**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**June 19, 2002**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 01-3158-CR** **Cir. Ct. No. 99-CT-90**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**TIMOTHY J. SEAMAN,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Green Lake County: WILLIAM M. MCMONIGAL, Judge. *Affirmed*.

¶1 ANDERSON, J.[1] Timothy J. Seaman challenges the circuit court's denial of his motion to suppress. He maintains that the arresting officer did not have a reasonable and articulable basis for initiating an investigative stop. While

[1] This is a one-judge appeal pursuant to WIS. STAT. § 752.31(2)(c) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

we agree with Seaman that his driving could have an innocent explanation, we affirm the circuit court given that a reasonable inference of unlawful conduct can be objectively discerned and an investigative stop was the only option available to resolve the ambiguity in Seaman's driving.[2]

¶2 Seaman was charged with his second offense of operating a motor vehicle while intoxicated and operating a motor vehicle with a prohibited alcohol concentration. He filed a motion seeking to suppress all evidence because of a lack of probable cause to support his arrest. The circuit court denied the motion and a jury subsequently found Seaman guilty of operating a motor vehicle with a prohibited alcohol concentration.

¶3 On appeal, Seaman asserts that there are no objectively suspicious inferences which could be drawn from his driving. "Kicking up a 'small amount of gravel and dust'" and driving over speed bumps at a moderate speed "should not be cause enough to allow a law enforcement officer to follow" Seaman onto his property and conduct an investigative stop.

¶4 This appeal involves the application of constitutional standards to undisputed facts, a question of law which we review de novo. ***State v. Foust***, 214

[2] The State's opening reaction is to claim that Seaman has waived this challenge to the reasonable suspicion necessary to initiate an investigative stop. It contends that he failed to file a written motion expressly challenging the investigative stop within ten days of his initial appearance as required by WIS. STAT. §§ 971.30(2)(c), 971.31(2) and 971.31(5)(a). Waiver is a rule of judicial administration, not jurisdiction, and we have discretion to make exceptions. ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980). We choose to address the merits. Moreover, the State has not persuaded us that waiver is appropriate in this case. No one was surprised by the attack on the investigative stop. Seaman and the State addressed the issue on the merits and the circuit court decided the issue on the merits. Our decision to address the merits should not be considered as approval of the motion practice in this case; trial by ambush is not countenanced in Wisconsin. The better practice is to alert the State and the circuit court to all the challenges a defendant may muster in a timely filed written motion. *See* §§ 971.30, 971.31.

Wis. 2d 568, 571-72, 570 N.W.2d 905 (Ct. App. 1997). The temporary detention of a citizen constitutes a seizure within the meaning of the Fourth Amendment and triggers Fourth Amendment protections. ***State v. Harris***, 206 Wis. 2d 243, 253, 557 N.W.2d 245 (1996). A police officer may, in the appropriate circumstances, approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest. *See* ***Terry v. Ohio***, 392 U.S. 1, 22 (1968). When police make an investigative stop of a person, it is not an arrest and the standard for the stop is less than probable cause. ***State v. Allen***, 226 Wis. 2d 66, 70-71, 593 N.W.2d 504 (Ct. App. 1999). The standard is reasonable suspicion, "a particularized and objective basis" for suspecting the person stopped of criminal activity. ***Ornelas v. United States***, 517 U.S. 690, 696 (1996). When determining if the standard of reasonable suspicion was met, those facts known to the officer must be considered together as a totality of circumstances. ***State v. Richardson***, 156 Wis. 2d 128, 139, 456 N.W.2d 830 (1990). Where the evidence supports two competing inferences, the circuit court and the appellate court are entitled to rely upon the inference supporting a reasonable suspicion to conduct an investigative stop. *See* ***State v. Tompkins***, 144 Wis. 2d 116, 125, 423 N.W.2d 823 (1988).

¶5 In ***State v. Anderson***, 155 Wis. 2d 77, 454 N.W.2d 763 (1990), our supreme court addressed the policy considerations at work in a case involving a ***Terry*** stop. The court said that the focus of the Fourth Amendment and WIS. STAT. § 968.24 is reasonableness. ***Anderson***, 155 Wis. 2d at 83. This contemplates a commonsense balancing between individual privacy and the societal interest in allowing the police a reasonable scope of action in discharging their responsibilities. ***Id.*** at 87. The court noted that suspicious conduct by its very nature is ambiguous, and the principal function of the investigative stop is to

quickly resolve that ambiguity. ***Id.*** at 84. Consequently, the court held that police officers are not required to rule out the possibility of innocent behavior before initiating a brief stop. ***Id.*** However, the court has also said that an "inchoate and unparticularized suspicion or hunch … will not suffice." ***State v. Waldner***, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996) (citation omitted).

¶6 Nevertheless, conduct that has innocent explanations may also give rise to a reasonable suspicion of criminal activity. *See* ***id.*** at 61. "If a reasonable inference of unlawful conduct can be objectively discerned, the officers may temporarily detain the individual to investigate, notwithstanding the existence of innocent inference[s] which could be drawn." ***State v. Young***, 212 Wis. 2d 417, 430, 569 N.W.2d 84 (Ct. App. 1997). It is also true that a series of acts, each of which is innocent in itself, taken together, may give rise to a reasonable suspicion of criminal conduct. *See* ***id.*** But the test in any case is whether all the facts—including those which, individually, are consistent with innocent behavior—taken together are indicative of criminal behavior. *See* ***United States v. Sokolow***, 490 U.S. 1, 9-10 (1989).

¶7 In ***Waldner***, 206 Wis. 2d at 60, the supreme court concluded that lawful, but unusual, driving may be the basis of an officer's reasonable suspicion if a "reasonable inference of unlawful conduct can be objectively discerned." In that case, the officer observed a vehicle at 12:30 a.m. driving slowly, stopping at a corner without a stop sign, accelerating quickly, and then legally parking on the road and pouring some liquid on the street. The court held that the totality of the circumstances coalesced to form the basis for a reasonable suspicion. ***Id.*** at 53.

¶8 The only testimony at the suppression hearing was from Sheriff's Deputy Mark Putzke, a thirteen-year veteran with a bachelor's degree and

extensive law enforcement training. Putzke testified that he first saw Seaman in a mint-condition, maroon-colored 1968 Chevrolet stopped at an intersection of State Highway 23. The deputy watched as Seaman began to rapidly accelerate from the stop sign, he saw the rear tire on the passenger's side produce blue smoke from where it was in contact with the pavement, and he additionally saw the rear tire kick up or spit out gravel. Putzke testified that there was no traffic situation that would explain Seaman's rapid acceleration onto State Highway 23. The deputy began to tail Seaman and while traveling on State Highway 23 Seaman's driving was not out of the ordinary. Seaman turned into a trailer park and the deputy followed. The deputy recounted that the trailer park is a very closely packed residential development and has placed speed bumps on the road to slow down drivers in the park. Putzke watched Seaman negotiate a speed bump at a speed that the deputy believed was unsuitable for the immaculate collector car that Seaman was driving. The deputy followed Seaman to his final destination and did not see Seaman exit his vehicle. Putzke went up to the residence and eventually Seaman answered his knocking at the door. As a result of further investigation, including field sobriety tests, Putzke arrested Seaman on a charge of operating while intoxicated, second offense, in violation of WIS. STAT. §§ 346.63(1)(a) and 346.65.

¶9 We conclude that the totality of the circumstances in this case meets the "reasonable suspicion" requirement. ***Waldner***, 206 Wis. 2d at 53. Given Putzke's knowledge and experience, it was reasonable for him to suspect that the driver was intoxicated when he observed unusual driving—both unnecessary rapid acceleration from a complete stop and inappropriate speed over a speed bump in a crowded trailer park. This court is satisfied that the circuit court applied the

proper legal standard to the facts and correctly analyzed the facts; therefore, we affirm.

*By the Court.*—Judgment affirmed.

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