

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 24, 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. 02-0162-CR
STATE OF WISCONSIN**

Cir. Ct. No. 01-CT-782

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

SHAWN A. TIMM,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: BRUCE SCHMIDT, Judge. *Reversed and cause remanded.*

¶1 NETTESHEIM, P.J.¹ Shawn A. Timm appeals from a judgment of conviction for operating a motor vehicle while intoxicated (OWI), second offense, contrary to WIS. STAT. § 346.63(1)(a). Timm contends that the trial court

¹ This opinion 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.

erroneously denied his motion to suppress evidence because the arresting officer did not have reasonable suspicion to detain him. We agree. We reverse the judgment and remand for further proceedings.

FACTS

¶2 On August 19, 2001, at approximately 1:00 a.m., Officer Adam Streubel was driving down Main Street in the city of Neenah. Main Street was under construction from Green Bay Road through to a new overpass and was controlled by barricades on both sides of Lake Street, indicating “road closed” and “local traffic only.” As Streubel approached Lake Street traveling west on Main Street, he observed a red truck traveling eastbound on Main Street cross Lake Street by maneuvering around the barricade and continuing down Main Street. Streubel turned around and followed the truck, intending to stop it for traveling through a construction area. Streubel observed the truck turn onto Harrison Street at the bottom of the overpass. Harrison Street had not yet been paved and the truck went down a six-inch drop to a gravel surface. Streubel followed the truck onto Harrison Street and activated his emergency lights. The truck pulled over and Streubel made contact with Timm.

¶3 Streubel observed that Timm’s driver’s license indicated a Menasha, Wisconsin address. When asked why he was in the construction area, Timm indicated that he was on his way to Gord’s Bar and was unfamiliar with the area. Timm admitted having seen the barricades. During the course of his conversation with Timm, Streubel observed that Timm’s “eyelids were heavy.... His eyes were very glassy and his speech was slow and deliberate.” When asked whether he had had anything to drink, Timm replied that he had. Streubel administered field sobriety tests, determined that Timm was operating under the influence of

intoxicants and arrested him. Timm was transported to the Neenah police department where he was administered a breath test resulting in a .16% blood alcohol concentration.

¶4 The State filed a criminal complaint against Timm on September 7, 2001, charging him with OWI, second offense, and operating a motor vehicle with a prohibited blood alcohol concentration, second offense. Timm filed a number of pretrial motions, including a motion to suppress evidence alleging that Streubel lacked a reasonable suspicion to detain him. Following a motion hearing on October 24, 2001, the trial court denied Timm's motion to suppress. Timm subsequently pled guilty to the OWI offense. He now appeals the trial court's denial of his motion to suppress.

DISCUSSION

¶5 In reviewing a motion to suppress evidence, we will uphold a circuit court's findings of fact unless they are clearly erroneous. *State v. Eckart*, 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996). However, the application of constitutional principles to the facts as found is a question of law that we decide without deference to the circuit court. *State v. Patricia A.P.*, 195 Wis. 2d 855, 862, 537 N.W.2d 47 (Ct. App. 1995).

¶6 The stop of a vehicle and the detention of its passengers constitute a seizure within the meaning of the Fourth Amendment of the United States Constitution; however, there are situations in which an investigative stop may be constitutionally permissible when prompted by an officer's suspicion that the occupants have committed a crime. *State v. Guzy*, 139 Wis. 2d 663, 675, 407 N.W.2d 548 (1987). For an investigatory stop to be valid, a law enforcement officer must reasonably suspect, in light of his or her experience, that some kind of

criminal activity has taken or is taking place. *State v. Richardson*, 156 Wis. 2d 128, 139, 456 N.W.2d 830 (1990). Whether an officer’s suspicion justifies an investigative stop involves an objective test. *Guzy*, 139 Wis. 2d at 675. “Law enforcement officers may only infringe on the individual’s interest to be free of a stop and detention if they have a suspicion grounded in specific, articulable facts and reasonable inferences from those facts, that the individual has committed a crime.” *Id.* An “inchoate or unparticularized suspicion or ‘hunch’” will not suffice. *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 27 (1968)).

¶7 Reasonableness is measured against an objective standard taking into consideration the totality of the circumstances. *Richardson*, 156 Wis. 2d at 139. 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. Jackson*, 147 Wis. 2d 824, 831, 434 N.W.2d 386 (1989).

¶8 Before turning to the merits of Timm’s appeal, we turn first to his challenge to the State’s characterization of the facts. In its appellate brief, the State contends that Streubel had a reasonable suspicion that Timm violated WIS. STAT. § 346.04(2) by failing to obey the “road closed” and “local traffic only” signs. Section 346.04(2) requires motorists to obey posted traffic signs unless directed by an officer. In support of its argument, the State indicates that Streubel “observed Timm proceed enter [sic] a construction area, pass through that area, then exit the construction area.” From this, the State argues that Timm used the construction area “as if it were a normal street open to regular public traffic.”

¶9 However, the State fails to provide any citation to the record to corroborate the fact that Timm exited the construction zone prior to being pulled

over by Streubel. Such a failure is a violation of WIS. STAT. RULE 809.19(3), which requires a respondent's brief to comply with subsec. (1), which, in turn, requires "a statement of facts relevant to the issues presented for review, with appropriate references to the record." RULE 809.19(1)(d). This failure is particularly offensive in this case because the State's representation, if true, would likely result in our affirming the trial court's ruling. However, based on our independent review of the record, we find no indication that Streubel observed Timm exit the construction zone.² Moreover, the State did not argue this point before the trial court; nor did the trial court rely on it in arriving at its decision. We admonish the State to be more circumspect in the future.

¶10 Following the hearing, the trial court made the following findings:

[T]his stop took place about one o'clock in the morning. Both sides are in agreement that there were signs posted in this construction site, that the signs said "road closed, local traffic only," that there were barricades up, and that the defendant in this case went around the barricades and proceeded down the road. Although I guess there was an opening that one could do that.

[Timm] was ultimately cited for failing to obey a sign and going into a construction zone, but the fact that the defendant in this case was not speeding, was not swerving, had the appropriate equipment on his car is fine, but he did go into an area that was posted "road closed, open to local traffic only" or for local traffic only. I think the officer because of the time, because of the day of the week, certainly had the right to stop the vehicle to determine

² Streubel testified that Main Street was under construction from Green Bay Road to the new overpass. Streubel encountered Timm on Main Street as he crossed Lake Street. Streubel finally pulled Timm over on Harrison Street below the overpass. The record indicates that Harrison Street had a gravel surface, was not paved and was still in the process of being completed.

whether or not he did fit one of those exceptions to being on the road.

As noted earlier, the trial court did not make a finding that Timm exited or “passed through” the construction zone. Rather, the court determined that Timm’s entry into a construction zone open to “local traffic only,” coupled with the time of day and the day of the week, was sufficient to provide a reasonable suspicion that he had committed a crime.

¶11 It is undisputed that the roadway was not closed to traffic. Rather, it was open, but only to local traffic. Other than entering the controlled area during the early morning hours of a weekend day, the State did not argue, and the trial court did not find, that any other evidence suggested possible wrongdoing by the operator of the vehicle. Under these facts, we disagree with the trial court’s conclusion that Streubel had reasonable suspicion to believe that Timm had committed, was committing, or was about to commit a crime or forfeiture offense.

¶12 This case presents a classic example of a stop based upon the “unparticularized suspicion or hunch” condemned by *Terry* and *Guzy*. We do not doubt that drivers sometimes violate “local traffic only” regulations in construction zones at all times of the day or night. But such generalized suspicion does not translate into unbridled police authority to stop and detain all vehicles entering into such areas. In such a situation, the police must accumulate additional information which transforms the initial “hunch” into “reasonable suspicion” before a *Terry* stop is permitted. Here, had Streubel waited and continued to observe Timm’s vehicle, he may have acquired additional information warranting a *Terry* stop, i.e., Timm exiting the construction area. But he did not.

CONCLUSION

¶13 We conclude that the trial court erred in ruling that the police had reasonable suspicion to stop Timm's vehicle. We reverse the judgment and remand for further proceedings consistent with this opinion.

By the Court.—Judgment reversed and cause remanded.

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

