

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 21, 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. 2011AP666-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2010CT127

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEVIN J. BURCH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for La Crosse County:
RAMONA A. GONZALEZ, Judge. *Affirmed.*

¶1 BLANCHARD, J.¹ The issue on appeal is whether an officer had reasonable suspicion to make an investigative traffic stop. Kevin Burch appeals

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

the circuit court's denial of his motion to suppress evidence and the judgment of conviction for operating a motor vehicle with a prohibited alcohol concentration, in violation of WIS. STAT. § 346.63(1)(b), second offense. Burch argues that the arresting officer did not have reasonable suspicion to initiate the investigative stop, and therefore the court erred in denying his motion to suppress evidence resulting from the stop. For the reasons explained below, the court properly denied the motion because, based on the totality of the circumstances, the officer had reasonable suspicion.

BACKGROUND

¶2 The arresting officer was the only witness at the hearing on the motion to suppress. He testified in relevant part as follows.

¶3 The officer had worked for the Village of West Salem Police Department for about two years, having graduated from a police academy in 2005 and taken "a drunk driving course."

¶4 The officer was operating a squad car in West Salem late one weekday night when, at 12:44 a.m., the officer observed a truck that drew his attention. The truck drew his attention because it was traveling "at an extremely low rate of speed, slowing to an almost near stop" at an intersection at which there were no signs to stop or yield. The truck then accelerated and reached a second intersection one block away, which also had no stop or yield signs, despite which the truck came "to a complete stop." So far as the officer could observe, there was no other traffic or other reason for the driver of the truck to have slowed to a near stop at the first intersection or to have come to a complete stop at the second intersection.

¶5 The officer testified that he became suspicious that the driver was impaired based on the following combined factors: the time of night (namely, “the early morning hours[,] right around bar time”), the extreme slowing at the first unmarked intersection, and the complete stop at the second unmarked intersection. On that basis, the officer decided to make a traffic stop to investigate further. When the officer stopped the truck, Burch was the driver.

¶6 The circuit court implicitly credited the officer’s testimony, and on the basis of that testimony concluded that the totality of the circumstances justified the stop.

DISCUSSION

A. *Legal Standards*

¶7 This court will uphold factual findings of a circuit court in addressing a suppression motion, unless those findings are clearly erroneous. *State v. Samuel*, 2002 WI 34, ¶15, 252 Wis. 2d 26, 643 N.W.2d 423. In contrast, we apply the de novo standard of review to the legal question of whether an investigative stop was constitutional based on those facts. *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 the officer’s 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.

¶9 The question presented is whether the facts and circumstances of the case would warrant a reasonable law enforcement officer, in light of the officer’s training and experience, “to suspect that the individual has committed, was committing, or is about to commit a crime.” *Id.* The State has the burden of establishing that an investigative stop was reasonable. *State v. Taylor*, 60 Wis. 2d 506, 519, 210 N.W.2d 873 (1973).

B. Analysis

¶10 Burch first contends that the circuit court made clearly erroneous findings regarding two topics: (1) his driving behavior at the first intersection, and (2) the significance of the time of night at which the stop occurred. However, Burch’s assertions amount to insubstantial challenges to particular wording used by the court and plainly do not represent factual errors by the court significant to the analysis.

¶11 Regarding Burch’s driving at the first intersection, the court correctly noted that the officer testified that he observed the truck “slow to a near stop.” Burch focuses on the court’s later use, in the same short written memorandum decision and order, of the phrase “two stops in the middle of intersections.”² However, given the court’s earlier reference in the decision to this

² Without developing the point, Burch also suggests that the circuit court committed clear error in suggesting that he stopped “in the middle” of each of the two intersections. The
(continued)

topic, this was clearly shorthand for the idea that Burch made one near stop and a second complete stop.

¶12 Regarding the time of the stop, the court relied in part on the premise that 12:44 a.m. is “late at night when bars close.” Burch protests that bar time in West Salem is 2 a.m., not 12:44 a.m. However, the phrase used by the court was clearly intended to capture the idea that a greater percentage of the drivers on the road are impaired during the post-midnight hours than at other times of day. The preponderance of excess drinking occurs at night, and not all tavern patrons wait to hear the final bell before departing taverns. *See Post*, 301 Wis. 2d 1, ¶36 (“Finally, we note that the incident took place at 9:30 at night. While this is not as significant as when poor driving takes place at or around ‘bar time,’ it does lend some further credence to [the officer’s] suspicion that [the motorist] was driving while intoxicated.”). The court’s reference to the timing of the stop in this case merely echoed the unremarkable testimony of the officer that the officer’s suspicions were heightened by the fact that “it was during the week, [in] the early morning hours[,] right around bar time.”

¶13 Turning to his legal argument, Burch contends that the facts of this case resemble those in *State v. Fields*, 2000 WI App 218, 239 Wis. 2d 38, 619 N.W.2d 279, in which this court held that a defendant’s longer-than-normal stop at a stop sign did not provide reasonable suspicion of an intent to evade an officer,

testimony at the suppression hearing was ambiguous as to precisely where Burch slowed to a near stop the first time, or where he came to a full stop the second time. This court will assume without deciding, for purposes of its de novo review of whether the investigative stop was constitutional, that both the near stop and the full stop occurred at the places where a vehicle should have stopped if there had been stop signs at those intersections. This assumes in Burch’s favor the allegedly erroneous “in the middle of the intersections” reference.

which was the justification offered for the investigatory stop. In that case, the officer detained a driver who simply “stayed stopped for five to ten seconds” at an intersection where there was no stop sign and no other traffic was present. *Id.*, ¶4. The officer stated he was suspicious of the fact that the driver stopped for “no reason.” *Id.*, ¶5. The officer believed that the driver was attempting to avoid or evade the officer by waiting to see the direction the officer took. *Id.* Based on the totality of circumstances, this court concluded that the driver’s “slightly longer than normal stop at the stop sign, at that time and in that location,” could not have given rise “to the level of ‘specific and articulable facts’ necessary to justify reasonable suspicion that Fields had committed or was committing an unlawful act.” *Id.*, ¶23.

¶14 The State responds that the analysis in *Fields* turned on the nature of the suspicion articulated by the officer raised by the driver’s overly long stop, namely, that the driver’s conduct suggested an intent to *evade* the officer. This court found the evasion theory to be no more than a hunch. In contrast, the State argues, the facts in this case more closely resemble those found to support a conclusion of reasonable suspicion in *Post* and *State v. Waldner*, 206 Wis. 2d 51, 556 N.W.2d 681 (1996). As explained below, this court agrees that the justification for the stop in this case is more substantial than in *Fields*, and is sufficiently close to the justifications that passed muster in *Post* and *Waldner*.

¶15 In *Post*, a vehicle was observed at 9:30 p.m. weaving in an S-pattern several times for two blocks in a double-wide lane that included a parking lane and a traffic lane. *Post*, 301 Wis. 2d 1, ¶36. In *Waldner*, a vehicle was observed at around 12:30 a.m. traveling at a slow rate of speed when it stopped at an uncontrolled intersection. *Waldner*, 206 Wis. 2d at 53-54. The driver then opened his door and dumped liquid and ice from a plastic cup onto the road, and

turned and accelerated at a high rate of speed away from the intersection. *Id.* at 53.

¶16 Unlike the officer in *Fields*, but like the officers in *Post* and *Waldner*, the officer in the instant case had before him “specific and articulable” facts that, when objectively considered in light of his training and experience, reasonably supported suspicion of impairment. The unexplained near stop and complete stop form a pattern of suspicious driving behavior, like the weaving in *Post*. *Waldner* features an unusually vivid element (dumped liquid that was presumably alcohol), but the facts of *Waldner* could be said to raise the same general level of reasonable suspicion as is raised by the facts in the instant case. A similar reasonable inference of unlawful conduct, namely, impaired driving, could be objectively discerned.

¶17 Burch argues that the officer lacked reasonable suspicion because “there simply was nothing illegal or reasonably suspicious about the driving conduct” that the officer observed. Burch acknowledges that courts are to 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, but argues that the near stop and the full stop were merely “different” driving behavior, and not suspicious behavior. Further, he contends that it was “arguably the prudent thing” for him to stop at the second intersection, “where a marked police car sits for no apparent reason.”

¶18 These arguments ignore the rule that “police officers are not required to rule out the possibility of innocent behavior before initiating a brief stop.” *State v. Anderson*, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990). “[S]uspicious conduct by its very nature is ambiguous, and the [principal] function of the investigative

stop is to quickly resolve that ambiguity.” *Id.* “Therefore, if any reasonable inference of wrongful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, the officers have the right to temporarily detain the individual for the purpose of inquiry.” *Id.* In other words, a *Terry* stop allows police to obtain more information, through temporary “seizure,” regarding potential alternative innocent explanations for suspicious behavior; the potential for discovery of innocent explanations does not foreclose the stop. It is often going to be the case that aberrant driving behavior could have resulted from one or more causes that do not represent a violation of any statute or ordinance. However, where a reasonable suspicion arises from a pattern of aberrant driving, such as that exhibited by Burch under these circumstances, police are permitted to infringe on the right of the driver to be free of stops and temporary detentions so that police can attempt to resolve the ambiguity by detaining the driver for that limited purpose in a limited manner.³

¶19 As *Fields* suggests, if Burch had merely slowed to a near stop inexplicably one time, or had merely stopped inexplicably one time, such conduct, even at 12:44 a.m., might not have been sufficient. However, when considered together, in light of the officer’s training and experience and the late hour, Burch’s two separate unexplained interruptions of normal driving conduct created the circumstances for reasonable suspicion of impaired driving.

³ The scope and duration of the stop and detention are not challenged in this case.

CONCLUSION

¶20 For these reasons, the circuit court properly denied Burch's motion to suppress evidence. Accordingly, this court affirms the judgment of conviction.

By the Court.—Judgment affirmed.

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

