

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 24, 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. 2010AP1944-CR

Cir. Ct. No. 2009CT339

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY M. PENCE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Columbia County:
JAMES MILLER, Judge. *Affirmed.*

¶1 VERGERONT, J.¹ Timothy Pence appeals the denial of his motion to suppress evidence and the judgment of conviction for operating a motor vehicle

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) and (3) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

while under the influence of an intoxicant (OWI), in violation of WIS. STAT. § 346.63(1)(a), third offense. Pence argues that the arresting officer did not have reasonable suspicion to initiate the investigative stop and the court therefore erred in denying his motion to suppress evidence resulting from this stop. For the reasons we explain below, we conclude the circuit properly denied the motion because, based on the totality of the circumstances, there was the requisite reasonable suspicion. We therefore affirm.²

BACKGROUND

¶2 Pence was stopped by Columbia County Deputy Sheriff Cory Miller in the early morning of June 30, 2009. During the stop, evidence was obtained that led to Pence's conviction. Pence moved to suppress evidence, arguing the stop was unlawful. At the hearing on the motion to suppress, Deputy Miller testified as follows.

¶3 At approximately 2:13 a.m. on Tuesday, June 30, 2009, Deputy Miller was traveling northbound on Highway 51 near the Town of Pacific in Columbia County, Wisconsin. Deputy Miller followed a vehicle that was weaving within its lane for approximately one-and-a-half to two miles. Deputy Miller saw the vehicle weave "at least five different times." The vehicle caught his attention because it was after 2 a.m. and the vehicle was weaving. Deputy Miller testified that establishments that serve liquor close at 2 a.m. on weekdays and, in his experience, when he makes stops after midnight, there is a high probability that the driver is intoxicated. He also testified that it is not normal for a driver to

² Pence also argues the officer did not have probable cause for the stop, but it is unnecessary to address this argument because we conclude there was reasonable suspicion.

weave within his or her lane and, based on his experience, someone weaving in his or her lane is possibly intoxicated or unable to safely operate a vehicle. After observing the vehicle weave at least five times, Deputy Miller conducted an investigative stop of the vehicle.

¶4 Deputy Miller also testified that he has worked in law enforcement for five years. He is trained in OWI enforcement and field sobriety testing, and has made close to 100 stops for OWI.

¶5 The circuit court concluded that the totality of the circumstances justified the stop.

DISCUSSION

¶6 The issue on appeal is whether Deputy Miller had reasonable suspicion for the investigative stop.

¶7 When we review a circuit court's order on a suppression motion, we uphold the circuit court's factual findings unless they are clearly erroneous. *State v. Samuel*, 2002 WI 34, ¶15, 252 Wis. 2d 26, 643 N.W.2d 423. However, whether or not an investigative stop was constitutional based on those facts is a question of law, which we review de novo. *State v. Guzman*, 166 Wis. 2d 577, 586, 480 N.W.2d 446 (1992).

¶8 The federal and state constitutions protect against unreasonable searches and seizures. U.S. CONST. amend. IV; WIS. CONST. art. I, § 11. To conduct a valid investigatory stop, a law enforcement officer must reasonably suspect, in light of his or her experience, that some sort of criminal activity is occurring. *State v. Richardson*, 156 Wis. 2d 128, 139, 456 N.W.2d 830 (1990). To determine whether a stop is supported by reasonable suspicion, we consider

whether “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant’ the intrusion of the stop.” *State v. Post*, 2007 WI 60, ¶10, 301 Wis. 2d 1, 733 N.W.2d 634 (quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968)). The reasonableness of a stop is determined based on the totality of the facts and circumstances in the case. *Post*, 301 Wis. 2d 1, ¶13 (citations omitted). The key question is whether the facts and circumstances of the case would warrant a reasonable law enforcement 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.* (citation omitted). The State has the burden to establish that a particular investigative stop is reasonable. *State v. Taylor*, 60 Wis. 2d 506, 519, 210 N.W.2d 873 (1973).

¶9 Pence argues that Deputy Miller lacked reasonable suspicion because he was not speeding, driving erratically, or otherwise breaking Wisconsin traffic laws. However, we determine the reasonableness of a stop based on the totality of the circumstances, not based on whether a traffic law was broken. *See Post*, 301 Wis. 2d 1, ¶24.

¶10 The circuit court here implicitly credited Deputy Miller’s testimony, and we accept the circuit court’s findings of fact based on that credibility determination. We agree with the circuit court that, under the totality of the circumstances, the stop was supported by reasonable suspicion.

¶11 The totality of the circumstances in this case supports the reasonableness of Deputy Miller’s investigative stop. Deputy Miller has received OWI training as a law enforcement officer and has significant experience in arresting intoxicated drivers. The stop took place just after 2 a.m., close to closing time for liquor establishments. Deputy Miller observed Pence weave at least five

times while following him over one-and-a-half to two miles. The video from Deputy Miller's squad car shows Pence's vehicle weaving. Deputy Miller testified that, in his experience, if a driver is weaving at this time of day, it is highly probable that the individual is operating while intoxicated. Taking these circumstances together, we conclude it was reasonable for Deputy Miller to suspect that Pence was driving while intoxicated and to initiate an investigative stop.

¶12 Pence argues that Deputy Miller did not have reasonable suspicion to conduct the stop because his behavior did not match the behavior of the defendant in *Post*. Pence notes that the court in *Post* held that “weaving within a single traffic lane does not alone give rise to the reasonable suspicion necessary to conduct an investigative stop.” *Id.* at ¶2. However, as we have already explained, Pence's weaving was not the only circumstance that gave rise to reasonable suspicion. The late hour, Deputy Miller's training and experience, and Pence's weaving, all together, created the circumstances for reasonable suspicion. *Post* requires us to look at the totality of the circumstances; it does not establish a minimum set of facts that subsequent cases must match in order to be deemed reasonable suspicion.

CONCLUSION

¶13 The circuit court properly denied Pence's motion to suppress evidence. Accordingly, we affirm the judgment of conviction.

By the Court.—Judgment affirmed.

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

