

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 14, 2010

A. John Voelker
Acting 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. 2009AP2475-CR

Cir. Ct. No. 2008CF1

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PAUL H. NELIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Ashland County:
JOHN P. ANDERSON, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Paul Nelis appeals a judgment convicting him of operating with a prohibited alcohol concentration, fifth and subsequent offense, and possession of a controlled substance, as party to a crime. He argues the circuit

court should have granted his motion to suppress because the arresting officer stopped his vehicle without reasonable suspicion. We affirm.

BACKGROUND

¶2 On January 2, 2008, the State filed a criminal complaint charging Nelis with operating while intoxicated, fifth and subsequent offense, and operating with a prohibited alcohol concentration, fifth and subsequent offense. The State later filed an amended complaint adding charges of possession of narcotic drugs, possession of a controlled substance, and possession of Tetrahydrocannabinols, each as party to a crime.

¶3 Nelis subsequently moved to suppress. At the hearing on Nelis's motion, the State called City of Ashland Police Officers Scott Morland and Nick Ovaska as witnesses.

¶4 Morland testified that in the early morning hours of December 20, 2007, he received information from dispatch that two callers had reported hearing a vehicle backing into a snow bank in the 400 block of Stuntz Avenue. Morland responded to that location, where he found Ben LaDoux standing in the middle of the road. LaDoux, who appeared to be intoxicated, told Morland that a man he knew only as "Paul" had just dropped him off. LaDoux stated that Paul was "all fucked up," which Morland took to mean intoxicated. LaDoux indicated that Paul was driving a gray Toyota. LaDoux had last seen Paul's vehicle traveling northbound on Stuntz Avenue and guessed he was heading east. Morland testified he observed tire tracks "all over" the fresh snow on Stuntz Avenue. It appeared a vehicle had been dragging snow onto the road, and there were tire tracks going into a yard.

¶5 Morland radioed the other officers on duty and told them to be on alert for a gray Toyota, possibly headed east on Highway 2, driven by a male named Paul who might be intoxicated. Ovaska received Morland's radio communication. He testified he first saw Nelis's vehicle traveling east on Highway 2 near Wal-Mart. He recognized the vehicle as a gray Toyota and observed it swerving. He activated his emergency lights near Mack Road, which is in the city of Ashland, and followed the vehicle out of the city until it stopped about a mile later. Ovaska testified he did not speed to catch up to Nelis's vehicle.

¶6 Nelis's counsel pointed out discrepancies between Ovaska's testimony and the dispatch log from the night of Nelis's arrest. According to the log, the citizen calls to dispatch came in at 2:32:57 a.m., and Ovaska stopped Nelis's vehicle only four minutes and twenty-eight seconds later, at 2:37:38 a.m. Eric Van Guilder, a private investigator hired by Nelis, testified that driving the speed limit it would have taken Ovaska seven minutes to get to the place where he stopped Nelis. Ovaska testified that he drove the speed limit, but according to the dispatch log he made the trip in less than five minutes. Van Guilder also testified it would take one minute and thirty seconds to drive from Mack Road, where Ovaska said he turned on his emergency lights, to the place where he stopped Nelis. On the police video of the stop, only thirty seconds elapsed between when Ovaska activated his emergency lights and when he pulled over Nelis's vehicle.

¶7 Based on the dispatch log and Van Guilder's testimony, Nelis argued Ovaska's testimony that he observed Nelis swerving within the Ashland city limits was incredible. Nelis contended Ovaska drove his vehicle quickly through the city of Ashland and caught up to Nelis outside the city limits without observing any erratic driving in the city. Nelis argued the stop was therefore illegal because it was made outside Ovaska's jurisdiction and without reasonable suspicion.

¶8 The trial court acknowledged, “I have my internal doubts that [Ovaska’s] testimony is particularly accurate as to what happened out there only because the time line doesn’t add up ... the log times and pull over times don’t quite add up.” Nonetheless, the trial court denied Nelis’s motion to suppress. The court found that WIS. STAT. § 349.03(4)¹ authorized Ovaska’s extrajurisdictional stop of Nelis’s vehicle. Specifically, the court determined that § 349.03(4) allows an officer to make an extrajurisdictional stop when the officer has reasonable suspicion to make the stop based on events occurring in the officer’s jurisdiction. The court found that, even if Ovaska did not observe Nelis driving erratically within the city limits, Ovaska had reasonable suspicion to stop him based on events that occurred in the city of Ashland.

¶9 After the trial court denied his motion to suppress, Nelis pled no contest to operating with a prohibited alcohol concentration, fifth and subsequent offense, and possession of a controlled substance, as party to a crime. The remaining charges were dismissed and read in. Nelis now appeals. He does not challenge the trial court’s determination that WIS. STAT. § 349.03(4) authorized Ovaska to make an extrajurisdictional stop. The only issue he raises is whether reasonable suspicion supported the stop.

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted. WISCONSIN STAT. § 349.03(4) states, “If a violation under s. 343.305 or 346.63 or a local ordinance in conformity with s. 346.63 (1), (5) or (7) occurs within a law enforcement officer’s jurisdiction, he or she may enforce the violation anywhere in the state.” Operating with a prohibited alcohol concentration is a violation of WIS. STAT. § 346.63(1)(b).

DISCUSSION

¶10 To perform an investigatory traffic stop, an officer must have reasonable suspicion that the person stopped has committed an offense. *State v. Rutzinski*, 2001 WI 22, ¶14, 241 Wis. 2d 729, 623 N.W.2d 516. The officer’s suspicion must be based on “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion” into the person’s liberty. *Terry v. Ohio*, 392 U.S. 1, 21 (1968). When determining whether a set of facts gives rise to reasonable suspicion, “courts should apply a commonsense approach to strike a balance between the interests of the individual being stopped to be free from unnecessary or unduly intrusive searches and seizures, and the interests of the State to effectively prevent, detect, and investigate crimes.” *Rutzinski*, 241 Wis. 2d 729, ¶15 (citation omitted). The possibility that a person is operating a vehicle while intoxicated is an exigency that “strongly weighs in favor of immediate police investigation.” *Id.*, ¶38.

¶11 Whether reasonable suspicion to stop exists is a question of constitutional fact. *State v. Powers*, 2004 WI App 143, ¶6, 275 Wis. 2d 456, 685 N.W.2d 869. We apply a two-step standard of review to questions of constitutional fact. *Id.* First, we review the trial court’s findings of historical fact and uphold them unless they are clearly erroneous. *Id.* Second, we review the determination of reasonable suspicion independently. *Id.*

¶12 Here, the trial court found that the totality of the circumstances provided Ovaska with reasonable suspicion to stop Nelis’s vehicle. The court cited specific facts supporting its decision:

But I think that under the state of the present law the officer under his present knowledge, with what he knew at the time, the type of car that meets the description was going to

be heading east on Highway 2, there's no other traffic, it is December 20th, dark, it is cold, it is snowy, he sees a car in front, he speeds up, gets to the point it looks like it is the car that might fit the description, he hits the lights, pulls him over, I think is enough. Not necessarily everything I like to have, but I think it is enough.

Nelis does not dispute any of the trial court's findings of fact. He instead argues the court's findings do not constitute reasonable suspicion. Nelis claims there was no connection between his car and the two calls to dispatch that triggered the events culminating in the stop. He also claims there was no connection between his car and Morland's observations in the 400 block of Stuntz Avenue.

¶13 Contrary to Nelis's contention, his car was reasonably connected to the events on Stuntz Avenue, which were connected to the two citizen calls to dispatch. Nelis correctly observes there is no evidence the citizen callers identified him or his car. However, given that Morland arrived on the 400 block of Stuntz Avenue one minute after two callers reported hearing a car backing into a snow bank, and given LaDoux's statement that he had just been dropped off by an intoxicated man named Paul driving a gray Toyota, it was reasonable for Morland to infer that the gray Toyota was the car callers had reported hearing. This is especially true given that the calls came in at about 2:30 a.m. in December in Ashland, a time and place where there likely were not many other vehicles on the road. Thus, the fact that the callers did not specifically identify the gray Toyota does not mean there was no connection between that vehicle and the citizen calls. Rather, the connection was established by the short time span between the calls and Morland's arrival on the scene and by the unlikelihood that another car had been backing in and out of a snow bank at that precise place and time.

¶14 Furthermore, there was enough evidence for Morland to have reasonable suspicion that the driver of the gray Toyota was intoxicated. The citizen callers reported hearing a car backing in and out of a snow bank on Stuntz Avenue. LaDoux commented that the driver who had recently dropped him off was “all fucked up.” Morland himself observed tire tracks “all over” Stuntz Avenue and going into a yard. All of this occurred at about 2:30 a.m., shortly after bar closing. Together, these facts add up to reasonable suspicion that the driver of the gray Toyota was operating while intoxicated.

¶15 Finally, there was enough of a connection between Nelis’s car and the events on Stuntz Avenue for Ovaska to have reasonable suspicion that Nelis’s car was the gray Toyota driven by LaDoux’s intoxicated acquaintance “Paul.” Ovaska received a radio alert to look for a gray Toyota, possibly headed east on Highway 2, whose driver might be intoxicated. While traveling east on Highway 2, Ovaska spotted a gray car that appeared to be a Toyota. At that time, there were no other cars traveling eastbound on Highway 2. In fact, Ovaska testified he observed no other traffic between Stuntz Avenue and the Ashland city limits. According to the dispatch log, Ovaska stopped Nelis’s vehicle only five minutes after the citizen calls to dispatch and only 4.3 miles from Stuntz Avenue. Given the timing and location of the stop, the fact that Nelis was driving a gray car that appeared to be a Toyota, and the total absence of other traffic in the area, Ovaska had reasonable suspicion to believe Nelis’s car was the same gray Toyota that had dropped LaDoux off on Stuntz Avenue minutes earlier.

¶16 Nelis suggests Ovaska did not have reasonable suspicion to stop him because neither LaDoux nor any other witness testified to seeing Nelis driving erratically. However, this fact is not fatal to the determination that Ovaska had reasonable suspicion to stop Nelis. “Because an OWI conviction does not require

proof of erratic driving, proof of erratic driving is obviously not required for purposes of a reasonable suspicion.” *Powers*, 275 Wis. 2d 456, ¶12 n.2.

¶17 Nelis also incorrectly asserts the record contains no basis for LaDoux’s belief that Nelis was “all fucked up.” LaDoux told Morland that “Paul” had just dropped him off. This leads to a reasonable inference that LaDoux was in the car with Nelis and had an opportunity to observe his behavior and form an opinion of his sobriety. In Wisconsin, a layperson is allowed to give an opinion that another person is intoxicated. *Id.*, ¶13. That LaDoux himself was intoxicated does not disqualify him from this rule. Moreover, Morland’s observation of tire tracks “all over the road” and “going into a yard on Stuntz Avenue” is consistent with and corroborates LaDoux’s opinion of Nelis’s sobriety. The record therefore contains a reasonable basis for LaDoux’s opinion that Nelis was intoxicated.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

