

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 26, 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. 2011AP898

Cir. Ct. No. 2010CT651

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN THE MATTER OF THE REFUSAL OF JOHN E. AHERN:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JOHN E. AHERN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Fond du Lac County:
ROBERT J. WIRTZ, Judge. *Affirmed.*

¶1 NEUBAUER, P.J.¹ John E. Ahern appeals from an order finding that he unlawfully refused to take a test for intoxication after arrest, contrary to WIS. STAT. § 343.305(9). Ahern contends that the circuit court erred in finding his refusal to submit to an evidentiary chemical test unreasonable. Ahern argues that his refusal was reasonable because the arresting officer did not have sufficient reasonable suspicion or probable cause to legally detain him. Based on the totality of the circumstances, we conclude that the officer had reasonable suspicion justifying an investigatory stop of Ahern’s vehicle and, therefore, Ahern’s refusal to submit to an evidentiary chemical test was unreasonable. We affirm the order.

FACTS

¶2 The facts underlying Ahern’s conviction for operating a motor vehicle while under the influence of an intoxicant (OWI) were testified to at a combined hearing addressing Ahern’s refusal and his motion to suppress. Deputy Panagiotis Vergos, of the Fond du Lac County Sheriff’s Department, testified that on September 25, 2010, at 1:00 a.m. in the morning, he observed a SUV parked in the middle of the Baudry Lane roadway with the engine running and its taillights on. Vergos was traveling northbound on Highway 45 when he first passed Baudry Lane. Vergos observed that the SUV was “stopped in the roadway.” Vergos estimated that Ahern’s vehicle was approximately eighteen to thirty inches from the edge of the roadway and did not leave sufficient room for other traffic to drive around it. After Vergos passed Baudry Lane, he turned around on Highway 45, headed south on Highway 45, and then pulled up behind the SUV to check on it.

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

Before the police car came to a stop, Vergos turned his emergency lights on. Baudry Lane is a two-way, dead-end street, with some residences at the end of the street. The driver of the vehicle exited and approached the police car.

¶3 The driver of the vehicle was identified as Ahern. When Ahern was speaking to Vergos, Vergos observed that Ahern had red and bloodshot eyes. Vergos told Ahern to get back into his car, which Ahern did, and then Vergos walked on the passenger side of the vehicle to speak with the female passenger sitting in the front seat. Vergos asked both Ahern and the passenger questions separately to gather information on the purpose of sitting in the SUV and received conflicting statements. Vergos gave Ahern a field sobriety test, which he failed, followed by a preliminary breath test, which Ahern also failed. Ahern was arrested for OWI and transported to the Fond du Lac County Sheriff's Department for processing. Vergos read the form titled Informing the Accused to Ahern and Ahern refused to take the test twice.

¶4 Ahern filed a motion to dismiss the refusal charge and a motion to suppress based upon lack of reasonable suspicion or probable cause to detain. The circuit court denied Ahern's motion to suppress and found Ahern unlawfully refused to take the test for intoxication after arrest. Ahern appeals.

DISCUSSION

¶5 Ahern does not challenge the underlying facts relating to the time and street location where his SUV was detained. The narrow issue on appeal is whether Vergos had reasonable suspicion necessary to conduct a lawful traffic

stop of Ahern's vehicle.² Based on our review of the record, we conclude that he did.

¶6 Ahern's motions and arguments on appeal assert Fourth Amendment violations resulting from an unreasonable seizure. Both the Fourth Amendment of the United States Constitution and article I, § 11, of the Wisconsin Constitution guarantee to all citizens the right to be free from unreasonable searches and seizures. Because an investigatory stop is a "seizure" within the meaning of the Constitution, a law enforcement officer, before stopping an individual, must reasonably suspect, in light of his or her training and experience that the individual is, or has been violating the law. *Terry v. Ohio*, 392 U.S. 1, 20-22 (1968); *State v. King*, 175 Wis. 2d 146, 150, 499 N.W.2d 190 (Ct. App. 1993); WIS. STAT. § 968.24. An officer may perform an investigatory stop of a vehicle based on a reasonable suspicion of a noncriminal traffic violation. *State v. Colstad*, 2003 WI App 25, ¶11, 260 Wis. 2d 406, 659 N.W.2d 394.

¶7 In order to be constitutionally valid, the officer's suspicion must be based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion" on a citizen's liberty. *Terry*, 392 U.S. at 21. It is a commonsense test; what is reasonable in a given situation depends on the totality of the circumstances. *State v. Anderson*, 155 Wis. 2d 77, 83-84, 454 N.W.2d 763 (1990).

² The parties' dispute whether Vergos had probable cause to stop Ahern's vehicle based on Ahern's violation of WIS. STAT. § 346.54(1)(d). Based on our conclusion that Vergos had reasonable suspicion to conduct an investigative stop of Ahern's vehicle, we do not address the issue except to note that the circuit court's findings support the existence of probable cause as to the traffic violation.

¶8 In reviewing a circuit court’s ruling on a motion to suppress evidence, we will uphold the court’s findings of historical fact unless they are clearly erroneous. *State v. Arias*, 2008 WI 84, ¶12, 311 Wis. 2d 358, 752 N.W.2d 748. Whether police conduct violated the constitutional guarantee against unreasonable searches and seizures is a question of constitutional fact that we review de novo. *Id.*, ¶11.

¶9 Here, the circuit court found that “the officer did articulate reasonable criteria for why he stopped [Ahern’s] car.” The court reasoned:

[Vergos] said he thought it was abnormal and suspicious given the time of day, the lack of a busy street.... [H]ere’s a person who is just stopped there, doing nothing but stopped in the middle of the road, not near any particular residence. That alerted the officer’s attention to see what’s going on with this car that they’re stopped and sufficiently into the middle of the road, as I find, that the car wouldn’t have a reasonable explanation for being there that far into the road....

[I]f you were going to park your car, I think you would have gotten it over further to the side of the road. He’s got his lights on, but he’s not moving.

The circuit court determined that Vergos was justified in finding out what was occurring at “1:00 in the morning down a dead-end road, where you’re not moving and you’re just stuck there in the middle of the road.” We agree.

¶10 At the time of the stop, Vergos had reason to believe that Ahern was violating a noncriminal traffic law. Although not articulated by Vergos at the suppression hearing, his testimony that the vehicle “wasn’t pulled over as far as it can go” and that “a portion of his vehicle appeared to be in the middle of the

roadway” supports the finding that Ahern committed a traffic violation.³ See WIS. STAT. § 346.54(1)(d) (providing that “[i]n parallel parking, a vehicle shall be parked facing in a direction of traffic with the right wheels within 12 inches of the curb or edge of the street when parked on the right side”). Vergos estimated that Ahern’s vehicle was approximately eighteen to thirty inches from the edge of the roadway and did not leave sufficient room for other traffic to drive around it. After viewing the video, the circuit court found that Ahern’s SUV was parked eighteen inches from the edge of the pavement. The law is well established that “an officer may make an investigative stop if the officer ‘reasonably suspects’ ... that a person is violating the non-criminal traffic laws.” *County of Jefferson v. Renz*, 231 Wis. 2d 293, 310, 603 N.W.2d 541 (1999) (citations omitted). Vergos’ observation, when coupled with the time of day and location of the vehicle, provided sufficient reasonable suspicion to conduct an investigative stop.

¶11 In reaching our conclusion, we reject Ahern’s contention that, because of new laws prohibiting texting while driving, “[t]he way the vehicle was positioned has now become commonplace” and therefore could not give rise to reasonable suspicion. Ahern ignores that, even if texting, a motorist is obligated to pull over and safely park his or her vehicle in compliance with traffic laws. Further, the potential availability of an innocent explanation does not prohibit an investigative stop:

[P]olice officers are not required to rule out the possibility of innocent behavior before initiating a brief stop ... [I]f any reasonable inference of wrongful conduct can be

³ Ahern contends that the State never introduced the issue of a violation of WIS. STAT. § 346.54(1)(d) before the circuit court. Ahern is mistaken. The record of the motion hearing reflects that the State not only brought this specific provision to the circuit court’s attention, but read the provision to the court.

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.

State v. Griffin, 183 Wis. 2d 327, 333, 515 N.W.2d 535 (Ct. App. 1994) (citation omitted; alterations in original). As did the circuit court, we conclude, under the totality of circumstances, that Vergos had reasonable suspicion that Ahern was violating the law. As such, Ahern was lawfully detained at the time of his refusal.

CONCLUSION

¶12 Based on our conclusion that Vergos had the requisite reasonable suspicion to effect a stop, we affirm the circuit court's order deeming Ahern's refusal unreasonable.

By the Court.—Order affirmed.

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

