

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 20, 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. 2008AP2588-CR

Cir. Ct. No. 2007CF240

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

STEVEN C. KRUEGER,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dunn County:
ROD W. SMELTZER, Judge. *Reversed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. The State appeals an order granting Steven Krueger's motion to suppress evidence gained as the result of an investigatory stop of Krueger's vehicle. The State contends the circuit court erred by concluding the

police officer lacked reasonable suspicion for the stop. We agree and therefore reverse the order.

BACKGROUND

¶2 At 6:15 a.m. on the morning of August 29, 2007, City of Menomonie police officer Martin Folczyk and another officer were returning from “checking on marijuana grows” in an unmarked pickup truck. The officers traveled westbound toward an intersection in an industrial park. Approximately thirty yards before the intersection, Folczyk noticed a south-facing vehicle at a stop sign. Folczyk saw the vehicle’s passenger “lighting some kind of smoking device” and the driver, later identified as Krueger, leaning toward the passenger. Folczyk detected the flame inside Krueger’s vehicle and observed the flame “all the way past the intersection.” Folczyk confirmed that the other officer observed “the same things.” Folczyk testified that based on his training, experience and understanding of how various types of controlled substances may be smoked, the flame did not come from the lighting of a cigarette but, rather, was consistent with lighting a bowl of marijuana or heating a methamphetamine pipe. Folczyk testified that he had five years’ experience as a drug enforcement officer.

¶3 After Folczyk’s vehicle passed through the intersection, Krueger’s vehicle turned right, following Folczyk’s truck. At the next intersection, Folczyk moved to the right side of the road and engaged his signal as if he was going to make a right turn. Folczyk explained that he hoped Krueger would pull up along the left side of the truck to make a left turn—“the common direction of travel for people leaving the industrial park and returning” to the City of Menomonie. As Folczyk pulled over to the right, however, Krueger did not advance on the left. When Krueger did not “creep forward” on the left, Folczyk ultimately turned left

in front of Krueger's vehicle and contacted dispatch to have an officer with a marked squad car initiate a stop of Krueger's vehicle.

¶4 Based on evidence found as a result of the stop, Krueger was ultimately charged with felony possession of methamphetamine and misdemeanor possession of drug paraphernalia. The circuit court granted Krueger's motion to suppress evidence, concluding the officers lacked reasonable suspicion to stop the vehicle. This appeal follows.

DISCUSSION

¶5 Police may approach a person for purposes of investigating possible criminal behavior without probable cause to make an arrest. *State v. Richardson*, 156 Wis. 2d 128, 138, 456 N.W.2d 830 (1990) (citing *Terry v. Ohio*, 392 U.S. 1, 22 (1968)). Investigative stops are considered seizures within the meaning of the Fourth Amendment; therefore, the stop must be based on a reasonable suspicion in order to pass constitutional muster. *State v. Harris*, 206 Wis. 2d 243, 258-59, 557 N.W.2d 245 (1996). "An inchoate and unparticularized suspicion or hunch will not suffice." *State v. Fields*, 2000 WI App 218, ¶10, 239 Wis. 2d 38, 619 N.W.2d 279. Rather, 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*, 392 U.S. at 21. Determination of reasonableness is guided by a common sense test that asks whether the facts known to the officer at the time of the stop would lead that officer, given his or her training, to reasonably suspect that a crime has occurred or is about to occur. *See State v. Anderson*, 155 Wis. 2d 77, 83-84, 454 N.W.2d 763 (1990).

¶6 Whether evidence 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. In reviewing questions of constitutional fact, we will uphold a circuit court’s factual findings unless they are clearly erroneous, but we will independently decide whether those facts meet the constitutional standard. *Id.* Here, the State does not contest the circuit court’s factual findings, but argues the circuit court improperly determined that the facts do not rise to the level of reasonable suspicion. We agree.

¶7 Folczyk testified that based on his training and experience, the brightness and duration of the flame detected were not consistent with the lighting of a cigarette but, rather, were consistent with the flame seen when lighting a bowl of marijuana or heating a methamphetamine pipe. Folczyk explained that when lighting a cigarette, it takes approximately one second to flick your lighter and light the cigarette, and it is a single flame standing straight up. In contrast, when lighting a bowl of marijuana, the lighter is turned upside down into the bowl and the inverted flame rolls back around the bowl. With regard to methamphetamine, the glass pipe or bulb would be heated from underneath “which spreads the flame out” and “makes a longer-burning light” that must be lit long enough to vaporize the crystal substance for inhalation. These are specific and articulable facts that, given Folczyk’s experience as a drug enforcement officer, warranted a reasonable belief criminal activity was afoot. *See State v. Young*, 2006 WI 98, ¶21, 294 Wis. 2d 1, 717 N.W.2d 729. Accordingly, Folczyk had reasonable suspicion to initiate the traffic stop.

By the Court.—Order reversed.

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

