

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 27, 2003

Cornelia G. Clark
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. 03-0090-CR

Cir. Ct. No. 02CT000104

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LINDA M. GRAFF, N/K/A LINDA M. SCHAEFER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Manitowoc County: DARRYL W. DEETS, Judge. *Affirmed.*

¶1 NETTESHEIM, J.¹ Linda M. Graff, n/k/a Linda M. Schaefer, appeals from a judgment of conviction for operating a motor vehicle while intoxicated (OWI), fourth offense, contrary to WIS. STAT. §§ 346.63(1)(a) and

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2001-02). All statutory references are to the 2001-02 version.

346.65(2)(d). Schaefer contends that the trial court erred in denying her motion to suppress evidence on grounds that the arresting officer did not have reasonable suspicion to stop her vehicle. While the trial court found that the officer's subjective reason for stopping the vehicle was insufficient, it further found an objective basis for the stop based on the officer's observation that Schaefer was speeding.

¶2 We likewise conclude that the stop was justified based on the officer's observation that Schaefer's speed exceeded the posted limits. We therefore uphold the trial court order denying her motion to suppress and affirm the judgment.

FACTS

¶3 On January 25 and February 8, 2002, the State cited Schaefer with OWI and operating a motor vehicle with a prohibited alcohol concentration (PAC), respectively. On April 29, 2002, Schaefer filed a motion to suppress evidence based on an illegal stop. The trial court held a hearing on May 31, 2002. Officer Joan Waskow of the City of Manitowoc Police Department testified that she stopped Schaefer's vehicle on January 25, 2002, at approximately 8:40 a.m.² Waskow initially recognized Schaefer in a vehicle at a stop sign and "knew that she did not have a driver's license." After noticing Schaefer in the vehicle, Waskow observed her proceeding down the road. When asked whether "[f]rom the time you saw [Schaefer] in her vehicle until the stop was there anything

² We note that Waskow refers to Schaefer by her prior name, Graff, throughout the hearing. In the interest of clarity, we will refer to Schaefer by her current name throughout this opinion.

unusual about [Schaefer's] driving," Waskow responded that when she started to follow Schaefer, she had difficulty catching up to her and Waskow "could tell that [Schaefer] was traveling over the speed limit." Waskow estimated Schaefer's speed at that point to be between thirty-five to forty miles per hour in a posted twenty-five mile per hour zone.

¶4 Waskow testified that she intended to stop Schaefer's vehicle as soon as she saw Schaefer stopped at the stop sign because she "had knowledge that [Schaefer] did not have a driver's license." Waskow's knowledge was based on conversations with other officers and previous occasions when Waskow had run a status check of Schaefer's license. According to Waskow, "Seeing [Schaefer] in the vehicle operating a vehicle was the determining factor" in initiating the stop. After Waskow stopped Schaefer's vehicle, she ascertained that Schaefer was driving without a license and arrested Schaefer for operating after revocation and OWI.

¶5 The trial court denied Schaefer's motion to suppress stating:

In regard to the motion to dismiss or suppress evidence based on the illegal stop, we have an officer that ... testified that she knew that [Schaefer] did not have a driver's license. She based that on information she had from other officers, and also from prior contacts which were longer than six months ago.

I do not believe that that information by itself is sufficient to make a stop. It could be that she would have gotten a license in the mean time....

[U]nder the objective standard, [the officer] has facts that this car is traveling over the speed limit ... [a]nd a reasonable police officer, under those circumstances, with those objective facts, is able to make a stop.

¶6 Schaefer subsequently pled guilty to OWI, fourth offense. She now appeals the judgment based on the trial court's denial of her motion to suppress.

DISCUSSION

¶7 Whether Waskow's stop of Schaefer's vehicle was reasonable presents a question of constitutional law, which we review de novo. See *State v. Waldner*, 206 Wis. 2d 51, 54, 556 N.W.2d 681 (1996). In *Terry v. Ohio*, 392 U.S. 1, 22 (1968), the United States Supreme Court held that "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." This level of suspicion requires that the police officer be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. See *id.* at 21. The question under this test is whether the facts available to the officer at the moment of the seizure or the search would warrant a person of reasonable caution in the belief that appropriate action was taken. See *id.* at 22.

¶8 Reasonable suspicion exists where the officer, at the time of the detention, has knowledge of facts and circumstances sufficient to warrant a person of reasonable prudence to suspect that the person may be committing or has committed an offense. *County of Dane v. Sharpee*, 154 Wis. 2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990). Reasonable suspicion does not involve a technical analysis; rather, it invokes the factual and practical considerations of everyday life on which reasonable and prudent persons, not legal technicians, act. See *id.* The test is one that invokes considerations of common sense. *Id.* A court must look to the totality of the circumstances to determine whether the officer reasonably suspected that the defendant had committed an offense. *Id.*

¶9 The test for a *Terry* stop is reasonableness. See *State v. Guzy*, 139 Wis.2d 663, 675, 407 N.W.2d 548 (1987). This test seeks to balance the individual’s protection against unwarranted government intrusion with the societal interest in enabling police officers to solve crimes. *Id.* at 675-76. “Nevertheless, the law must be sufficiently flexible to allow law enforcement officers under certain circumstances, the opportunity to temporarily freeze a situation, particularly where failure to act will result in the disappearance of a potential suspect.” *Id.* at 676.

¶10 Here, Waskow decided to stop Schaefer’s vehicle based on her initial observation of Schaefer operating a vehicle and her knowledge that Schaefer’s license had previously been suspended. While we agree with the trial court that Waskow’s uncorroborated and dated information was insufficient to support a stop, we are not bound by Waskow’s subjective intentions. Instead, we objectively assess whether Waskow had probable cause or reasonable suspicion to detain Schaefer. See *State v. Gaulrapp*, 207 Wis. 2d 600, 607, 558 N.W.2d 696 (Ct. App. 1996). Based on Waskow’s testimony at the suppression hearing, we conclude that she did.

¶11 Waskow testified that “[f]rom the time [she] saw [Schaefer] in her vehicle until the stop,” she had difficulty catching up to Schaefer and “could tell that [Schaefer] was traveling over the speed limit.” Waskow estimated Schaefer’s speed at that point to be between thirty-five to forty miles per hour in a posted twenty-five mile per hour zone. Waskow’s observations of this potential traffic violation provided reasonable suspicion to stop Schaefer’s vehicle. See *id.*, at 605 (a traffic stop may be based on reasonable suspicion of a traffic violation); see also WIS. STAT. § 968.24.

¶12 In reaching our decision, we acknowledge Schaefer's argument that Waskow initiated the stop prior to making any observations about Schaefer's speed. In support, Schaefer relies on Waskow's incident report to support her contention that Waskow activated her emergency lights prior to observing Schaefer's speed. However, the incident report was not introduced as evidence, nor referred to at the motion hearing. Instead, Schaefer attached a copy of the incident report to her trial court brief in support of her motion to suppress.³ That did not elevate the incident report to the status of evidence.

¶13 On a motion to suppress evidence, a defendant generally bears the burden of producing evidence to support a constitutional violation, and the State then bears the burden of showing a constitutionally valid procedure by a preponderance of the evidence. *State v. Noble*, 2002 WI 64, ¶19, 253 Wis. 2d 206, 646 N.W.2d 38. Insofar as Schaefer contends that the stop commenced prior to Waskow's observations regarding Schaefer's speed, she failed to carry her burden of proof on this point at the suppression hearing. In arriving at its decision, the trial court properly limited itself to documentary and testimonial evidence before it as introduced at the suppression hearing.

CONCLUSION

¶14 We conclude that Waskow's reasonable suspicion that Schaefer was exceeding posted speed limits provided an objective basis to stop Schaefer's

³ Schaefer provides no citation to the suppression hearing transcript in support of her assertion that Waskow activated her squad lights prior to observing Schaefer's speed, nor have we found any testimony which supports it.

vehicle. We therefore uphold the trial court order denying Schaefer's motion to suppress evidence and affirm the judgment.

By the Court.—Judgment affirmed.

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

