

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**July 26, 2012**

Diane M. Fremgen  
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. 2011AP1728-CR**

**Cir. Ct. No. 2010CT88**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**PAUL H. OLSON,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Monroe County:  
MARK L. GOODMAN, Judge. *Affirmed.*

¶1 SHERMAN, J.<sup>1</sup> Paul Olson appeals a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant (OWI), second offense, contrary to WIS. STAT. § 346.63(1)(a). Olson contends that the

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

arresting officer lacked reasonable suspicion to believe that he had been driving while intoxicated and, therefore, the circuit court should have suppressed evidence obtained from his detention. I affirm.

### **BACKGROUND**

¶2 At approximately 11:30 p.m. on February 16, 2010, Sparta Police Officer Christopher Welker observed Olson driving in what he described as an overly cautious manner. Officer Welker testified that while he did not observe any traffic violations, he observed Olson activate his right turn signal when his vehicle approached the intersection of Montgomery Street and Water Street, move into the right lane and slow down as though he was preparing to turn right. When the vehicle reached the intersection, Olson deactivated the turn signal and proceeded straight until the next intersection. Officer Welker testified that he then observed Olson “slow[] down considerably, almost to a stop” before reaccelerating when Olson drove through three uncontrolled intersections, even though there was no traffic in the area. Officer Welker also testified that he twice observed the back tires of Olson’s vehicle spinning when the vehicle reaccelerated after a stop.

¶3 Officer Welker testified that he followed Olson’s vehicle until it came to a stop on the side of the road. Officer Welker testified that he pulled his vehicle over behind Olson’s vehicle “to see if the driver was going to get out, [or] if maybe he was stopping just for me to go past him.” Officer Welker testified that Olson exited his vehicle and began walking toward the back of the truck. Officer Welker testified that Olson appeared to have a lack of balance, stating that he “kind of veered from side to side a little as he walked.”

¶4 Officer Welker testified that after he observed Olson’s walking, he exited his vehicle to speak with Olson. Officer Welker testified that as he spoke

with Olson, he observed that Olson appeared to have slurred speech, and that when he stepped closer to Olson, he observed that Olson's eyes were bloodshot and "glossy" and he smelled the odor of intoxicants. Officer Welker testified that at that point, he asked Olson if he had a driver's license and if Olson had had anything to drink. Olson retrieved his driver's license from his vehicle and denied having consumed any alcohol. Officer Welker testified that at this point, he did not consider Olson free to leave and directed Olson to undergo field sobriety tests and a preliminary breath test.

¶5 Olson was charged with OWI, second offense, as well as operating a motor vehicle with a prohibited alcohol concentration, second offense. Olson moved the court for dismissal of the charges against him, or in the alternative for suppression of all evidence due to lack of reasonable suspicion for the investigatory stop. The court denied Olson's motion. The court found that a seizure occurred when Officer Welker began "repeatedly questioning Olson about his consumption of alcohol," which was the point when a reasonable person would have believed that he was not free to leave. The court determined that at that point, Officer Welker had reasonable suspicion to initiate an investigatory stop in light of the totality of the circumstances, which included Olson's "unusual and overly cautious" driving, the spinning of his tires, and a demonstrated lack of balance when he exited his vehicle. Olson subsequently entered a plea of no contest to the OWI charge. Olson appeals.

## **DISCUSSION**

¶6 Olson contends the circuit court erred in denying his motion to suppress. On review of a circuit court's decision on a motion to suppress, an appellate court will uphold the circuit court's factual findings unless those findings

are clearly erroneous. *State v. Popke*, 2009 WI 37, ¶10, 317 Wis. 2d 118, 765 N.W.2d 569. We review de novo whether the facts lead to reasonable suspicion. *Id.*

¶7 “In *Terry v. Ohio*, 392 U.S. 1, 8 [] (1968), the United States Supreme Court explained that it is reasonable and consistent with Fourth Amendment protections for an officer to conduct a temporary ‘investigatory stop’ of an individual if the officer has reasonable suspicion ‘that criminal activity may be afoot.’” *State v. Miller*, 2012 WI 61, ¶29, 341 Wis. 2d 307, 815 N.W.2d 349; see WIS. STAT. § 968.24.<sup>2</sup> An investigatory or *Terry* stop, “though a seizure, allows police officers to briefly ‘detain a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest.’” *State v. Young*, 2006 WI 98, ¶20, 294 Wis. 2d 1, 717 N.W.2d 729 (citation omitted).

¶8 To support reasonable suspicion, an officer must have an objectively reasonable suspicion of wrongful conduct. *State v. Anderson*, 155 Wis. 2d 77, 83-84, 454 N.W.2d 763 (1990). Reasonable suspicion sufficient to make an investigatory stop is based on a common sense test: what would a reasonable police officer reasonably suspect in light of his or her training and experience

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<sup>2</sup> The legislature codified the standard for an investigatory stop in WIS. STAT. § 968.24, which provides:

Temporary questioning without arrest. After having identified himself or herself as a law enforcement officer, a law enforcement officer may stop a person in a public place for a reasonable period of time when the officer reasonably suspects that such person is committing, is about to commit or has committed a crime, and may demand the name and address of the person and an explanation of the person's conduct. Such detention and temporary questioning shall be conducted in the vicinity where the person was stopped.

under all of the facts and circumstances present. *State v. Jackson*, 147 Wis. 2d 824, 834, 434 N.W.2d 386 (1989). The officer’s suspicion must be “grounded in specific articulable facts and reasonable inferences from those facts” that the driver consumed enough alcohol to impair his or her ability to drive. *State v. Colstad*, 2003 WI App 25, ¶¶8, 19, 260 Wis. 2d 406, 659 N.W.2d 394.

¶9 Olson argues that the investigatory stop occurred when Officer Welker exited his vehicle and began to ask him questions, which, he claims, is the point when Officer Welker “asserted [his] dominance” and he acquiesced to Officer Welker’s demands. Olson further argues that at that point, Officer Welker did not have reasonable suspicion, under the totality of the circumstances, to conduct an investigatory stop.

¶10 The parties devote substantial argument to determining when Officer Welker seized Olson. The point in time when a seizure takes place is critical for the following two reasons: “(1) it determines when Fourth Amendment [of the United States Constitution] and Article I, Section 11 [of the Wisconsin Constitution] protections become applicable; and (2) it limits the facts we may consider in evaluating whether [the officer] had reasonable suspicion to stop [the defendant].” *Young*, 294 Wis. 2d 1, ¶23. Olson maintains that Officer Welker seized him when Officer Welker began to ask him questions. The State maintains that the seizure took place after Welker’s initial questioning, when Officer Welker asked Olson whether he had had anything to drink that night. I need not determine when Olson was seized because, assuming without deciding that Olson was seized at the moment when Officer Welker began to ask him questions, Officer Welker had sufficient reasonable suspicion to justify the stop.

¶11 Although Officer Welker did not observe Olson commit any traffic violations, the other facts known to Officer Welker at the time he initiated questioning demonstrate that he had reasonable suspicion to justify the investigatory stop. The incident took place at 11:30 p.m. “The hour of the day may ... be relevant in that the individual’s activities may or may not be consistent with the typical behavior of law-abiding citizens at that time.” *State v. Kyles*, 2004 WI 15, ¶58, 269 Wis. 2d 1, 675 N.W.2d 449. Second, before exiting his vehicle, Officer Welker observed that Olson appeared to be having trouble balancing when he walked toward the back of his vehicle. Third, Officer Welker observed Olson drive in an unusual manner, which he characterized as “overly cautious.” Overly cautious driving due to police presence, standing alone, is generally not a sufficient basis for an investigatory stop. *See generally State v. Fields*, 2000 WI App 218, 239 Wis. 2d 38, 619 N.W.2d 279. However, combined with the time of night, the spinning tires, and Olson’s difficulty with walking, Officer Welker had sufficient reasonable suspicion to conduct an investigatory stop. Accordingly, I conclude that the denial of Olson’s motion to suppress was proper, and affirm the judgment of conviction.

*By the Court.*—Judgment affirmed.

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

