

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 30, 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. 2011AP2702

Cir. Ct. No. 2011CV727

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

TOWN OF GRAND CHUTE,

PLAINTIFF-RESPONDENT,

v.

WILLIAM F. THOMAS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: JOHN A. DES JARDINS, Judge. *Affirmed.*

¶1 HOOVER, P.J.¹ William Thomas appeals a judgment of conviction for operating while intoxicated, first offense.² Thomas argues the circuit court

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.

² Thomas was also convicted of speeding. He does not challenge his speeding conviction on appeal.

erred by denying his suppression motion. Specifically, he asserts the officer lacked reasonable suspicion to extend the traffic stop in order to investigate whether he was operating while intoxicated. We affirm.

BACKGROUND

¶2 At the suppression hearing, officer Aaron Schellinger testified that on August 15, 2010, at approximately 1:40 a.m., he observed a motorcycle weaving within its lane of traffic. Schellinger explained that it appeared as though the motorcycle was attempting to weave in its lane. He decided not to stop the motorcycle on that basis, and instead, began to follow it.

¶3 After the motorcycle made a right turn, it began to accelerate at a “rapid pace.” Schellinger clocked the motorcycle traveling sixty-five miles per hour in a thirty-five mile-per-hour zone, and stopped it for speeding.

¶4 When Schellinger made contact with the driver, subsequently identified as Thomas, Schellinger smelled the odor of intoxicants on Thomas. Schellinger then administered field sobriety tests. Thomas showed signs of impairment and was arrested for operating while intoxicated.

¶5 The circuit court found Schellinger had reasonable suspicion to extend the traffic stop to administer field sobriety tests. The court denied Thomas’s suppression motion, and, following a court trial on stipulated facts, it found Thomas guilty.

DISCUSSION

¶6 On appeal, Thomas concedes Schellinger lawfully stopped him for speeding. He argues Schellinger lacked reasonable suspicion to believe he was

operating while intoxicated and, therefore, unlawfully extended the traffic stop to administer field sobriety tests.

¶7 An officer may lawfully extend a traffic stop, if, during the stop, “the officer discover[s] additional information ... which, when combined with information already acquired, provide[s] reasonable suspicion that [the defendant] was driving while under the influence of an intoxicant.” *State v. Colstad*, 2003 WI App 25, ¶19, 260 Wis. 2d 406, 695 N.W.2d 394. 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. It “must be based on more than an officer’s ‘inchoate and unparticularized suspicion or hunch.’” *Id.*, ¶10 (citation omitted). 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 [extended] stop.” *Id.* (citation omitted); see also *State v. Betow*, 226 Wis. 2d 90, 94-95, 593 N.W.2d 499 (Ct. App. 1999).

¶8 Thomas argues Schellinger lacked reasonable suspicion to extend the traffic stop because the only fact supporting Schellinger’s belief that Thomas was operating while intoxicated was the odor of intoxicants. Thomas asserts the odor of intoxicants does not, by itself, constitute reasonable suspicion that a driver is operating while intoxicated. He contends Schellinger did not rely on the observed weaving to form a belief that Thomas was operating while intoxicated because Schellinger did not stop Thomas for weaving and, during cross-examination, when asked whether Thomas was able to get off his motorcycle,

Schellinger responded, “The only thing that I observed was the odor of intoxicants.”

¶9 We reject Thomas’s assertion that the odor of intoxicants was the only fact supporting Schellinger’s belief that Thomas was operating while intoxicated. Although Schellinger testified, “The only thing that I observed was the odor of intoxicants,” the test for reasonable suspicion is an objective one.³ *See State v. Waldner*, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996); *see also State v. Buchanan*, 178 Wis. 2d 441, 447 n.2, 504 N.W.2d 400 (Ct. App. 1993) (“[I]t is the circumstances that govern, not the officer’s subjective belief.”). Here, in addition to the odor of intoxicants, Schellinger observed Thomas weaving within his lane and speeding thirty miles per hour over the posted limit. We conclude that, under the totality of the circumstances, the odor of intoxicants combined with the observed weaving, the 1:40 a.m. time of the stop, and the inordinately excessive speed gave rise to a reasonable suspicion that Thomas consumed enough alcohol to impair his ability to drive. *See Post*, 301 Wis. 2d 1, ¶¶10, 13. Schellinger properly extended the traffic stop to administer field sobriety tests.

By the Court.—Judgment affirmed.

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

³ Moreover, taken in context, it appears that when Schellinger made the statement, Thomas was questioning him only on his post-stop observations.

