

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 22, 2009

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. 2008AP2369-CR

Cir. Ct. No. 2008CF49

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LANCE J. KRAMER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sheboygan County: L. EDWARD STENGEL, Judge. *Reversed.*

Before Brown, C.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. Lance Kramer appeals from a judgment of conviction of fifth offense operating a motor vehicle with a prohibited blood alcohol concentration. He argues that the police officer lacked a reasonable

suspicion to conduct an investigatory stop and that evidence obtained during the stop should be suppressed. We agree and reverse the judgment.

¶2 Kramer was stopped at approximately 1:44 a.m. on January 18, 2008. The officer observed Kramer activate his right turn signal, position his vehicle in the right turn lane, and slow down as if he was going to make the turn off the highway. Kramer did not turn but went through the intersection and returned to his lane of travel. Kramer continued on the highway at the slower speed he had attained while negotiating the turn lane. The speed limit on the highway was forty-five miles per hour. One-tenth of a mile later the officer stopped Kramer's vehicle. Kramer smelled of intoxicants and did not perform well on field sobriety tests. He was arrested and his vehicle was searched. After he was read the Informing the Accused form, Kramer was transported to a hospital for a blood draw. Kramer's motion to suppress evidence obtained as a result of the vehicle stop was denied. Kramer entered a no contest plea to the charge of which he is convicted.¹

¶3 Investigative traffic stops are subject to the constitutional reasonableness requirement. *State v. Post*, 2007 WI 60, ¶12, 301 Wis. 2d 1, 733 N.W.2d 634. To justify the stop the officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry v. Ohio*, 392 U.S. 1, 21 (1968). The burden of establishing that an investigative stop is reasonable falls on the State. *Post*, 301 Wis. 2d 1, ¶12. The determination of reasonableness is guided by a

¹ Under the plea agreement, a related charge of possession of drug paraphernalia and a bail jumping charge in another case were dismissed as read-ins.

common sense test that asks whether the facts known to the officer would lead that officer, given his or her training, to suspect that a crime has occurred or is about to occur. *State v. Anderson*, 155 Wis. 2d 77, 83-84, 454 N.W.2d 763 (1990).

¶4 Whether evidence obtained following an investigative stop should be suppressed is a question of constitutional fact. See *State v. Alexander*, 2008 WI App 9, ¶7, 307 Wis. 2d 323, 744 N.W.2d 909. We will uphold the circuit court's factual findings unless they are clearly erroneous. *Id.* We review the determination of reasonable suspicion de novo. *State v. Williams*, 2001 WI 21, ¶18, 241 Wis. 2d 631, 623 N.W.2d 106.

¶5 Here the facts are not disputed. In the mile or so that the officer followed Kramer before Kramer signaled for a right turn, the officer did not observe any lane drifting, weaving, or other erratic driving. The officer only observed the aborted right hand turn and the slow speed upon returning to the highway. It is not illegal conduct and the State concedes that no traffic violation occurred.²

¶6 We acknowledge that a driver's actions need not be erratic, unsafe, or illegal to give rise to reasonable suspicion. *Post*, 301 Wis. 2d 1, ¶24. Where each observed factor alone may not support further investigation, we look to the

² In his testimony the officer did not explicitly state that he believed Kramer had committed a traffic violation by failing to turn right or driving too slow on the highway. The circuit court found that there was no evidence that the officer believed he had observed a traffic violation. Thus, there is no place in this appeal for Kramer's argument that the officer was mistaken in his application of the law or Kramer's citation to *United States v. McDonald*, 453 F.3d 958, 961-92 (7th Cir. 2006) (an officer's mistaken or good faith belief that a law has been broken is not objectively reasonable so as to supply reasonable suspicion or probable cause) or *State v. Longcore*, 226 Wis. 2d 1, 9, 594 N.W.2d 412 (Ct. App. 1999), *aff'd.*, 2000 WI 23, 233 Wis. 2d 278, 607 N.W.2d 620 (per curiam) (lawful stop cannot be predicated upon a mistake of law). It is a red herring.

totality of the facts as building blocks of reasonable suspicion. *Id.*, ¶28; *State v. Waldner*, 206 Wis. 2d 51, 58, 556 N.W.2d 681 (1996).

¶7 The State argues there are three such building blocks: the time of day was approaching bar closing, the aborted right hand turn, and the slow driving on the highway. The officer only observed the slow driving on the highway for one-tenth of a mile—just a little over one block. It was not sufficient time to observe whether Kramer was going to proceed at that speed or simply had not attained highway speed after slowing for the aborted turn. The officer indicated that Kramer had slowed down for the right hand turn to twenty-five miles an hour and that after aborting the turn, Kramer continued at that speed for one-tenth of a mile before the officer initiated the stop. It was not enough time to determine if such driving was a sign of possible impairment. At best we have two building blocks of reasonable suspicion. They are simply too weak and not enough to provide a foundation for reasonable suspicion that Kramer was driving while impaired. The evidence acquired after the stop of Kramer’s vehicle should have been suppressed.

By the Court.—Judgment reversed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

