

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 2, 2016

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 Nos. 2015AP1571-CR
2015AP1572-CR**

**Cir. Ct. Nos. 2014CT885
2014CM1250**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS M. ORT,

DEFENDANT-APPELLANT.

APPEALS from judgments of the circuit court for Outagamie County: NANCY J. KRUEGER, Judge. *Affirmed.*

¶1 SEIDL, J.¹ In these consolidated appeals, Thomas Ort appeals judgments of conviction for third-offense operating while intoxicated (OWI) and

¹ These appeals are decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

for resisting or obstructing an officer. Ort argues the arresting officer did not have reasonable suspicion to conduct the traffic stop of his vehicle, from which both convictions arise, and, as a result, the circuit court erred by denying his motion to suppress evidence in both cases. We disagree and affirm the judgments.

BACKGROUND

¶2 Ort was charged in Outagamie County Case No. 2014CT885 with third-offense OWI and third-offense operating with a prohibited alcohol concentration. In Outagamie County Case No. 2014CM1250, he was charged with obstructing an officer based on his conduct following the traffic stop. Ort later moved to suppress evidence in both cases, claiming he was stopped and detained in violation of his constitutional rights.

¶3 City of Kaukauna police officer Charles Vosters was the only witness to testify at the suppression hearing for both cases. Vosters testified as follows: On September 26, 2014, at 7:49 p.m., he was stopped in his squad car at a light, facing east, when a citizen witness stopped next to him in a car facing west. He recognized the person by name and had previous contacts with him, all of which were “positive.” The witness reported to Vosters that a man driving a silver truck was following the witness in his car, and the truck was swerving and tailgating the witness’s car. While Vosters was talking to the witness, a silver truck came around the corner and “almost r[a]n into the back” of the witness’s car. The truck then stopped alongside the witness’s car. Vosters asked the witness, “[I]s that the guy?” The witness responded, “Yes.” Vosters got a good look at the truck and driver. He described the truck as a “new Chevy Silverado, silver.”

¶4 The truck drove away, and the witness in his car followed it. Vosters made a U-turn to follow the truck but lost sight of it for approximately ten

seconds. However, Vosters caught up to the witness, who, Vosters testified, pointed “kind of frantically” down the road and said “right there.” Vosters looked to his left and saw the truck “traveling at a high rate of speed.” Vosters estimated the truck was traveling forty miles per hour or more in a twenty-five mile-per-hour speed zone. He did not use a radar device to determine the truck’s speed. Rather, Vosters testified that he had been patrolling the city for ten years, he had used a radar device in the past to determine how fast cars were traveling, and he could accurately identify a vehicle’s speed without radar. He explained, “You get a good understanding of what 25 miles an hour looks like, or 30 miles an hour looks like, in town, compared to a vehicle traveling significantly faster than the speed limit.”

¶5 Vosters began following the truck again. According to Vosters, it appeared to be the same vehicle. He then lost sight of the truck for “a brief period of time,” “[f]ive, 10 seconds, if that, closer to five,” due to a large hill. However, “[t]here was no car between [Vosters] and the suspect vehicle,” and as Vosters “crested the hill,” he looked down the street and “noticed the same truck parked on the side of the road with the brake lights on, or parking.” Vosters activated his squad car’s emergency lights and pulled behind the truck. As Vosters was preparing to exit his squad car, the truck’s driver fled on foot. Vosters pursued on foot and subsequently arrested the driver, who was later identified as Ort.

¶6 At the close of the suppression hearing, the circuit court found Vosters’ testimony credible. The court also found Vosters “articulated objective facts which indicate[d] the identification by [the witness] that this was the truck[,]” and “had observations that this truck was speeding and stopped him for that reason as well.” The court determined Vosters’ “observations during his pursuit of this vehicle would[,] under the totality of the circumstances[,] certainly

give him reasonable suspicion for the stop.” Accordingly, the court denied Ort’s motion to suppress evidence.

¶7 Ort pled no contest to third-offense OWI and to obstructing an officer. The remaining charge was dismissed. Ort now appeals the denial of his suppression motion. *See* WIS. STAT. § 971.31(10).

DISCUSSION

¶8 “The temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a ‘seizure’ of ‘persons’ within the meaning of the Fourth Amendment.” *State v. Gaulrapp*, 207 Wis. 2d 600, 605, 558 N.W.2d 696 (Ct. App. 1996) (citing *Whren v. United States*, 517 U.S. 806, 809-10 (1996)). “[R]easonable suspicion that a traffic law has been or is being violated is sufficient to justify all traffic stops.” *State v. Houghton*, 2015 WI 79, ¶30, 364 Wis. 2d 234, 868 N.W.2d 143. However, reasonable suspicion requires more than an officer’s “inchoate and unparticularized suspicion or ‘hunch.’” *See State v. Post*, 2007 WI 60, ¶10, 301 Wis. 2d 1, 733 N.W.2d 634 (quoting *Terry v. Ohio*, 392 U.S. 1, 27 (1968)). “Rather, the officer ‘must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant’ the intrusion of the stop.” *Id.* (quoting *Terry*, 392 U.S. at 21).

¶9 Whether an officer had reasonable suspicion to conduct a traffic stop is a question of constitutional fact to which we apply a two-step standard of review. *Id.*, ¶8. “We review the circuit court’s findings of historical fact under the clearly erroneous standard, and we review independently the application of those facts to constitutional principles.” *Id.* The burden is on the State to

establish an investigative stop is reasonable, *id.*, ¶12, and the reasonableness of the stop is determined based on the totality of the circumstances, *id.*, ¶13.

¶10 Ort argues Vosters did not have reasonable suspicion to conduct the traffic stop. He does not challenge the circuit court’s finding that Vosters observed a truck speeding or that speeding would be a reasonable basis for Vosters to stop the truck.² Rather, Ort contends that his truck is “a generic, standard pickup truck” and that “[t]here are literally hundreds of such vehicles on Wisconsin’s highways.” As a result, Ort claims, Vosters’ decision to stop what Ort characterizes as the “first silver truck he saw”—after Vosters lost sight of the truck on the hill—amounted to nothing more than a hunch that it was the same truck.

¶11 We are unpersuaded by Ort’s argument that Vosters did not have reasonable suspicion to stop Ort simply because Vosters lost sight of the truck for a brief period on a large hill. Vosters testified he observed the truck speeding after the witness identified the truck the second time. Vosters explained that at that point he followed the truck and lost sight of it for only five to ten seconds, and that no other vehicles were between his squad car and the truck. Additionally, Vosters described the truck, with particularity, as a “new Chevy Silverado, silver,” and testified that as he crested the hill, he “noticed the *same truck* parked on the side of the road[.]” (Emphasis added.) The circuit court found Vosters’ testimony credible. *See State v. Hughes*, 2000 WI 24, ¶2 n.1, 233 Wis. 2d 280, 607 N.W.2d

² Driving in excess of the fixed or posted speed limit is a traffic violation. *See* WIS. STAT. § 346.57(4) (prohibiting a person from driving at speeds in excess of fixed speed limits); *see also* § 346.57(5) (prohibiting a person from driving in excess of any speed established pursuant to law by state or local authorities and indicated by official signs).

621 (“[W]e consider the trial judge to be the ‘ultimate arbiter of the credibility of a witness,’ and will uphold a trial court’s determination of credibility unless that determination goes against the great weight and clear preponderance of the evidence.” (citation omitted)). We find no reason to disturb the circuit court’s credibility determination here.

¶12 On this record, we conclude Vosters’ decision to stop Ort’s truck was not based on a mere “hunch.” Rather, Vosters had reasonable suspicion to stop Ort’s truck based on Vosters’ observations regarding the truck’s color, make, model, and age; the lack of other vehicles between Vosters’ vehicle and the truck; and the short duration of time in which Vosters lost sight of the truck on the hill.

By the Court.—Judgments affirmed.

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

