COURT OF APPEALS
DECISION
DATED AND FILED

January 15, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1996-CR **Cir. Ct. No. 2006CT293**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL GEORGE PENDERGAST,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Douglas County: GEORGE L. GLONEK, Judge. *Affirmed*.

¶1 HOOVER, P.J.[1] Daniel Pendergast appeals a judgment of conviction for operating a motor vehicle while intoxicated, third offense. Pendergast argues the circuit court erred when it denied his motion to suppress

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

because the arresting officer lacked reasonable suspicion to make a traffic stop. We disagree and affirm the judgment.

BACKGROUND

¶2 Pendergast received a citation for operating while intoxicated on September 4, 2006. He filed a motion to suppress and the court held a hearing on January 31, 2007. At the hearing, trooper Donald Magdzas testified he observed Pendergast's vehicle at approximately 3:10 a.m. coming from the general direction of the bar district of downtown Superior. He stated he observed the vehicle for about two minutes and for over a mile in distance. According to Magdzas, the vehicle drifted "continuously" within its lane of travel. While the vehicle did not cross either line, Magdzas described the movement as more than simply mild drifting and "not a normal driving pattern." Magdzas testified the behavior was "very noticeable," "happening continuously," and indicated to him that "there was some sort of problem[,]" such as intoxication. While Magdzas had a camera in his vehicle, he did not activate it until approximately ten seconds before he pulled over Pendergast.

¶3 The trial court concluded that Magdzas's testimony was credible. The trial court further concluded that under the totality of the circumstances Magdzas had reasonable suspicion to stop Pendergast.

DISCUSSION

¶4 When reviewing a circuit court's denial of a motion to suppress, we uphold the circuit court's findings of fact unless they are clearly erroneous. *See* ***State v. Waldner***, 206 Wis. 2d 51, 54, 556 N.W.2d 681 (1996). However, whether

those facts satisfy the constitutional requirement of reasonableness is a question of law we review without deference. ***Id.***

¶5 The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. In order to make a constitutionally permissible investigative stop, the officer must have reasonable suspicion that the driver or occupants of the vehicle committed an offense. ***State v. Rutzinski***, 2001 WI 22, ¶14, 241 Wis. 2d 729, 623 N.W.2d 516. Reasonable suspicion depends on whether an officer's suspicion is grounded in "specific, articulable facts and reasonable inferences from those facts" indicating the individual committed a crime. ***Waldner***, 206 Wis. 2d at 56 (citation omitted). When determining whether reasonable suspicion exists, an officer need not rule out the possibility of innocent behavior. ***State v. Anderson***, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990). An officer need not observe unlawful conduct; rather, the officer must consider the totality of the circumstances and draw reasonable inferences about the cumulative effect. ***Waldner***, 206 Wis. 2d at 58.

¶6 Pendergast argues that under the totality of the circumstances, the arresting officer did not have reasonable suspicion to stop him. Pendergast cites ***State v. Post***, 2007 WI 60, 733 N.W.2d 634, to assert that his behavior could not have given rise to reasonable suspicion because his weaving was minimal and "happened a very few times over a great distance." In ***Post***, the supreme court held "weaving within a single traffic lane does not alone give rise to the reasonable suspicion necessary to conduct an investigative stop of a vehicle." ***Id.***, ¶2. The court also stated that where weaving is "minimal or happens very few times over a great distance" it might not be sufficient to give rise to reasonable suspicion. ***Id.***, ¶19.

¶7 In ***Post***, the court concluded that the totality of the circumstances provided reasonable suspicion where the degree of weaving was significant and the incident took place at 9:30 at night. ***Id.***, ¶36. The court further recognized that while the time was a contributing factor, it was "not as significant as when poor driving takes place at or around 'bar time.'" ***Id.***

¶8 Pendergast's attempt to characterize his weaving as "minimal" is not consistent with the officer's testimony. Magdzas described Pendergast's weaving as "very noticeable" and stated Pendergast was weaving "continuously" for approximately a mile. Additionally, Magdzas noted the time, 3:10 a.m., and location, coming from the bar district, as factors in his decision to stop Pendergast. These factors taken together give rise to a reasonable suspicion sufficient for a stop.[2]

¶9 Pendergast makes a host of other arguments that are underdeveloped and unsupported by any citation to authority. Pendergast contends Magdzas could have turned on his camera sooner, and Magdzas did not specify the number of times Pendergast weaved. There is no requirement that an officer specify the number of times a car weaves, nor is there a requirement that an officer videotape a suspected offender. Pendergast also argues that he did not commit any traffic offense. An officer need not observe a traffic offense in order to stop a person. ***Waldner***, 206 Wis. 2d at 58. The trial court, finding that Magdzas was credible,

[2] Pendergast argues that Magdzas's stated reason for stopping him was to check his welfare and not for any criminal or traffic violation. This is not an accurate summary of Magdzas's testimony. Magdzas stated that in addition to being concerned for Pendergast's welfare, he was concerned that Pendergast might have been intoxicated. He was not required to rule out the possibility of innocent behavior before stopping Pendergast. *See* ***State v. Anderson***, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990).

was therefore not erroneous in its determination that reasonable suspicion existed to stop Pendergast.

By the Court.—Judgment affirmed.

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