppress the results of a traffic stop and dismiss the offenses against him. The State argues that based upon the totality of the

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1999-2000). All statutory references are to the 1999-2000 version unless otherwise noted.

circumstances, the officer had reasonable suspicion to stop and temporarily detain Marshalek. We affirm the order of the trial court.

### FACTS<sup>2</sup>

¶2 On January 21, 2001, City of West Bend Police Officer Eric Grinwald was turning southbound on Main Street when he noticed a vehicle pass his location; Grinwald continued on his route behind this vehicle, later determined to be driven by Marshalek. Grinwald observed Marshalek activate his right turn signal approximately 300 to 400 feet before making a right turn. Grinwald then observed Marshalek make a right turn onto Jefferson Street, crossing the “imaginary center line” by approximately three to four feet.

¶3 Grinwald did not stop Marshalek but continued to follow him for approximately four blocks. Grinwald noted that Marshalek appeared to be driving in the center of the roadway, to avoid parked cars on the side of the two-lane, neighborhood residential street.

¶4 Grinwald then observed Marshalek make a left turn from Jefferson Street south onto 11th Avenue. Grinwald testified that Marshalek turned left too sharp, going into the oncoming traffic lane; however, Grinwald also stated that Marshalek was not driving at an excessive speed or in a dangerous manner. Grinwald noted that Marshalek was always going at an appropriate speed, and

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<sup>2</sup> Marshalek has failed to file a response brief in this appeal; such a failure is a violation of WIS. STAT. RULE 809.19(3) of the rules of appellate procedure, which requires the respondent to file a brief within thirty days of the service of the appellant’s brief. This court may impose an appropriate penalty upon a party for such a rule violation. WIS. STAT. RULE 809.83(2). We therefore hold Marshalek to those facts set forth in the State’s brief. Marshalek will not be heard on reconsideration to challenge facts that this court properly gleaned from the State’s brief.

both Jefferson Street and 11th Avenue are residential two-lane streets with no painted center lines.

¶5 After the sharp left turn onto 11th Avenue, Grinwald stopped and detained Marshalek, eventually arresting him for operating while intoxicated. Marshalek was ultimately charged with operating a motor vehicle while intoxicated, third offense, and operating with a prohibited blood alcohol concentration, third offense. Marshalek later filed a motion to suppress the evidence from the stop, arguing that there was no reasonable suspicion to stop his vehicle. After a hearing on May 24, 2001, the trial court granted Marshalek's motion to suppress and dismissed the charges against him. The trial court stated:

The factors that I take particular note of. I was a little concerned about the operating his car a little close to the curb as he was turning left onto South 11th. But taking that into consideration with the fact of no traffic -- And I didn't hear any testimony whatsoever that there was any traffic at all that was moving during this whole episode....

The factors that I'm considering are, first, no oncoming traffic anywhere in the road in the testimony. The speed was reasonable, not illegal, as observed by the officer all along the route that we are involved in this trial.

I think what's important to consider is the fact that there were no centerlines anywhere in these roads; and it was dark and there were at least several of those parked cars. It is not unusual, or is not unusual in my experience, as well, that cars, when they're passing cars, have to move a little bit to the left. We're dealing here with an imaginary line. And that's hard to decide, you know, the problem that was observed here by the officer.

The testimony of the defendant was credible in this Court's view that he was looking for a spot to park and respond to the lights that were on the squad that were visible to the defendant.

Considering the totality of the testimony, the defendant from an objective standard was doing things generally right-- And I use the term marginally right, at least.

--during this whole episode; and there was no endangering of either property or human beings during this whole episode. This may or may not justify driving the vehicle somewhat over the imaginary centerline, given the circumstances here and the hour and the fact of no traffic.

Given the totality of the testimony and the evidence, the Court believes that there was not a reasonable, articulable suspicion justifying the stop at the juncture that we're indicating in the testimony all along the route, so I'm going to grant the Motion to Suppress.

I don't know what would have happened if the driver would have been followed three or four more blocks. But at least in the route it was traveled, I do not find that there was a reasonable articulable suspicion justifying the stop....

Following this ruling, the trial court entered an order dismissing the criminal complaint. The State appeals.

## DISCUSSION

¶6 On review, we will uphold the trial court's findings of historical fact unless they are against the great weight and clear preponderance of the evidence. *State v. Jackson*, 147 Wis. 2d 824, 829, 434 N.W.2d 386 (1989). This is the equivalent of the "clearly erroneous" test set forth at WIS. STAT. § 805.17(2). However, whether those facts satisfy the constitutional requirement of reasonableness presents a question of law and we are not bound by the trial court's decision on that issue. *Id.* In addition, the legality of a traffic stop is a question of law we also review de novo. *State v. Baudhuin*, 141 Wis. 2d 642-43, 648, 416 N.W.2d 60 (1987).

¶7 Detaining a motorist for a routine traffic stop constitutes a seizure. *State v. Longcore*, 226 Wis. 2d 1, 6, 593 N.W.2d 412 (Ct. App. 1999). A brief detention is reasonable only if it is justified by a reasonable suspicion that the motorist has committed an offense. *Id.* Reasonable suspicion is based upon

specific and articulable facts that together with reasonable inferences therefrom reasonably warrant a suspicion that an offense has occurred or will occur. *Id.* at 8.

¶8 The State argues that based upon the totality of the circumstances, Grinwald had adequate reasonable suspicion to stop and temporarily detain Marshalek. We disagree.

¶9 The test of reasonable suspicion is an objective one and must be a suspicion “grounded in specific articulable facts and reasonable inferences from those facts.” *State v. Waldner*, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996). However, Grinwald’s testimony was couched entirely in the subjective. Grinwald “estimated” a wide turn; Marshalek’s activation of his turn signal 300 to 400 feet prior to the turn “suggested” a turn signal violation; Marshalek’s car turned wide of an “imaginary” center line and “appeared” to be driving in the center of the roadway.

¶10 There were no center lines anywhere to support Grinwald’s suppositions, and by Grinwald’s own admission, Marshalek was not driving at an excessive speed or in a dangerous manner. The trial court found, and we agree, that “[c]onsidering the totality of the testimony, the defendant from an objective standard was doing things generally right ....” No objective evidence was presented that an offense had occurred or was about to occur. Without objective evidence, there cannot be reasonable suspicion here.

## CONCLUSION

¶11 No reasonable suspicion existed to stop and detain Marshalek because no objective evidence was presented that an offense had occurred or was about to occur. We affirm the trial court's order granting Marshalek's motion to suppress the results of the illegal stop and dismiss the offenses against him.

*By the Court.*—Order affirmed.

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