

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 22, 2012

Diane M. Fremgen
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. 2012AP54-CR

Cir. Ct. No. 2011CT920

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MATTHEW O. MACARTHUR,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: MICHAEL W. GAGE, Judge. *Affirmed.*

¶1 HOOVER, P.J.¹ Matthew MacArthur appeals a judgment of conviction for operating while intoxicated, third offense. MacArthur argues the

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

circuit court erred by denying his suppression motion because the officer lacked probable cause or reasonable suspicion to stop his vehicle. We affirm.

BACKGROUND

¶2 At the suppression hearing, officer Tyrell West testified that on July 1, 2011, at approximately 1:47 a.m., he observed an individual, subsequently identified as MacArthur, walking and stumbling through an alley. MacArthur was pulling on door handles and also knocked over a pallet leaning against the wall.

¶3 By the time West made contact with him, MacArthur was seated in a vehicle that was parked in a lot adjacent to the alley. West did not recall where MacArthur was seated in the vehicle. However, he explained that MacArthur was alone and that there was no one else around.

¶4 West told MacArthur that he had observed him knock over the pallet in the alley, and he asked MacArthur to go pick it up. MacArthur agreed and left to pick up the pallet. After speaking to MacArthur, West believed MacArthur was intoxicated. MacArthur smelled of alcohol and his eyes were bloodshot and glassy.

¶5 When MacArthur returned, West advised MacArthur that he should not drive. MacArthur told West that he would get a ride from a friend or have a friend drive him. MacArthur then began to walk away from the area.

¶6 Minutes later, West observed the vehicle that MacArthur had been sitting in pull out of the parking lot. West explained that approximately six minutes had elapsed from his initial contact with MacArthur when he observed the vehicle leave the lot.

¶7 West began following the vehicle, and there was no other traffic on the road. After the vehicle made two right turns without signaling, one at a stop sign and one at a flashing red light, West stopped the vehicle. MacArthur was driving, and he was subsequently arrested for operating while intoxicated.

¶8 The court found West had probable cause to stop MacArthur for failing to signal, contrary to WIS. STAT. § 346.34(1)(b), and denied MacArthur's suppression motion. MacArthur pled no contest, and the court found him guilty.

DISCUSSION

¶9 On appeal, MacArthur argues West unlawfully stopped his vehicle and, as a result, the circuit court erred by failing to grant his suppression motion. To conduct a lawful traffic stop, an officer needs to have probable cause to believe a traffic violation has occurred or have reasonable suspicion that a crime or traffic violation has been or will be committed. *State v. Popke*, 2009 WI 37, ¶¶13, 23, 317 Wis. 2d 118, 765 N.W.2d 569. Whether there is probable cause or reasonable suspicion to conduct a traffic stop is a question of constitutional fact. *Id.*, ¶10. We uphold the circuit court's factual findings unless they are clearly erroneous; however, we independently apply those facts to constitutional principles. *Id.*

¶10 Probable cause exists when the officer has "reasonable grounds to believe that the person is committing or has committed a [violation]." *Id.*, ¶14 (citation omitted). The evidence to support probable cause "need not establish proof beyond a reasonable doubt or that ... guilt is more probable than not, but rather, probable cause requires that 'the information lead a reasonable officer to believe that guilt is more than a possibility.'" *Id.* (citation omitted).

¶11 Reasonable suspicion exists when, under the totality of the circumstances, “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.” *State v. Post*, 2007 WI 60, ¶13, 301 Wis. 2d 1, 733 N.W.2d 634 (citation omitted). “Such a stop must be based on more than an officer’s ‘inchoate and unparticularized suspicion or hunch.’” *Id.*, ¶10 (citation omitted). Instead, the officer “‘must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant’ the intrusion of the stop.” *Id.* (citation omitted).

¶12 MacArthur argues West lacked probable cause and reasonable suspicion to stop his vehicle. He first contends West lacked probable cause to believe he violated WIS. STAT. § 346.34(1)(b) because that statute only requires a motorist to signal “[i]n the event any other traffic may be affected” *See* WIS. STAT. § 346.34(1)(b). He asserts his failure to signal did not affect other traffic because West, who was behind him, was the only other traffic on the road and, irrespective of the direction MacArthur traveled after each stop, West still had to make his required stops after MacArthur. Second, MacArthur argues West lacked reasonable suspicion to stop his vehicle because, at the moment West stopped the vehicle, West had only a “hunch” MacArthur was the driver and a hunch does not amount to reasonable suspicion.

¶13 We conclude West had reasonable suspicion to stop MacArthur for operating while intoxicated. *See Mercado v. GE Money Bank*, 2009 WI App 73, ¶2, 318 Wis. 2d 216, 768 N.W.2d 53 (appellate court may affirm trial court on different grounds than those relied on by trial court). In this case, West observed MacArthur stumbling through an alley at approximately 1:47 a.m. and had contact with MacArthur while he was in his vehicle. MacArthur was the only person in

the vehicle and in the area. He smelled of alcohol and his eyes were bloodshot and glassy. West told MacArthur not to drive and, within minutes, observed MacArthur's vehicle pull into traffic.

¶14 Although MacArthur argues West did not conclusively know whether MacArthur was the driver, an officer may stop an individual “[i]f a reasonable inference of unlawful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn” *See State v. Waldner*, 206 Wis. 2d 51, 60, 556 N.W.2d 681 (1996). Here, the time period from when West made his initial contact with MacArthur until he observed MacArthur's vehicle pull into traffic was approximately six minutes. Under the totality of the circumstances, this short duration combined with MacArthur's intoxication and the absence of nearby individuals who would be able to drive MacArthur's vehicle gave West grounds to reasonably suspect MacArthur operated the vehicle while under the influence of an intoxicant. *See Post*, 301 Wis. 2d 1, ¶¶10, 13.

By the Court.—Judgment affirmed.

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

