

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 29, 2012

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. 2011AP552-CR

Cir. Ct. No. 2008CF214

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL L. NEWMAN,

DEFENDANT-APPELLANT.

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

Before Brown, C.J., Neubauer, P.J., and Neal Nettesheim, Reserve
Judge.

¶1 PER CURIAM. Daniel L. Newman has appealed from a judgment convicting him of being a felon in possession of a firearm. Newman contends that the trial court erred in denying two motions to suppress evidence seized from his

vehicle. We conclude that the trial court properly denied the motions and affirm the judgment.

¶2 Newman was stopped by Saukville Police Officer Robert Meyer for a traffic violation at 2:11 a.m. on August 25, 2008. Meyer stopped Newman's Ford Explorer after observing Newman make an illegal U-turn on Highway 33. Newman does not challenge the validity of the traffic stop. However, he contends that the stop was illegally extended beyond its original scope. Relying on *Arizona v. Gant*, 556 U.S. 332 (2009), he also contends that his constitutional rights were violated when Meyer conducted a warrantless search of his vehicle after arresting him for operating a motor vehicle while intoxicated and placing him in the squad car.¹ During the search, Meyer found a handgun in the vehicle's central console.

¶3 An officer may conduct an investigatory stop of a vehicle based on a noncriminal traffic violation. *State v. Colstad*, 2003 WI App 25, ¶¶11, 13, 260 Wis. 2d 406, 659 N.W.2d 394. If an officer becomes aware of additional suspicious factors during a valid traffic stop, and those factors are sufficient to give rise to an articulable suspicion that the person has committed or is committing an offense or offenses separate and distinct from the acts that prompted the stop, the stop may be extended and a new investigation begun. *Id.*, ¶19 (citation omitted). The validity of the extension is evaluated under the same criteria as the initial stop. *Id.*

¹ The trial court initially granted Newman's motion to suppress based upon *Arizona v. Gant*, 556 U.S. 332 (2009). The State appealed the trial court's order in *State v. Newman*, No. 2010AP710-CR. However, after the release of *State v. Dearborn*, 2010 WI 84, 327 Wis. 2d 252, 786 N.W.2d 97, and *State v. Littlejohn*, 2010 WI 85, 327 Wis. 2d 107, 786 N.W.2d 123, and remand by this court for reconsideration based upon those cases, the trial court denied the motion to suppress.

¶4 What constitutes reasonable suspicion is a common sense test: under all the facts and circumstances present, what would a reasonable officer reasonably suspect in light of his or her training and experience. *Id.*, ¶8. Courts must look to the totality of the circumstances in determining whether reasonable suspicion existed. *State v. Waldner*, 206 Wis. 2d 51, 58, 556 N.W.2d 681 (1996). Reasonable suspicion is evaluated under an objective test. *Id.* at 55-56. Although an inchoate, unparticularized suspicion or hunch will not suffice, *id.* at 56, when an officer observes lawful but suspicious conduct he or she has the right to temporarily detain the individual for the purpose of inquiry if a reasonable inference of unlawful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn. *Id.* at 60. Suspicious conduct by its very nature is ambiguous. *Id.*

¶5 Whether there was reasonable suspicion to conduct a traffic stop is a question of constitutional fact. *State v. Popke*, 2009 WI 37, ¶10, 317 Wis. 2d 118, 765 N.W.2d 569. In reviewing the trial court's ruling on a motion to suppress evidence, we will uphold its 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 those facts satisfy the constitutional requirement of reasonableness is a question of law that we review de novo. *See Waldner*, 206 Wis. 2d at 54.

¶6 Based upon the evidence presented at the first suppression hearing, we uphold the trial court's determination that Meyer did not unlawfully extend the traffic stop. As already noted, Meyer stopped Newman's vehicle after observing it make an illegal U-turn. The record indicates that the stop occurred at 2:11 a.m. on the on-ramp from Highway 33 to Interstate Highway 43. Meyer testified that he observed two men in the vehicle and, when he approached it, he also noticed multiple unboxed electronic items piled carelessly on top of each other in the back

seat, including two DVD players, a home stereo system, and a laptop computer. Meyer explained that he was suspicious that the items might be stolen, based on his belief that a person transporting multiple electronic items like those he observed usually “would possibly place those in the back cargo area or place them nicely and not, you know, strewn atop of each other rather carelessly.”

¶7 After obtaining identification from Newman and his passenger and being informed by Newman that he was traveling back to Milwaukee from his uncle’s house in Sheboygan, Meyer asked Newman where he had obtained the electronic items. Newman responded that he had purchased them from his uncle for \$150.

¶8 Meyer testified that he believed most people who had purchased electronics would take more care in transporting them, rather than piling them in a manner that could scratch and damage them. He testified that he then returned to his squad car to check the validity of Newman’s license, to determine whether either occupant had any warrants, and to write up the traffic citation. He testified that, based on his suspicion that the electronic items might be stolen, he also radioed for assistance from a county deputy. He testified that he believed assistance was warranted because he was going to re-approach the vehicle and ask Newman for permission to check whether the items were stolen. He indicated that he wanted back up assistance before re-approaching the vehicle because of his suspicion that the items were stolen, the time of night, the lighting conditions, and the fact that he was alone and there were two men in the car.

¶9 Meyer testified that while he waited for the deputy, he ran the license and warrant checks and completed writing the citation. Meyer testified that it usually takes him five to ten minutes to write a traffic citation, and that it

might have taken as long as fifteen minutes for the backup officer to arrive. Meyer testified that after the deputy arrived, he re-approached the vehicle and spoke to Newman. He testified that he gave Newman the traffic citation and asked him to step out of the car to talk about the electronic equipment, which Newman did. Newman reiterated that he bought the equipment from his uncle for \$150, and agreed that Meyer could see one of the items to check whether it was stolen. Meyer testified that he ran the item through dispatch on his portable radio “and nothing came back.” Meyer also testified that while speaking with Newman he noticed an odor of intoxicants. After questioning Newman about whether he had been drinking and conducting field sobriety tests, Meyer arrested Newman for operating a motor vehicle while intoxicated and placed him in Meyer’s squad car.² Meyer testified that he then searched Newman’s vehicle for any signs of intoxicants, including open intoxicants or containers for alcohol. During the search, he found the handgun.

¶10 Based upon Meyer’s testimony, we conclude that the trial court properly rejected Newman’s claim that the traffic stop was unreasonably extended. As discussed by the trial court, although it took fifteen and possibly even twenty minutes for the deputy to arrive at the scene, Meyer also devoted a portion of the time he waited for the deputy to running the license and warrant checks and writing up the traffic citation. The five to ten minutes required to perform those acts was necessary and proper regardless of whether Meyer was also waiting for back up during that time. Moreover, as determined by the trial court, requesting back up assistance was reasonable based on the time of night, the fact that there

² Newman has not challenged his arrest for operating a motor vehicle while intoxicated in this appeal.

were two occupants in the vehicle, and the suspicious nature of the electronic items strewn in Newman's car. The trial court determined that under the circumstances, the length of time Newman was additionally detained while Meyer waited for back up and re-approached the vehicle to give Newman the citation and question him about the electronic items was reasonable.

¶11 We agree. While there may have been an innocent explanation for having the electronic items in the car, Meyer could also reasonably be suspicious that the items were stolen. As noted above, he observed multiple items, including two DVD players, a laptop computer, and a home stereo system. The items were not boxed or carefully packed, as would be customary if a person had purchased electronics and wanted to protect them while transporting them. Instead, they were strewn about and piled up, permitting a reasonable inference that they had been stolen and hurriedly put into the vehicle.

¶12 Newman points out that Meyer did not observe any other signs that the items were stolen, like burglarious tools or suspicious clothing. However, we reject Newman's argument that this rendered Meyer's suspicions no more than a hunch. The nature and quantity of the electronic items observed by Meyer, combined with the manner in which they were carelessly piled in the back seat, constituted specific articulable facts that gave rise to a reasonable suspicion that the items were stolen, justifying the extension of the detention for further investigation.

¶13 Newman also argues that the extension of the stop was unlawful because he had already told Meyer he purchased the items from his uncle. However, as discussed above, an officer may temporarily detain a person for the purpose of inquiry if a reasonable inference of unlawful conduct can be

objectively discerned, and is not required to believe the person's innocent explanation. *See Colstad*, 260 Wis. 2d 406, ¶14. Based on the totality of the circumstances, Meyer properly extended the detention to investigate whether the electronics were stolen. Newman's motion to suppress on the ground that the traffic stop was unreasonably extended therefore was properly denied.

¶14 Newman's final argument is that his constitutional rights under *Gant* were violated when Meyer performed a warrantless search of his vehicle after arresting him for operating a motor vehicle while intoxicated and placing him in the squad car. However, as recognized by Newman in his reply brief, this issue was resolved by *Davis v. United States*, 131 S. Ct. 2419, 2423-24 (2011), after this appeal was commenced. At the time of Newman's arrest and the search of his vehicle, the law of this state permitted a police officer to search the interior of an automobile incident to an arrest when, as here, the defendant was still at the scene, even though not physically in his vehicle. *See State v. Fry*, 131 Wis. 2d 153, 174-76, 388 N.W.2d 565 (1986). The good faith exception precludes application of the exclusionary rule when an officer conducted a search in objectively reasonable reliance upon clear and settled Wisconsin precedent that was later deemed unconstitutional by the United States Supreme Court. *Davis*, 131 S. Ct. at 2423-24; *State v. Dearborn*, 2010 WI 84, ¶¶3-4, 327 Wis. 2d 252, 786 N.W.2d 97. Suppression of the evidence seized from Newman's vehicle was therefore unwarranted.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2009-10).

