

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 16, 2006

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. 2006AP1277-CR

Cir. Ct. No. 2005CT211

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

v.

GAY N. DENNER,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Grant County:
GEORGE S. CURRY, Judge. *Reversed and cause remanded.*

¶1 VERGERONT, J.¹ The State of Wisconsin appeals the circuit court's order granting Gay Denner's motion to suppress evidence on the ground that the arresting officer did not have reasonable suspicion to stop his vehicle. We

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

conclude the officer did have the requisite reasonable suspicion and we therefore reverse and remand for further proceedings.

BACKGROUND

¶2 Wisconsin State Trooper John Moore stopped the pickup truck Denner was driving on November 4, 2005, at approximately 11:50 p.m. As a result of that stop, Denner was charged with operating a motor vehicle while intoxicated in violation of WIS. STAT. § 346.63(1)(a), third offense, and operating a motor vehicle with prohibited alcohol concentration in violation of § 346.63(1)(b), third offense. Denner moved to dismiss the complaint on the ground that Trooper Moore did not have reasonable suspicion to stop his truck.

¶3 At the hearing on Denner's motion, Trooper Moore testified as follows. He was on patrol within the city limits of the City of Boscobel, traveling south on Highway 61, when he observed Denner's truck coming toward the intersection of Highway 61. The slow speed of the truck caught his attention. He estimated that the truck was traveling between twelve and fifteen miles per hour in a twenty-five-mile-per-hour zone. It is not illegal to be traveling this slow, the trooper acknowledged, but he considered it not normal.

¶4 Trooper Moore therefore began to follow the truck on Highway 61. At that point, the speed limit was thirty-five miles per hour and the truck increased its speed to approximately twenty-five miles per hour. The trooper observed that the driver was not driving the truck straight within the lane of traffic, but was drifting back and forth within the lane. The speed zone then became a fifty-five-mile-per-hour zone and at that point the truck increased its speed to about thirty miles per hour. At a turn in the highway, the truck initially had its left tires near the centerline, drifted all the way to the right side of the lane, and when it

completed the corner, the right tires of the truck were either right on or just over the white fog line; then the truck came back into its lane of travel. The truck then sped up to about forty-four miles per hour and again was gradually drifting back and forth within its lane.

¶5 At the intersection of Highway 61 and Highway 60, the truck signaled to make a right turn and, when it went into the right turn lane, it did not do so completely but its left tires at one point were over the dividing line between the left and right turn lane. The truck made a very wide turn. After the turn, the truck came back into the lane, then drifted back out to the left with his left tires again on that line then back into the lane. At that point, Trooper Moore put on his squad car lights and stopped the truck. The driver kept driving for a little bit and then finally pulled over and stopped.

¶6 On cross-examination, Trooper Moore conceded the following: he had observed no traffic violation, there is nothing illegal about driving under the speed limit, the truck did not cross the centerline or the fog line except when its right tires were right on the fog line or just a little bit over when going around the corner just north of Boscobel, and there is no traffic violation for crossing a fog line or for moving within one's lane of travel.

¶7 Trooper Moore testified that, based on his observations of the truck, he believed that the person driving was either "tired, impaired, intoxicated, sick, [or] there [was] something wrong with the vehicle that [was] causing this." In his opinion, what he was observing was not normal, that is, the slow speed, the

drifting in the lane, not being able to get into the designated turn lane properly, and the wide turn.²

¶8 The circuit court concluded that Trooper Moore did not have reasonable suspicion to believe that Denner was violating the law. The court asked the parties to brief whether there was an exception to the reasonable suspicion requirement where an officer reasonably believed that the driver of a truck might be tired. Based on the parties' briefs, the court concluded there was not such an exception and it denied the motion.³

² Trooper Moore also testified that, where the pickup truck came to a stop at the intersection of Highway 60, there is a painted white stop line that is a marker where vehicles have to stop; the front tires of the truck were about one-to-two feet over the white stop line. He testified that there is a "Bright Line law" in WIS. STAT. § 346.46 providing that one must stop before a painted white stop line and Denner was slightly over; but he considered it "extreme" to take law enforcement action based on being slightly over the stop line and he was not going to do that. The State in its brief on appeal states that it is not relying on Denner stopping slightly over the stop line in its analysis and we therefore do not discuss it. We note, though, that Trooper Moore did testify that that was one of the things, along with the others listed in the text accompanying this footnote, that led him to believe that something was "not normal."

³ An officer does not need reasonable suspicion of unlawful behavior in order to make a stop if the officer is engaged in a community caretaker activity. *State v. Clark*, 2003 WI App 121, ¶20, 265 Wis. 2d 557, 666 N.W.2d 112. "[A] bona fide community caretaker activity is one that is 'divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.'" *Id.*, ¶21 (citation omitted). The parties did not address the community caretaker function in their briefs in the circuit court and do not address it on appeal. Therefore we do not discuss it.

DISCUSSION

¶9 On appeal, the State contends that the circuit court erred because Trooper Moore’s testimony establishes that he had a reasonable suspicion that Denner was driving while under the influence of an intoxicant.⁴

¶10 In order to justify an investigatory seizure under the Fourth Amendment,

“[t]he police must have a reasonable suspicion, grounded in specific articulable facts and reasonable inferences from those facts, that an individual is [or was] violating the law.”
 “The question of what constitutes reasonable suspicion is a common sense 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. Colstad, 2003 WI App 25, ¶8, 260 Wis. 2d 406, 659 N.W.2d 394 (citations omitted). Reasonableness is measured against an objective standard taking into consideration the totality of the circumstances. *See State v. Richardson*, 156 Wis. 2d 128, 139-40, 456 N.W.2d 830 (1990).

⁴ In the circuit court, the State’s argument focused on Trooper Moore’s belief that the driver of the truck was tired, and the State argued that there were reasonable grounds to believe the driver was violating traffic laws such as inattentive driving. *See, e.g.*, WIS. STAT. § 346.89(1). On appeal, the State argues in addition that there was reasonable suspicion that the driver was operating under the influence of an intoxicant. Denner does not object to the State’s making this argument and he responds to it. It may be that the State did not sufficiently develop this argument before the circuit court. However, we have the authority to address arguments and issues on appeal even if they were not made in the circuit court. *Wisconsin Builders Ass’n v. Wisconsin Dep’t of Transp.*, 2005 WI App 160, ¶35 n.2, 285 Wis. 2d 472, 702 N.W.2d 433. Because the factual record is fully developed and the question is one of law and fully briefed, we address the State’s argument that Trooper Moore had a reasonable suspicion that Denner was driving while under the influence of an intoxicant. Because this issue is dispositive, we do not address the State’s arguments that Trooper Moore had a reasonable suspicion that Denner was violating traffic laws.

¶11 We uphold the trial court's findings of fact unless they are clearly erroneous. *State v. Guzy*, 139 Wis. 2d 663, 671, 407 N.W.2d 548 (1987). However, whether the facts as found by the circuit court, or the undisputed facts, are sufficient to fulfill the constitutional standard is a question of law, which we review de novo. *State v. Krier*, 165 Wis. 2d 673, 676, 478 N.W.2d 63 (Ct. App. 1991).

¶12 We conclude that the observations that Trooper Moore described in his testimony, which the circuit court implicitly accepted, are sufficient to permit a reasonable officer to reasonably suspect that the driver of the truck was driving under the influence of an intoxicant.

¶13 Trooper Moore testified that the slow speed at which the truck was driving was not normal. He observed the truck driving significantly below the speed limit, not just at one point, but in three different speed zones and over the period of time he was observing him. Driving twelve-to-fifteen miles per hour in a twenty-five-mile-per-hour zone is unusually slow, as is thirty miles per hour in a fifty-mile-per-hour zone.

¶14 There are a number of reasons a driver may be driving this slowly and some may be innocent, such as being tired. However, reasonable suspicion may be based on lawful conduct that has innocent explanations. *State v. Waldner*, 206 Wis. 2d 51, 58-59, 541 N.W.2d 681. An officer is not required to rule out innocent explanations and he may draw reasonable inferences that are consistent with guilt and temporarily freeze the situation in order to investigate further. *Id.* at 59; *see also State v. Jackson*, 147 Wis. 2d 824, 835, 434 N.W.2d 386 (1989). A reasonable officer could reasonably suspect that a vehicle driving close to midnight at the slow speeds at which Trooper Moore observed Denner's truck was

driving that slowly because the driver knew he was under the influence of an intoxicant and was making a special effort not to make any mistakes while driving. The drifting within the lane and the wide turn, when considered together with the unusually slow speed, add to the reasonableness of the inference that the driver was not fully in control of his driving and was driving slowly in an attempt to maintain control.

¶15 Denner points out that the trooper observed no unlawful conduct, but that is not necessary for reasonable suspicion. If a law enforcement officer observes unlawful conduct, then there is no need for an investigative stop because the observation of unlawful conduct itself gives the officer probable cause for a lawful seizure. *Waldner*, 206 Wis. 2d at 58-59.

¶16 Denner also points out that in *Waldner* there were circumstances forming a basis for reasonable suspicion that do not exist here: namely, the driver in *Waldner* stopped at a place where there was no stop sign; he drove very slowly and suddenly accelerated; he poured a liquid and ice onto the roadway; and he walked away from an officer. *Id.* at 53. However, *Waldner* did not establish a minimum required set of factors, but instead was applying the reasonable suspicion standard to the circumstances of that case. In *Waldner*, as in this case, none of the circumstances unambiguously indicated intoxication; all were consistent with innocent explanations.

¶17 Because we conclude that a reasonable officer could reasonably suspect in light of his or her training or experience that the driver of the truck Trooper Moore observed was driving while under the influence of an intoxicant, we conclude the circuit court erred in granting Denner's motion to suppress.

Accordingly, we reverse and remand for further proceedings consistent with this opinion.

By the Court.—Order reversed and cause remanded.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.

