

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 30, 2011

A. John Voelker
Acting 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. 2010AP1500-CR

Cir. Ct. No. 2008CF3737

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY MARK MAJEWSKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: DENNIS R. CIMPL, Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Timothy Mark Majewski appeals a judgment convicting him of operating while intoxicated, as a sixth offense. Majewski argues that the police lacked a reasonable suspicion to believe that he was driving

while intoxicated at the time he was stopped and, therefore, suppression of the evidence was warranted. We affirm.

¶2 A police officer has reasonable suspicion to stop a driver if he or she is “able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion of the stop.” *State v. Post*, 2007 WI 60, ¶10, 301 Wis. 2d 1, 8, 733 N.W.2d 634, 637 (quotation marks and citation omitted). “[W]hat 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. Young*, 212 Wis. 2d 417, 424, 569 N.W.2d 84, 88 (Ct. App. 1997). “Determining whether there was reasonable suspicion requires us to consider the totality of the circumstances.” *State v. Allen*, 226 Wis. 2d 66, 74, 593 N.W.2d 504, 508 (Ct. App. 1999). The time of day and the training and experience of the detaining officer are both factors to consider in an assessment of the totality of the circumstances. *Id.* at 74–75, 593 N.W.2d at 508.

¶3 When reviewing the denial of a motion to suppress, we uphold the circuit court’s factual findings unless they are clearly erroneous. *State v. Eckert*, 203 Wis. 2d 497, 518, 553 N.W.2d 539, 547 (Ct. App. 1996). Whether, under those facts, a reasonable suspicion justifying a stop exists is a question of law that we review *de novo*. *Ibid.*

¶4 At the suppression hearing, Deputy Sheriff Bryan Lee, a fourteen-year veteran of the Milwaukee County Sheriff’s Department, testified that he observed Majewski’s motorcycle traveling southbound on Loomis Road at 2:00 a.m. He testified that he saw Majewski swerve several times within his lane of travel and saw him swerve as he was negotiating a curve. He also saw the

motorcycle nearly strike the median. Lee testified that he activated his lights, stopped Majewski, and asked him why he was swerving. Majewski explained that he had been “fooling around.”

¶5 We conclude that, under all the facts and circumstances present, Deputy Sheriff Lee’s decision to stop Majewski was based on a reasonable suspicion that Majewski was intoxicated, and thus reasonable under the Fourth Amendment. Lee has extensive experience as a deputy sheriff and is very familiar with motorcycles because he is a “motorcycle officer,” sometimes riding a motorcycle while on patrol. Lee observed erratic driving, including swerving within the lane of traffic and almost hitting the median, at 2:00 a.m., a time at which people are leaving taverns. Lee’s observations, when considered in light of his experience and the late hour, were sufficient to give rise to a reasonable suspicion that Majewski was driving while impaired.

¶6 Majewski contends Lee’s testimony was unreliable because a video camera installed in the squad car, which activated automatically when Lee started his siren, did not show Majewski swerving and almost hitting the median. Even though the camera, with its limited perspective, did not provide corroboration for Lee’s observations, the circuit court concluded that Lee’s testimony that Majewski was swerving was reliable because he was an experienced law enforcement officer who was familiar with motorcycles. This finding is not clearly erroneous especially since the officer activated the camera by starting his siren after seeing something that in his view warranted the activation. The fact that Lee’s testimony was not corroborated by the camera surveillance does not render the testimony unreliable.

¶7 Majewski also contends that Lee’s testimony should be discounted because he incorrectly thought that a motorcycle had three lanes of traffic—left, middle, and right—for each car lane; Lee’s testimony was apparently based on information in a guide that the Department of Motor Vehicles provides to teach people how to ride motorcycles, but is not codified in the statutes. Regardless of Lee’s testimony on this point, whether Majewski’s actions are characterized as swerving within one lane of traffic or swerving between the three “motorcycle lanes” contained within one car lane, the net result is the same—Majewski was swerving and not driving straight. We have previously explained that “whether weaving within a single lane gives rise to a reasonable suspicion requires an examination of the totality of the circumstances.” *Post*, 2007 WI 60, ¶27, 301 Wis. 2d at 16, 733 N.W.2d at 641. Here, the additional circumstances, when coupled with the in-lane swerving, gave rise to a reasonable suspicion that Majewski was driving while intoxicated.

By the Court.—Judgment affirmed.

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

