

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**November 17, 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. 2010AP1618-CR**

**Cir. Ct. No. 2009CM246**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**WILLIAM J. MERRY,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Ozaukee County:  
THOMAS R. WOLFGRAM, Judge. *Affirmed.*

¶1 NEUBAUER, P.J.<sup>1</sup> William J. Merry appeals pro se from a judgment of conviction for operating while under the influence (OWI), third

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

offense. Merry contends that the trial court erred in denying his motion to suppress on grounds that the arresting officer lacked reasonable suspicion to stop his vehicle. We reject Merry's argument. We affirm the judgment.

¶2 On March 16, 2009, Merry was charged with OWI and operating with a prohibited alcohol concentration (PAC), both as a third offense. The charges stemmed from Merry's February 15, 2009 arrest by Officer Jerry Nye of the city of Port Washington police department. Merry filed a motion to suppress evidence stemming from the stop and arrest and a hearing was held on August 13, 2009. Nye was the sole witness at the motion hearing. Nye testified that on February 15, 2009, at approximately 2:32 a.m., he was traveling westbound from the intersection of Grand Avenue and Wisconsin Street in Port Washington when he noticed something unusual. Nye testified:

I noticed a black truck that was traveling westbound east of that intersection. I noticed it in my rearview mirror as it approached the intersection. I noted that the stoplight for the intersection for westbound traffic was red. And as he approached he came to a complete stop. Shortly after that I noticed he made a left-hand turn into the red light onto Wisconsin Street.

Nye confirmed that this was the intersection with a Cousin's sub shop. When asked whether, in his experience, both the eastbound and westbound lights are the same at all times, Nye responded, "Correct." Nye additionally testified that there is not a green turn arrow at that intersection.

¶3 Nye testified that, at the time he noticed Merry's vehicle, Merry was approximately two blocks behind him. After observing the vehicle turn left on a red light, Nye turned around and caught up to the vehicle as it was pulling into a parking lot for the WE Energies plant. Nye turned on his squad lights and initiated a traffic stop. Nye approached the driver, identified him as Merry, and informed

him of the reason for the stop. According to Nye, Merry said he did not have a legitimate reason for going through the red light and that “[i]t was a mistake.” When asked why he was in the parking lot, Merry first stated that he was there to visit a friend and then, after being informed that he was in a parking lot of a business, Merry stated he was “just turning around.” Nye noted that Merry had a passenger in the vehicle.

¶4 While conversing with Merry, Nye noted an odor of intoxicants coming from the vehicle and that Merry’s speech was thick and slurred. Nye asked Merry to step out of the vehicle to perform field sobriety testing. When Merry exited the vehicle, Nye noted that Merry was “uneasy on his feet and was staggering.” Merry refused to perform field sobriety testing. Nye then placed him under arrest for OWI. When asked what the arrest was based on, Nye testified:

I based that on the totality of the circumstances, the traffic violation, the odor of intoxicants coming from the vehicle, the thick slurred speech, the stagger as he walked out of the vehicle, as well as my attempt to pat down his pockets as he began to stumble backwards.

Based on Nye’s testimony, the trial court denied Merry’s motion to suppress. The court found that Nye’s observation of the traffic violation provided grounds for the initial stop and his subsequent observations provided probable cause to arrest for OWI. Merry pled guilty to OWI and was convicted on December 23, 2009.<sup>2</sup>

¶5 Merry first argues that Nye’s testimony regarding the traffic violation was insufficient to justify the initial stop of his vehicle. Specifically,

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<sup>2</sup> Merry’s plea questionnaire and waiver of rights form filed on December 23, 2009, reflects his plea as “no contest”; however, the judgment of conviction indicates that Merry pled guilty. The transcript of the plea hearing is not included in the appellate record.

Merry contends: “The officer [did] not know or state that he knew there was a green light or a green arrow or some other directional signal given that would permit Mr. Merry to turn left at the moment the officer perceive[d] a violation.” Merry argues that absent that information, Nye was not authorized to pursue him. We reject Merry’s contention.

¶6 The temporary detention of individuals during a traffic stop constitutes a seizure of persons within the meaning of the Fourth Amendment. *State v. Harris*, 206 Wis. 2d 243, 258, 557 N.W.2d 245 (1996) (citing *Whren v. United States*, 517 U.S. 806, 809-10 (1996)). An officer may perform an investigative stop if the officer reasonably suspects a person is violating a noncriminal traffic law. *County of Jefferson v. Renz*, 231 Wis. 2d 293, 310, 603 N.W.2d 541 (1999) (citing *State v. Griffin*, 183 Wis. 2d 327, 333-34, 515 N.W.2d 535 (Ct. App. 1994)); *see also State v. Colstad*, 2003 WI App 25, ¶13, 260 Wis. 2d 406, 659 N.W.2d 394 (investigatory stop was proper if there was reasonable suspicion to believe defendant had violated a traffic ordinance). “Reasonable suspicion is based upon specific and articulable facts that together with reasonable inferences therefrom reasonably warrant a suspicion that an offense has occurred or will occur.” *State v. Longcore*, 226 Wis. 2d 1, 8, 594 N.W.2d 412 (Ct. App. 1999) (citing *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968) (emphasis omitted)).

¶7 “[W]hether 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. We review such a decision using a two-step standard of review. *Id.* We defer to the trial court’s factual determinations unless they are clearly erroneous, and we review de novo whether those facts are sufficient to create reasonable suspicion. *Id.*

Reasonableness is determined based on the totality of the facts and circumstances. *Id.*, ¶13.

¶8 Here, Nye testified that when he observed Merry's vehicle, he could see "that the stoplight for the intersection for westbound traffic was red." While Merry is correct that Nye did not (and could not) testify to having personally observed the traffic light from Merry's perspective, Nye did confirm that "both eastbound and westbound lights are the same at all times" and there is not a green turn arrow at that intersection. Nye's testimony that he observed Merry's vehicle stop and then proceed through a red light is sufficient to support a determination that Nye had reasonable suspicion that Merry had violated a traffic law. *See* WIS. STAT. § 346.37(1)(c)1. ("[v]ehicular traffic facing a red signal shall stop"); *see also Colstad*, 260 Wis. 2d 406, ¶13 (investigatory stop was proper if there was reasonable suspicion to believe defendant had violated a traffic ordinance).

¶9 Merry additionally contends that the trial court erred in considering Nye's observations as to intoxication when ruling on the grounds for the initial investigatory stop. However, Merry is confusing the trial court's discussion of reasonable suspicion with its finding of probable cause to support the arrest. The court found, "[Nye] sees the vehicle being driven by this defendant going through a red light after stopping." The court then expressly stated, "There's reason both for the stop, the traffic violation, and reason for the arrest, driving under the influence." It is clear from the trial court's decision that it was not basing its decision as to the initial stop on Nye's subsequent observations of intoxication. We therefore reject Merry's challenge on this ground.

¶10 We conclude that Nye had reasonable suspicion to believe that Merry failed to obey a traffic signal and, thus, was justified in performing an

initial stop of Merry's vehicle. We uphold the trial court's denial of Merry's motion to suppress. We affirm the judgment.

*By the Court.*—Judgment affirmed.

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

