

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 25, 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. 2011AP647-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2010CT388

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIAM M. HUGHES,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Jefferson County:
RANDY R. KOSCHNICK, Judge. *Affirmed*

¶1 VERGERONT, J.¹ William Hughes appeals the judgment of conviction for operating a motor vehicle while under the influence of an intoxicant

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) and (3) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

(OWI) in violation of WIS. STAT. § 346.63(1)(a), third offense. He contends the circuit court erred in concluding that the initial stop and the detention to administer field sobriety tests were lawful. We conclude the circuit court was correct and affirm the judgment of conviction.

BACKGROUND

¶2 Hughes was charged with OWI, third offense, after being stopped and detained by State Trooper Mark Samborski on October 9, 2010, at approximately 10:20 p.m. Hughes moved to suppress evidence, alleging that the stop and detention were unlawful. At the hearing on this motion, Trooper Samborski was the only witness, and he testified as follows.

¶3 Trooper Samborski was in a marked vehicle patrolling the interstate in Jefferson County on the evening of October 9, 2010. He knew that there had been a football game at the University of Wisconsin in Madison that day. It is common knowledge among state troopers that after a sporting event there is an increased likelihood of drivers under the influence of alcohol. At approximately 10:10 p.m., he received a radio dispatch indicating that a citizen caller had reported a reckless or possibly impaired driver traveling eastbound on I-94 from mile marker 255, which is about a mile into Jefferson County from Dane County. Dispatch informed him that the suspect vehicle was “over the lines on both sides” or “over both lines.” He understood this to mean that the vehicle was weaving outside of the designated lane of travel. Dispatch described the vehicle to him as “a dark colored car” and gave him the complete license plate number. Dispatch also informed him that the caller was afraid to get too close to the vehicle. Trooper Samborski’s understanding of dispatch’s practice is that it airs the calls within a minute or so of receiving them.

¶4 The location described by dispatch was west of Trooper Samborski, so he began traveling west on the interstate highway. His partner, who also received the call, asked dispatch to get an updated location, and dispatch called the caller back. The caller told dispatch, which relayed this information to Trooper Samborski, that about two minutes earlier the caller had left the interstate at Lake Mills, exit 259, and the suspect vehicle had continued eastbound on the interstate from that exit.

¶5 In response to this information, Trooper Samborski pulled onto the median east of Johnson Creek to observe eastbound traffic on I-94. By this time he had “run” the license plate number communicated by dispatch and knew the make, model, and color of the suspect vehicle.

¶6 As he observed eastbound traffic, Trooper Samborski saw an eastbound vehicle that matched the description of the suspect vehicle. He pulled out onto the interstate and followed it. As he did, he saw the vehicle brake “a couple times” and drift “left slightly, right slightly.” Trooper Samborski then activated a digital video recorder in his squad car.

¶7 As Trooper Samborski followed the suspect vehicle, he verified that the reported license plate from dispatch matched the plate on the vehicle he was now following. He followed the vehicle for approximately two and one-half miles. During that time, he observed the vehicle several times drift toward the center line,² then back toward the fog line; then the vehicle drove onto the right shoulder over the fog line with both right side tires by several inches or more, after

² The circuit court found that the “center line” is the white line dividing the two eastbound lanes.

which it drifted back into the lane. Trooper Samborski then activated his vehicle's lights, and the suspect vehicle pulled over to the shoulder and stopped.

¶8 Trooper Samborski spoke with the driver of the vehicle, whom the trooper identified as Hughes, and immediately smelled an odor of intoxicants. The trooper saw that Hughes had glassy eyes. In response to the trooper's question, Hughes admitted that he had been drinking earlier. The trooper then asked Hughes to exit his vehicle so the trooper could administer field sobriety tests, and Hughes did.

¶9 In addition to Trooper Samborski's testimony, the digital video recording was introduced and accepted into evidence.

¶10 The circuit court concluded that the combined circumstances of the information from the caller transmitted to Trooper Samborski, the trooper's observations of the vehicle before the videotape begins, and the facts revealed by the videotape provided a reasonable suspicion for the stop. The court further concluded that the observations after the stop—the odor of alcohol, Hughes' glassy eyes, and Hughes' admission of drinking alcohol—provided a lawful basis for detaining Hughes in order to administer field sobriety tests.

DISCUSSION

¶11 On appeal Hughes challenges the lawfulness of both the initial stop and the detention for field sobriety tests.

¶12 To execute a valid investigatory stop consistent with the Fourth Amendment prohibition against unreasonable searches and seizures, a law enforcement officer must reasonably suspect, in light of his or her experience, that some kind of criminal activity has taken or is taking place. *See State v.*

Richardson, 156 Wis. 2d 128, 139, 456 N.W.2d 830 (1990). Upon stopping the individual, the officer may make reasonable inquiries to dispel or confirm the suspicions that justified the stop. See *Terry v. Ohio*, 392 U.S. 1, 22 (1968). The detention must be reasonably related in scope to the circumstances that justified the interference in the first place. *County of Dane v. Campshure*, 204 Wis. 2d 27, 32, 552 N.W.2d 876 (Ct. App. 1996).³

¶13 In assessing whether reasonable suspicion exists for a particular stop, we consider all the specific and articulable facts, taken together with the rational inferences from those facts. See *State v. Dunn*, 158 Wis. 2d 138, 146, 462 N.W.2d 538 (Ct. App. 1990). “The question of what 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. Jackson*, 147 Wis. 2d 824, 834, 434 N.W.2d 386 (1989).

¶14 In reviewing a circuit court’s decision on reasonable suspicion, we accept the circuit court’s findings of fact unless they are clearly erroneous. See *State v. Post*, 2007 WI 60, ¶8, 301 Wis. 2d 1, 733 N.W.2d 634. However, we review de novo the application of the constitutional standard to the facts. See *id.*

³ The State cites *State v. Colstad*, 2003 WI App 25, 260 Wis. 2d 406, 659 N.W.2d 394, for the proper standard on the scope of the detention. In *Colstad* we concluded that there was reasonable suspicion of a traffic violation, inattentive driving, which justified the initial stop, and that the mild odor of intoxicants the officer smelled after the initial stop, coupled with the information already acquired, constituted reasonable suspicion of driving under the influence. *Id.*, ¶¶14, 19-21. Therefore, we held, the officer properly extended the stop to conduct field sobriety tests. *Id.*, ¶21. We cite *County of Dane v. Campshure*, 204 Wis. 2d 27, 552 N.W.2d 876 (Ct. App. 1996), rather than *Colstad* because the initial stop in this case, as in *Campshure*, was based on the officer’s suspicion of OWI.

¶15 We conclude the totality of the circumstances provided a basis for Trooper Samborski to reasonably suspect that Hughes was driving while intoxicated at the time the trooper stopped him.

¶16 The citizen caller described driving that could reasonably be considered as erratic, and, thus, a possible sign of driving while intoxicated. *See State v. Rutzinski*, 2001 WI 22, ¶34, 241 Wis. 2d 729, 623 N.W.2d 516. With respect to the reliability of the citizen caller, the court found that the caller had made himself or herself known to dispatch because the caller was re-contacted. A citizen caller's exposure to being identified is a reasonable basis for an officer's conclusion that the caller is being truthful. *See id.*, ¶32. In addition, the record shows that the caller provided the police with verifiable information indicating the caller's base of knowledge, another indicia of reliability. *See id.*, ¶33. The caller was relating events that were occurring as the caller followed the suspect vehicle, and the caller reported the license plate number, color of the car, location, and movement of the vehicle. Trooper Samborski was able to corroborate these details when he saw a vehicle of that color with that license plate number traveling eastbound at a location that was consistent with the vehicle having been where the caller reported it. The caller's statement that he or she was afraid contributed to the urgency of the situation and supplemented the reliability of the tip. *See id.*, ¶35.

¶17 Trooper Samborski independently observed driving that was consistent with that reported by the caller. It is true, as Hughes contends, that the sudden braking, drifting within the lane, and what the court described as an "S" maneuver and abrupt drift over the fog line, shown on the videotape, are not traffic violations and may have innocent explanations. However, the driving that creates a reasonable suspicion that the driver is intoxicated need not constitute a traffic

violation. *Post*, 301 Wis. 2d 1, ¶28. And an officer need not accept the innocent explanation when there is a reasonable alternative explanation consistent with unlawful conduct. *State v. Waldner*, 206 Wis. 2d 51, 61, 556 N.W.2d 681 (1996).

¶18 When the trooper’s own observations are combined with the observations of the citizen caller, and the time of night, and the trooper’s knowledge of the increase in driving while intoxicated after sports events, we are satisfied that a reasonable officer could reasonably suspect that the driver of this vehicle was driving while impaired by alcohol. *See State v. Lange*, 2009 WI 29, ¶32, 317 Wis. 2d 383, 766 N.W.2d 551 (“[T]he time of night is relevant. [The officers] ... encountered the defendant about when Saturday night bar-time traffic arrives It is a matter of common knowledge that people tend to drink during the weekend when they do not have to go to work the following morning.”). *See also Post*, 301 Wis. 2d 1, ¶36 (While a time of 9:30 at night is not as significant as “bar time,” it nonetheless “does lend some further credence to ... suspicion that [the driver] was driving while intoxicated.”).

¶19 Hughes emphasizes that the circuit court concluded that neither the citizen call nor the trooper’s own observations were sufficient alone to constitute reasonable suspicion. This is irrelevant because, as the circuit court recognized, the correct legal standard is the totality of the circumstances. Thus we do not consider whether anything less than the totality of the circumstances would constitute reasonable suspicion.

¶20 Hughes also points out that the circuit court called this “a close case,” and he contends that in a close case we should decide in favor of individual rights. We reject this position. Regardless whether this is a close case, the correct standard is the reasonable suspicion standard based on the totality of the

circumstances. This standard is the result of balancing the interest of the individual in being free from intrusion and the interest of the State in detecting and preventing crime. *Waldner*, 206 Wis. 2d at 56.

¶21 Because we conclude that Trooper Samborski had a reasonable suspicion that Hughes was driving under the influence of an intoxicant, it was lawful for the trooper to stop Hughes to make reasonable inquiries in order to dispel or confirm that suspicion. *Terry*, 392 U.S. at 22. The additional information the trooper acquired after stopping Hughes—odor of alcohol, glassy eyes, and admission of drinking earlier—confirmed rather than dispelled the reasonable suspicion that Hughes was driving while intoxicated. Thus, it was reasonable for Trooper Samborski to investigate further by requesting Hughes to perform field sobriety tests. *See Campshure*, 204 Wis. 2d at 32 (Additional observations made after an initial stop based on reasonable suspicion of OWI made it reasonable to further investigate by requesting the driver to perform field sobriety tests.). Contrary to Hughes’ argument, the fact that in other cases there may be more evidence of intoxication before field sobriety tests are administered does not mean that it was unreasonable for Trooper Samborski to administer the tests to Hughes.

CONCLUSION

¶22 We affirm the circuit court’s denial of the motion to suppress evidence and the judgment of conviction.

By the Court.—Judgment affirmed.

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

