

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 7, 2008

David R. Schanker
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. 2007AP2377

Cir. Ct. No. 2005TR10157

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN THE MATTER OF THE REFUSAL OF GERALD J. PIESCHEL:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

GERALD J. PIESCHEL,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Sheboygan County:
GARY LANGHOFF, Judge. *Affirmed.*

¶1 NEUBAUER, J.¹ Gerald Pieschel appeals an order revoking his driver's license for refusing to submit to a chemical test after his arrest for operating while intoxicated (OWI), fourth offense. He argues that an anonymous tip and deviation into another lane while turning did not give the police officer reasonable suspicion or probable cause to stop and arrest him and, therefore, any evidence obtained through the stop must be suppressed. Pieschel also contends the trial court erred in finding that his refusal to consent to a blood test was unreasonable. We disagree and affirm.

¶2 We recite the uncontradicted facts from the transcript of the refusal and suppression hearing, where the sole witness was the arresting officer, City of Sheboygan Police Officer Daniel Vlietstra. Vlietstra was on patrol when he received an anonymous tip through dispatch. The tipster reported that a possibly intoxicated driver was leaving Domino's Pizza at Martin Avenue and Calumet Drive. The tipster, who Vlietstra understood to be a Domino's employee, described a white Dodge van with license plate number 362FSN. Vlietstra located the vehicle within a minute traveling northbound on Calumet.² As the van approached the intersection of Calumet and Main Avenue Vlietstra observed the van pull into the left lane of the two northbound lanes and turn its left turn signal on. After the vehicle turned its left signal on, it crossed the line separating the two northbound lanes of Calumet Drive so that both right tires were in the right-hand lane, and made a wide turn from that location onto Main Avenue.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

² Calumet Drive has two northbound and two southbound lanes. The northbound lanes are separated by a broken white line.

¶3 Believing that the driver, later identified as Pieschel, violated the law by failing to stay in his traffic lane, Vlietstra activated his emergency lights. Pieschel continued driving. Emergency lights still flashing, Vlietstra followed the vehicle as it turned onto Main Avenue, then onto North 22nd Street and then into a residential driveway. Pieschel exited the van and began walking towards the house with a pizza. Vlietstra got out of his car and told Pieschel to stop. Pieschel did not stop until he reached the house.

¶4 Vlietstra informed Pieschel that he was being stopped for deviating from his lane and because of the anonymous report that he possibly was intoxicated. Vlietstra observed that Pieschel had poor balance and swayed as he stood there and detected the odor of intoxicants on him. When asked if he had been drinking, Pieschel responded, “No comment.” Vlietstra administered the horizontal gaze nystagmus test during which he observed Pieschel’s eyes were red, bloodshot, watery and visibly twitching. Pieschel lost his balance and began to fall when he attempted the walk-and-turn test and told Vlietstra he would not be able to do it or to continue with any other field sobriety tests. At that point Vlietstra arrested Pieschel for drunk driving.

¶5 Pieschel became “very belligerent” and began swearing and calling Vlietstra names. En route to the police station for a breath test, Pieschel told Vlietstra he would not cooperate with any breath tests, so Vlietstra took him to the hospital for a blood test and read him the “Informing the Accused” form. Pieschel became loud and argumentative and said he would not submit to a blood test. A forcibly taken specimen revealed a blood alcohol concentration of .208 percent.

¶6 Pieschel filed a motion to suppress all evidence stemming from the anonymous tip on grounds that the tip did not furnish reasonable suspicion for

Vlietstra to initiate a traffic stop and that the State's failure to produce the 911 tape prevented him from confronting his accusers.³ After a hearing to address both the suppression motion and Pieschel's refusal to submit to a chemical test, the court found that the information from the anonymous tip, Pieschel's lane deviation and failure to stop for the emergency lights, and the objective indicia of intoxication substantiated the stop and arrest. The court denied Pieschel's suppression motion, found his refusal unreasonable, and revoked his driver's license for thirty-six months. Pieschel appeals.⁴

DISCUSSION

¶7 On appeal, Pieschel challenges the denial of his suppression motion and the finding that his refusal was unreasonable. In reviewing a trial court's ruling on a motion to suppress evidence, we uphold the court's findings of fact unless they are clearly erroneous. *State v. Eckert*, 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996). Whether a search or seizure passes constitutional muster, however, is a question of law subject to de novo review. *Id.* We also review de novo a trial court's decision that a refusal is unreasonable. *State v. Ludwigson*, 212 Wis. 2d 871, 875, 569 N.W.2d 762 (Ct. App. 1997).

¶8 Pieschel first argues that the anonymous tip did not give Vlietstra reasonable suspicion to stop him for OWI because the tip lacked reliable predictive information. See *State v. Williams*, 2001 WI 21, ¶28, 241 Wis. 2d 631, 623 N.W.2d 106. The question of the existence of reasonable suspicion under the

³ The recording of the tipster's phone call to police evidently was not preserved. Pieschel does not pursue the preservation of evidence issue on appeal.

⁴ The trial court stayed the revocation order pending appeal.

Fourth Amendment is a question of constitutional fact. *State v. Kolk*, 2006 WI App 261, ¶10, 298 Wis. 2d 99, 726 N.W.2d 337. Our standard of review is two-fold: we uphold the trial court’s findings of fact unless clearly erroneous, but determine de novo whether the facts as found demonstrate a constitutional violation. *Id.*

¶9 A police officer may lawfully conduct a *Terry*⁵ investigatory stop if, based upon the officer’s experience, he or she has reasonable suspicion that a crime has been committed, is being committed, or is about to be committed. *State v. Waldner*, 206 Wis. 2d 51, 55-56, 556 N.W.2d 681 (1996). Reasonable suspicion depends upon whether the officer’s suspicion that the individual was committing a crime was grounded in specific, articulable facts and their reasonable inferences. *Id.* By itself, an anonymous tip rarely is enough to create reasonable suspicion for a police officer to stop a suspect. *Florida v. J.L.*, 529 U.S. 266, 270 (2000). A suitably corroborated anonymous tip, however, can supply “sufficient indicia” of reliability for a police officer to make an investigatory stop. *Williams*, 241 Wis. 2d 631, ¶31. We apply a commonsense test: under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience. *State v. Young*, 212 Wis. 2d 417, 424, 569 N.W.2d 84 (Ct. App. 1997).

¶10 Pieschel’s argument about the adequacy of the tip falters because Vlietstra did not stop him based on the tip alone. Rather, Vlietstra testified that he activated the squad’s emergency lights only after observing Pieschel signal a left-hand turn, swerve to the right, cross the line into the right lane and turn left onto

⁵ *Terry v. Ohio*, 392 U.S. 1 (1968).

Main Avenue and that he informed Pieschel of that fact. By failing to remain in his lane of travel, Pieschel appeared to be in violation of at least one statute. WISCONSIN STAT. § 346.13(1), “Driving on roadways laned for traffic,” directs an operator of a vehicle to drive “as nearly as practicable entirely within a single lane” and not to “deviate from [that] traffic lane ... without first ascertaining that such movement can be made with safety to other vehicles approaching from the rear.” The State contends Pieschel also violated WIS. STAT. § 346.31(3), “Required position and method of turning at intersections,” which directs a driver to make a left turn, from approach through completion, in the lane farthest to the left whenever practicable.

¶11 Pieschel argues that WIS. STAT. § 346.13(1) requires only that he remain “as nearly as practicable” in his designated lane of travel and that safety of others must not be compromised. He contends there was no evidence that what he characterizes as a “minor deviation” into the other lane affected anyone’s safety. We understand Pieschel’s argument to be that his driving did not violate the statute, and a lawful act cannot form the basis for reasonable suspicion to justify a stop. *See Waldner*, 206 Wis. 2d at 58.

¶12 Pieschel confuses reasonable suspicion and probable cause. The law of investigative stops allows a police officer to stop a person upon less than probable cause. *Id.* at 59. An officer may make an investigatory stop of a vehicle based on a reasonable suspicion of a noncriminal traffic violation. *County of Jefferson v. Renz*, 231 Wis. 2d 293, 310, 603 N.W.2d 541 (1999); *see also* WIS. STAT. § 968.24, which codifies the “reasonable suspicion” standard articulated in *Terry*. *See Waldner*, 206 Wis. 2d at 55. Suspicious conduct by its very nature is ambiguous, and the main goal of an investigative stop is to quickly resolve that ambiguity. *State v. Anderson*, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990). The

key to determining whether the *Terry* stop was lawful is if the officer's action was reasonable under the totality of the circumstances. *Williams*, 241 Wis. 2d 631, ¶23.

¶13 We conclude that the anonymous tip of a possibly intoxicated driver with a specific description of the vehicle served to bring Pieschel to Vlietstra's attention. From there, Vlietstra followed Pieschel and observed him deviate into the right lane while signaling to turn left, giving rise to a reasonable suspicion of a noncriminal traffic violation. Under the totality of the circumstances, we conclude that reasonable suspicion existed for Vlietstra to stop Pieschel to assess the reason for the lane deviation. We are satisfied that the trial court correctly analyzed the facts and applied the correct legal standard to those facts.

¶14 Pieschel also contends that the trial court wrongly determined that probable cause existed to arrest him based upon a violation of WIS. STAT. § 346.13. He argues that we must engage in statutory construction and urges us to find that Vlietstra did not have probable cause to arrest him for failing to drive "as nearly as practicable" within a designated lane of traffic. As noted above, the investigatory stop was based on a reasonable suspicion. Beyond that, the probable cause issue here is not whether probable cause existed to arrest Pieschel for failing to stay in his lane. Rather, as Vlietstra testified and the trial court found, Vlietstra arrested Pieschel for drunk driving.

¶15 Probable cause is the quantum of evidence that, under the totality of the circumstances within the arresting officer's knowledge at the time of arrest, would lead a reasonable police officer to believe that the defendant probably committed a crime. *State v. Nordness*, 128 Wis. 2d 15, 35, 381 N.W.2d 300 (1986). We must uphold the trial court's findings of fact unless they are clearly

erroneous. *State v. Tkacz*, 2002 WI App 281, ¶17, 258 Wis. 2d 611, 654 N.W.2d 37.

¶16 Here, the court found that shortly after receiving the information from dispatch regarding the possibly intoxicated driver leaving Domino's, Vlietstra sighted the described vehicle, observed it swing into the right traffic lane and make a wide turn, activated the squad car's emergency lights and followed the vehicle. The court found that Pieschel ignored Vlietstra's efforts to stop him, exhibited poor balance, an odor of intoxicants and other indicia of intoxication, and failed field sobriety tests. These findings are not clearly erroneous. The totality of the circumstances within Vlietstra's knowledge at the time of the arrest would lead a reasonable police officer to believe that Pieschel committed a crime—driving under the influence of an intoxicant. We conclude that probable cause existed to arrest Pieschel for OWI. We affirm the denial of Pieschel's motion to suppress evidence.

¶17 Lastly, Pieschel argues that the trial court erred when it found unreasonable his refusal to submit to chemical testing. He predicates this issue on the asserted absence of reasonable suspicion or probable cause. We already have rejected those arguments; this one likewise fails.

¶18 The issues at a refusal hearing are limited to whether: the officer has probable cause to believe the individual was operating a vehicle while under the influence; the officer advised the individual in compliance with the informed consent law; and the individual improperly refused chemical testing. *See* WIS. STAT. § 343.305(9)(a)5. The State's burden of persuasion at a refusal hearing is substantially less than at a suppression hearing. *State v. Wille*, 185 Wis. 2d 673, 681, 518 N.W.2d 325 (Ct. App. 1994). The State need show only that the

arresting officer's account is plausible. *Nordness*, 128 Wis. 2d at 36. The court will not weigh the evidence for and against probable cause or determine the credibility of the witnesses. *Wille*, 185 Wis. 2d at 681. Indeed, the court need not even believe the officer's account, but only be persuaded that it is plausible. *Id.*

¶19 Vliestra testified that he was alerted by a tip of a possibly intoxicated driver; saw Pieschel cross into the right lane as he executed a left turn and fail to respond to the emergency lights; and observed Pieschel's poor balance, breath odor, red eyes, belligerence and unsatisfactory performance on two field sobriety tests. We agree with the trial court that Vlietstra plausibly had probable cause to believe that Pieschel was operating a vehicle while under the influence. We agree that Pieschel's refusal was unreasonable.

By the Court.—Order affirmed.

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

