

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 22, 2010

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. 2009AP2729

Cir. Ct. Nos. 2009TR2522
2009TR2523

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

CITY OF CHIPPEWA FALLS,

PLAINTIFF-APPELLANT,

V.

KENNETH C. HEIN,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Chippewa County:
RODERICK A. CAMERON, Judge. *Reversed and cause remanded for further proceedings.*

¶1 BRUNNER, J.¹ The City of Chippewa Falls appeals an order suppressing evidence of intoxicated use of a motor vehicle obtained during a

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

traffic stop of Kenneth Hein. The City contends the stop was supported by reasonable suspicion and the evidence admissible. We agree.

BACKGROUND

¶2 At about 2:30 a.m. on April 18, 2009, police officers were dispatched to the parking lot of a Burger King in the City of Chippewa Falls. Officer Mark Bauman was the first officer to the scene, and knew only that “something ... was going on with a couple of vehicles in the lot.” Hein’s pickup truck exited the lot as Bauman entered, cutting short the corner on a right-hand turn and running over the curb. Bauman did not pursue the vehicle; in his words, he was “confused about what had happened in the lot,” and wanted to gather more information from Burger King employees.

¶3 The three employees at the scene told Bauman the truck was involved in an “incident” in the lot, but did not elaborate. As he spoke with the employees, Bauman could still see the truck headed west on River Street toward Main Street. He also saw officer Matthew Kelm’s cruiser approaching River Street from the south on Main. Bauman radioed Kelm to keep Hein under surveillance while he completed the interviews.

¶4 Kelm made several observations while stopped at the intersection of River and Main Streets. Kelm visually estimated the truck’s speed at thirty-five miles per hour in a twenty-five mile-per-hour-zone.² Although Hein was driving in the left-turn-only lane as he neared the intersection, he did not turn left onto

² Kelm testified he could not use the speed detection equipment in his cruiser because the radar unit cannot read vehicles travelling perpendicular to the squad car.

Main Street, but continued travelling straight on River. Kelm turned on River and followed. Kelm trailed Hein for approximately one mile without observing any traffic violations, then radioed Bauman to ask if Bauman wanted the truck stopped. Bauman responded in the affirmative.

¶5 After interviewing the employees, Bauman determined Hein was in the parking lot to pull a car that had rolled past the curb edge and into decorative rock surrounding the parking area. However, Bauman observed no property damage and concluded the tow did not violate any laws.

¶6 At the suppression hearing, Hein challenged the City's purported justifications for the traffic stop. Hein argued police lacked evidence of any law violation in the parking lot, rendering further investigation unnecessary. He claimed he did not run over the curb when exiting Burger King and that, in any event, that information was never communicated to Kelm and could not support the stop. Hein asserted his travel in the left-turn-only lane could not establish reasonable suspicion because there was "no indication within the lane, either by overhead sign, the sight of road signs, or within the lane paint, that would indicate ... a restricted lane." Finally, Hein argued Kelm's speed assessment was unreliable because the record was devoid of any reference to Kelm's training or experience at visual speed detection. The circuit court accepted Hein's position and ordered suppression of all evidence derived from the traffic stop.

DISCUSSION

¶7 An investigatory seizure is justified only where police have "reasonable suspicion, grounded in specific articulable facts and reasonable inferences from those facts, that an individual is [or was] violating the law." *State v. Gammons*, 2001 WI App 36, ¶6, 241 Wis. 2d 296, 625 N.W.2d 623. An officer

is “not required to rule out the possibility of innocent behavior before initiating a brief stop.” *State v. Anderson*, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990). The critical question is whether the police conduct in question was reasonable under the circumstances. *Id.* at 87.

¶8 “The question of whether a traffic stop is reasonable is a question of constitutional fact.” *State v. Post*, 2007 WI 60, ¶8, 301 Wis. 2d 1, 733 N.W.2d 634. “A question of constitutional fact is a mixed question of law and fact to which we apply a two-step standard of review. We review the circuit court’s findings of historical fact under the clearly erroneous standard, and we review independently the application of those facts to constitutional principles.” *Id.* (citations omitted).

¶9 As a preliminary matter, we agree neither Hein’s crossing the curb, nor his operation in the left-turn lane, nor his alleged excessive speed can support the traffic stop. Even if incidental contact with the curb when turning is a traffic violation—an unlikely assumption given that WIS. STAT. § 346.31(2) requires right turns “be made as closely as practicable to the right-hand edge or curb of the roadway”—the circuit court found Bauman never informed Kelm he witnessed such conduct. Hein’s travel in the left-turn-only lane on River Street was permissible, as the circuit court found the only signage indicating the lane’s purpose was not visible to Hein. *See* WIS. STAT. § 346.02(7). Finally, we agree Kelm’s speed estimate is insufficient to establish reasonable suspicion because the record is devoid of any testimony or evidence to substantiate the reliability of that observation.

¶10 We cannot agree, however, that Hein’s stop was unreasonable under all the facts and circumstances. Bauman and Kelm responded to reports of

suspicious activity about 2:30 a.m., the nature of which was unknown as Bauman arrived at the scene and observed Hein's truck exiting the Burger King parking lot. A prudent officer proceeding into such ambiguity and uncertainty will ensure the availability of witnesses or suspects and freeze the scene in order to further investigate:

[A] law enforcement officer will be confronted with many situations in which it seems necessary to acquire some further information from or about a person whose name he does not know, and whom, if further action is not taken, he is unlikely to find again

[I]n such circumstances, where a crime may have been committed and a suspect or important witness is about to disappear, it seems irrational to deprive the officer of the opportunity to "freeze" the situation for a short time, so that he may make inquiry and arrive at a considered judgment about further action to be taken. To deny the police such a power would be to pay a high price in effective policing and in the police's respect for the good sense of the rules that govern them.

4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.2(a) at 286-87 (4th ed. 2004) (citation and footnote omitted); *see also Adams v. Williams*, 407 U.S. 143, 145-46 (1972) (brief stop of a suspicious individual, in order to determine his or her identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time).

¶11 The totality of the circumstances presented to the officers at the time of the stop supported their decision to temporarily detain Hein while gathering more information. The circuit court erred in granting Hein's suppression motion. Consequently, we reverse and remand for further proceedings consistent with this opinion.

By the Court.—Order reversed and cause remanded for further proceedings.

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

