

**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. 2009AP793

Cir. Ct. No. 2007TR2061

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

VILLAGE OF SIREN,

PLAINTIFF-RESPONDENT,

V.

NICHOLAS J. DEMOE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Burnett County:
KENNETH L. KUTZ, Judge. *Affirmed.*

¶1 HOOVER, P.J.¹ Nicholas DeMoe appeals a judgment of conviction for operating while intoxicated, first offense. DeMoe argues the traffic stop was not supported by reasonable suspicion. We reject DeMoe's argument and affirm.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

BACKGROUND

¶2 Police officer William Shafer observed DeMoe's vehicle traveling in front of him on Highway 35 in the Village of Siren at 2:43 a.m. DeMoe's vehicle proceeded for approximately one-half block with one tire-width of his vehicle outside the fog line. The vehicle then corrected, traveling on the fog line, and Shafer activated his emergency lights. DeMoe was arrested for operating while intoxicated.

¶3 DeMoe moved to dismiss the case, arguing Shafer did not have reasonable suspicion to stop him. Following an evidentiary hearing, the circuit court denied Shafer's motion. DeMoe was found guilty at a bench trial and now appeals.

DISCUSSION

¶4 An officer initiating an investigative stop of a vehicle must have reasonable suspicion that the driver committed an offense. *State v. Rutzinski*, 2001 WI 22, ¶14, 241 Wis. 2d 729, 623 N.W.2d 516. At the time of the stop, the officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, objectively warrant a belief that criminal activity is afoot. *Id.* Application of the reasonable suspicion standard to a given set of facts constitutes a question of law that we review independently of the circuit court. *Id.*, ¶12.

¶5 DeMoe does not dispute the circuit court's findings. Rather, he argues the totality of the circumstances does not permit a finding of reasonable suspicion. Specifically, DeMoe argues the operation just outside of the fog line for approximately one-half block and then correcting onto the fog line, at 2:43 in

the morning, does not lead to a reasonable suspicion of impaired driving because Shafer acknowledged that DeMoe was not weaving.

¶6 We disagree. Observation of a vehicle traveling partially outside, and then on, the fog line for a significant distance shortly after bar time reasonably leads to an inference that the person is operating while intoxicated, and permits the minimal intrusion of a temporary investigative stop.² DeMoe further argues that operation on or over the fog line is not prohibited by statute. Whether this is true does not affect the reasonable suspicion determination. Even “when a police officer observes lawful ... conduct, if a reasonable inference of unlawful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, police officers have the right to temporarily detain the individual for the purpose of inquiry.” *State v. Waldner*, 206 Wis. 2d 51, 60, 556 N.W.2d 681 (1996).

By the Court.—Judgment affirmed.

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

² DeMoe does not cite any cases that he suggests should be analogized or contrasted to the facts presented here.

