

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 23, 2011

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. 2010AP1794-CR

Cir. Ct. No. 2009CT352

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NICHOLAS FEX,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: ELLEN R. BROSTROM, Judge. *Affirmed.*

¶1 KESSLER, J.¹ Nicholas Fex appeals his judgment of conviction after he pled guilty to operating a motor vehicle while under the influence of an intoxicant as a third offense. Fex contends that the trial court erred in denying his motion to suppress evidence of his intoxication because police officers lacked

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

reasonable suspicion to stop his vehicle. Because we conclude that there was reasonable suspicion to stop Fex's vehicle, we affirm.

STATEMENT OF FACTS

¶2 On March 17, 2009, Fex was charged with one count of Operating a Motor Vehicle while under the influence of an intoxicant as a third offense and one count of Operating with a Prohibited Alcohol Concentration of .08% or greater. On February 5, 2009, at approximately 1:55 a.m., Greenfield police officers were dispatched to the Fin 'N Feather Bar in Greenfield in response to an anonymous call regarding a bar fight. Officer Shawn Licht, though not one of the officers dispatched, responded to the call because of his proximity to the location and went to the bar to investigate. Upon approaching the bar, he saw a red Pontiac Grand Prix leaving the parking lot at a high rate of speed. Officer Licht radioed the other responding officers alerting them of the vehicle that was leaving the bar and the direction in which it was headed. Less than a minute later, the vehicle was stopped approximately ten blocks away from the bar by Sergeant Peter Regenfelder, who was in the area and heard the dispatch call. Fex was the only occupant of the vehicle. According to the criminal complaint and Sergeant Regenfelder's testimony, after Sergeant Regenfelder made direct contact with Fex he noticed that Fex's eyes were glossy and bloodshot, his speech was slurred and he smelled of alcohol. Fex also admitted to having six beers and "a couple of shots." Sergeant Regenfelder then turned the investigation over to other Greenfield officers and field sobriety tests were performed. Fex was subsequently arrested for operating while intoxicated.

¶3 Fex then brought a motion to suppress any evidence pertaining to the charges brought against him based on his assertion that officers did not have

reasonable suspicion to stop his vehicle. A motion hearing was held on November 23, 2009, in front of the Honorable Ellen R. Brostrom in which Fex's motion was denied.² This appeal follows.

DISCUSSION

¶4 When reviewing a trial court's order to deny a motion to suppress, we will uphold a trial court's factual findings unless they are clearly erroneous. *State v. Richardson*, 156 Wis. 2d 128, 137, 456 N.W.2d 830 (1990). Whether an investigatory stop meets constitutional standards is a question of law that we review independently. *State v. Krier*, 165 Wis. 2d 673, 676, 478 N.W.2d 63 (Ct. App. 1991).

¶5 The sole issue on appeal is whether there was sufficient reasonable suspicion to stop Fex's vehicle. Fex contends that the trial court erred in denying his motion to suppress evidence because the stop was not supported by reasonable suspicion. Fex argues that an anonymous phone call to police to investigate a bar fight and Officer Licht's observation of Fex's car leaving the parking lot around the time Officer Licht approached the bar to investigate are not enough to constitute reasonable suspicion.

¶6 To make an investigatory stop of a person, officers must have reasonable suspicion that criminal activity is afoot. *State v. Allen*, 226 Wis. 2d 66, 71, 593 N.W.2d 504 (Ct. App. 1999). In evaluating whether a stop is supported by reasonable suspicion, we consider whether "specific and articulable facts which,

² Fex entered a plea to the charge of operating a motor vehicle while under the influence of an intoxicant as the third offense, while preserving the motion's issue for appeal. The State moved to dismiss the charge of Operating with a Prohibited Alcohol Concentration of .08% or greater.

taken together with rational inferences from those facts, reasonably warrant” the stop. *Terry v. Ohio*, 392 U.S. 1, 21 (1968). We determine the reasonableness of the stop based on the totality of the circumstances. *State v. Post*, 2007 WI 60, ¶13, 301 Wis. 2d 1, 733 N.W.2d 634. “The determination of reasonableness is a common sense test.” *Id.* “The crucial question is whether the facts of the case would warrant a reasonable police officer, in light of his or her training and experience, to suspect that the individual has committed, was committing, or is about to commit a crime.” *Id.* An officer may stop an individual with a reasonable inference of unlawful conduct, even if other innocent inferences can be drawn. *State v. Waldner*, 206 Wis. 2d 51, 60, 556 N.W.2d 681 (1996).

¶7 Officer Licht testified that as he was approaching the bar, he saw a red Pontiac Grand Prix leaving the parking lot “at a high rate of speed,” and he believed that “the occupant[] of the vehicle [was] involved in the fight.” Specifically, he stated: “It is a reasonable suspicion that I had based upon my training and experience with a car leaving a parking lot at a high rate of speed where we just got sent to a fight. Typically, people flee from fights.” He further noted that based on his fourteen years of experience, when people leave bar parking lots, they generally do so slowly because they have been drinking. Fex’s exit, however, “was extra fast.” Both Officer Licht and Sergeant Regenfelder noted that when they saw Fex’s vehicle it was the only car in the vicinity. Officer Licht noted that it was the only car exiting the parking lot at approximately 1:55 a.m., while Sergeant Regenfelder noted that no other cars were on the road travelling in Fex’s direction just a few minutes later. Sergeant Regenfelder also testified that he was certain the car he stopped was the car described over the radio dispatch as it matched the description put out by Officer Licht and because he could see the bar from his location.

¶8 Based on the totality of the circumstances, we agree with the trial court that the high rate of speed at which Fex left the bar together with the officers' knowledge that a fight had been reported at that bar, gave the officers enough reasonable suspicion to pull Fex over to determine whether he was involved in the bar fight. Officer Licht testified that in his experience, the manner in which Fex exited the parking lot was consistent with that of people fleeing bar fights but not with people merely leaving after spending time at a bar. Further, that Fex's vehicle was the only vehicle leaving the parking lot and the only one on the road at close to 2:00 a.m., in combination with the factors already stated, gave the officers reasonable suspicion to stop the vehicle to inquire about the fight. *See Allen*, 226 Wis. 2d at 74-75 (“[T]he time of day is another factor in the totality of the circumstances equation.”). As our supreme court noted, “[t]he building blocks of fact accumulate. And as they accumulate, reasonable inferences about the cumulative effect can be drawn.” *Post*, 301 Wis. 2d 1, ¶16 (citation omitted).

CONCLUSION

¶9 For all the forgoing reasons, based on the totality of the circumstances, we conclude that the officers had reasonable suspicion to stop Fex's vehicle. Accordingly, we affirm.

By the Court.—Judgment affirmed.

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

