

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 5, 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. 2010AP621-CR

Cir. Ct. No. 2009CT1612

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROLANDO S. CORTES,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County:
JOHN D. MCKAY, Judge. *Affirmed.*

¶1 BRUNNER, J.¹ Rolando Cortes appeals a judgment of conviction for operating while intoxicated, third offense. Cortes claims the circuit court

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.

should have suppressed evidence of intoxication because officers lacked reasonable suspicion to stop his vehicle. We reject Cortes's arguments and affirm.

BACKGROUND

¶2 The facts are undisputed and are based on the testimony of Green Bay Police Officer Thomas Conley at the suppression hearing. At approximately 1:45 a.m., Conley was stopped at a controlled intersection on Main Street. Another vehicle, driven by Cortes, was stopped across the intersection in the opposite lane. Conley saw Cortes point at him and say something to his passengers. As soon as the light turned green, Conley testified Cortes "took off at a high rate of speed."

¶3 Conley traveled approximately one block on Main Street before performing a U-turn. As he attempted to catch up with Cortes, he saw Cortes turn left on Roosevelt Street. Conley knew that Cortes would come to a stop sign at the intersection of Roosevelt and Cedar Streets, and, as Conley approached Roosevelt Street, expected to see Cortes's vehicle stopped. Instead, Cortes had already turned left and was traveling on Cedar Street. Conley did not believe there was any way Cortes "could have been that far ahead of me" if Cortes was driving within the speed limit.

¶4 Conley attempted to catch up to Cortes, who was "traveling at a high rate of speed." Conley did not have radar in his vehicle. Based on Conley's speed, he estimated Cortes was traveling "probably 55, 60 miles an hour." In Conley's view, driving at excessive speeds and making frequent turns "is consistent with people trying to ditch contraband ... or elude a traffic stop and/or arrest." Conley called for backup, activated his emergency lights, and initiated a traffic stop, during which he obtained evidence of Cortes's intoxication.

DISCUSSION

¶5 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).

¶6 Police may conduct an investigative stop if the officer is “able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant’ the intrusion of the stop.” *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968)). The intrusion is warranted if the officer reasonably suspects the person stopped is committing, is about to commit or has committed a crime. WIS. STAT. § 968.24; *Post*, 301 Wis. 2d 1, ¶13. An inchoate and unparticularized suspicion, or “hunch,” will not suffice. *State v. Waldner*, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996). “The reasonableness of a stop is based on the totality of the facts and circumstances.” *Post*, 301 Wis. 2d 1, ¶13.

¶7 Conley’s inference that Cortes was trying to elude or evade police was reasonable given the totality of the circumstances. Cortes pointed at Conley’s cruiser, and, as soon as the light turned green, took off at high speed. He then made a series of turns, driving at an estimated fifty-five to sixty miles per hour.²

² The intersections at issue are located near downtown Green Bay. We suspect Cortes’s speed was well in excess of the posted speed limit in violation of WIS. STAT. § 346.57(5), but Conley provided no testimony about the speed limit on Main, Roosevelt, or Cedar Streets. We also suspect Cortes’s speed was not reasonable and prudent under WIS. STAT. § 346.57(2), but

(continued)

“Flight at the sight of police is undeniably suspicious behavior. ... Although it does not rise to a level of probable cause, flight at the sight of a police officer certainly gives rise to a reasonable suspicion that all is not well.” *State v. Anderson*, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990). In addition, unusual driving at a late hour is one factor strongly suggesting further investigation is necessary. *See Waldner*, 206 Wis. 2d at 53, 57-58 (defendant’s unusual driving, which included stopping briefly at an uncontrolled intersection and turning onto a cross street at a high rate of speed, coupled with his dumping of liquid and ice from a plastic cup, coalesced to form reasonable suspicion).

¶8 Cortes suggests Conley’s uncertainty regarding his speed suggests the traffic stop was based on nothing more than Conley’s “hunch.” Conley’s inability to determine Cortes’s precise speed *might* be relevant if Conley lacked cause to suspect Cortes of anything other than a speeding violation. *See City of Milwaukee v. Berry*, 44 Wis. 2d 321, 323-25, 171 N.W.2d 305 (1969) (approving a visual speed estimate based on the officer’s position, the length of his observation, the existence of reference points, and the experience of the officer). As we have established, however, the totality of the circumstances—Cortes’s pointing, rapid acceleration, frequent turns and excessive speed—gave rise to reasonable suspicion that further investigation was warranted.

Conley provided no testimony about the area or its potential hazards. Accordingly, we cannot decide the case on either of these grounds.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE
808.23(1)(b)4.

