

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**September 16, 2010**

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. 2010AP1044**

**Cir. Ct. No. 2009CV567**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**CITY OF TOMAH,**

**PLAINTIFF-RESPONDENT,**

**V.**

**MATTHEW PUDLOW,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Monroe County:  
MICHAEL J. MCALPINE, Judge. *Affirmed.*

¶1 BLANCHARD, J.<sup>1</sup> Matthew Pudlow appeals from a judgment convicting him of operating a motor vehicle while under the influence of an

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

intoxicant (OWI) as a first offense, contrary to WIS. STAT. § 346.63(1)(a), and the circuit court's order denying his motion to suppress the evidence of his intoxication. The only issue is whether the trial court erred in denying Pudlow's motion to suppress. Pudlow claimed that the investigative stop that allowed the officer to develop facts supporting probable cause for his arrest violated his constitutional protections against unreasonable seizure. We conclude that the investigatory stop was legal because police had reasonable suspicion that Pudlow had violated the traffic law prohibiting unsafe backing, contrary to WIS. STAT. § 346.87. We therefore affirm.

### **BACKGROUND**

¶2 The sole witness at the hearing on Pudlow's motion to suppress was City of Tomah Police Officer Jarrod Furlano. Officer Furlano testified that he was on duty, in uniform, in a marked squad car, during the early morning hours of July 28, 2009. At around 1:35 a.m., while parked in a parking lot on Wittig Road, the officer noticed a car, subsequently identified as being driven by Pudlow, proceeding in reverse gear near an intersection on East McCoy Boulevard, a section of Wisconsin Highway 21. By visual estimation, the officer believed that Pudlow drove in reverse at approximately thirty miles per hour. Pudlow then drove forward into the left-hand turn lane.

¶3 The intersection at which this occurred is a forty-five-mile-per-hour zone and experiences busy traffic at all hours because several twenty-four-hour businesses are located nearby. Officer Furlano was completely focused on the unusual and speedy driving in reverse and did not remember seeing any other vehicles in the vicinity. He did not see Pudlow's vehicle swerve, hit the curb, or hear the tires squeal as it was reversing.

¶4 The officer drove onto Wittig Road toward North Superior Avenue to get closer to Pudlow's vehicle because the officer was alarmed by this driving behavior. Officer Furlano stopped at the intersection of Wittig Road and North Superior Avenue and continued to watch the vehicle as it turned left from East McCoy Boulevard onto North Superior Avenue. As the car turned, the officer noticed the vehicle's engine area rise, and simultaneously heard increased engine noise, indicating to the officer that the vehicle was accelerating quickly. Pudlow's vehicle passed directly in front of the officer as it continued southbound before making another quick turn. Again, the engine rose and the engine noise increased, indicating that Pudlow was accelerating quickly through the second turn.

¶5 Officer Furlano followed Pudlow's car past several closed businesses. The officer could not recall whether or not he activated his lights and/or gave any audible signal for Pudlow to stop.<sup>2</sup> Whether or not in response to Officer Furlano's presence behind him, Pudlow pulled into the parking lot of a closed business. The officer pulled in and parked his squad car near Pudlow's car. The officer then walked over to Pudlow's parked vehicle to speak with him about his driving behavior.

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<sup>2</sup> For this reason, the circuit court appears to have assumed without deciding, for purposes of the suppression motion, that Officer Furlano, in fact, stopped Pudlow's car, and neither party suggests otherwise on appeal. We therefore follow that factual assumption, and presume a Fourth Amendment seizure of Pudlow's car in the form of an investigatory traffic stop. Similarly, turning to the scope of the police actions raised in this appeal, the parties and the circuit court assumed a seizure that, if justified as an investigatory traffic stop, did not involve conduct of the officer that went beyond that necessary to conduct such an investigatory stop and brief detention. See *Terry v. Ohio*, 392 U.S. 1, 19-20 (officer's action must be "reasonably related in scope to the circumstances which justified the interference in the first place."). Consequently, we make the same assumption.

¶6 The record is unclear about the events that led to Pudlow’s arrest for OWI, but they are not necessary for our determinations. The officer also cited Pudlow for unsafe backing, contrary to WIS. STAT. § 346.87, and operating with a prohibited alcohol concentration, contrary to WIS. STAT. § 346.63(1)(b).

¶7 The municipal court denied Pudlow’s suppression motion and found him guilty of the OWI and the unsafe backing violation. Pudlow appealed to the circuit court. The circuit court concluded, following its de novo review, that there was reasonable suspicion for the officer to stop Pudlow. It therefore denied Pudlow’s suppression motion. Following a trial to the court, the circuit court dismissed the unsafe backing citation on the grounds that the City failed to meet its burden of proof on that offense by clear, satisfactory, and convincing evidence. On our de novo review, we agree that the officer had the requisite reasonable suspicion to make an investigatory stop.

## DISCUSSION

¶8 When reviewing a denial of a suppression motion, we uphold the circuit court’s “findings of fact unless they are against the great weight and clear preponderance of the evidence.” *State v. Jackson*, 147 Wis. 2d 824, 829, 434 N.W.2d 386 (1989). We review constitutional issues de novo. *Id.* Therefore, we independently review whether the officer’s observation of Pudlow’s driving was sufficient to justify the stop of the vehicle. *See id.*

¶9 Temporary detention of individuals during the stop of a vehicle by the police constitutes a “seizure” within the meaning of the Fourth Amendment. *Whren v. United States*, 517 U.S. 806, 809-10 (1996). The United States Constitution and the Wisconsin Constitution protect citizens against unreasonable

searches and seizures without a warrant supported by probable cause. U.S. CONST. amend. IV; WIS. CONST. art. 1, § 11.

¶10 An investigatory stop, however, is reasonable and thus constitutional if the officer possesses reasonable suspicion under WIS. STAT. § 968.24.<sup>3</sup> *State v. Krier*, 165 Wis. 2d 673, 678, 478 N.W.2d 63 (Ct. App. 1991). Under § 968.24, an investigatory stop for criminal and noncriminal violations is warranted if an officer reasonably suspects, based on the totality of the circumstances, that the motorist has committed, is in the process of committing, or is about to commit an unlawful act. *Krier*, 165 Wis. 2d at 677-78. “The question of what constitutes reasonableness is a common sense test.” *State v. Anderson*, 155 Wis. 2d 77, 83, 454 N.W.2d 763 (1990). “What would a reasonable police officer reasonably suspect in light of his or her training and experience ?” *Id.* at 83-84.

¶11 Further, the officer must identify “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, 733 N.W.2d 634 (quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968)). “[P]olice officers are not required to rule out the possibility of innocent behavior before initiating a brief stop.” *Anderson*, 155 Wis. 2d at 84. This approach strikes a

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<sup>3</sup> WISCONSIN STAT. § 968.24 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.

balance between the governmental interest in preventing crime and the individual's right to be free from unreasonable governmental intrusion. *State v. Morgan*, 2002 WI App 124, ¶14, 254 Wis. 2d 602, 648 N.W.2d 23.

¶12 At the suppression hearing, Officer Furlano described several facts that led to his encounter with, and assumed stop of, Pudlow. The officer observed a vehicle reversing at approximately thirty miles per hour near a highway intersection at around 1:30 a.m. The intersection is located in a forty-five-mile-per-hour zone with several businesses in close proximity that create traffic at all hours. After reversing, the vehicle drove forward and turned left quickly at the intersection. Officer Furlano noticed the increased engine noise and the raised engine as the vehicle turned, which indicated that the driver was accelerating rapidly. The officer observed the driver accelerate rapidly through a second turn soon after.

¶13 The totality of the circumstances provided Officer Furlano with reasonable suspicion to justify an investigative stop of the vehicle in order to investigate Pudlow's driving behavior, specifically a violation of the unsafe backing law, WIS. STAT. § 346.87. Under § 346.87, "[t]he operator of a vehicle shall not back the same unless such movement can be made with reasonable safety."

¶14 Officer Furlano observed Pudlow engaged in conduct that could constitute unsafe backing, which posed a danger to any person or motorist who might have appeared in his path. Motorists may use reverse gear to back up their vehicles in a safe manner on roadways for short distances, at low speeds, under many circumstances without violating the unsafe backing statute. In contrast, the officer's uncontradicted testimony, which was not meaningfully impeached by the

defendant, was that the defendant backed up at approximately thirty miles per hour in an area in which one could expect other people or vehicles to appear. Officer Furlano described the stretch of Highway 21 where the backing occurred as being busy, even at night. Several twenty-four-hour businesses, including hotels, fast-food restaurants, and a bus station create traffic at all hours. Moreover, Pudlow reversed near a convenience store where vehicles frequently enter and exit.

¶15 In addition, it only fueled Officer Furlano's concern about the defendant's unsafe driving, and its potential cause or causes, that the defendant followed this dangerous backing maneuver by quickly accelerating forward through two successive turns.

¶16 Pudlow argues that the stop was unlawful under *State v. Longcore*, on the grounds that the officer based his stop on the officer's alleged mistake of law that Pudlow had violated the unsafe backing law. *See State v. Longcore*, 226 Wis. 2d 1, 594 N.W.2d 412 (Ct. App. 1999) (stop based on probable cause is unlawful when stop is predicated on officer's mistake of law). Pudlow claims that the officer misunderstood what conduct constitutes a violation of WIS. STAT. § 346.87 and therefore the stop was predicated on a mistake of law. As the circuit court correctly observed, *Longcore* does not apply here. If Pudlow has a complaint, it is that the officer made a mistake of fact, not law, in believing that he had either reasonable suspicion, or probable cause to believe an offense had been committed, justifying a stop.

¶17 Our decision in reviewing the circuit court's suppression determination turns on an objective review of the totality of the circumstances to determine whether an officer in the position of Officer Furlano had reasonable suspicion for a stop. *See State v. Guzy*, 139 Wis. 2d 663, 675, 407 N.W.2d 548

(1987). It is irrelevant that Officer Furlano testified that he decided to exercise his independent discretion as an officer to issue a ticket for unsafe backing only after discovering that the defendant was intoxicated. *See State v. Baudhuin*, 141 Wis. 2d 642, 651, 416 N.W.2d 60 (1987) (“As long as there was a proper legal basis to justify the intrusion, the officer’s subjective motivation does not require suppression of the evidence or dismissal.”). It is also irrelevant that the circuit court concluded at trial that the City had not met its burden in proving an actual violation of the unsafe backing statute. The circuit court applied the correct, separate standard to its trial decision. The circuit court’s trial determination need not, by logic or by rule of law, have produced the same result as its earlier suppression decision. We have no need to address the merits of the circuit court’s decision to dismiss the ticket for unsafe backing; our focus is solely only on the record facts as they relate to the suppression issue.

¶18 We conclude that the stop and brief detention of Pudlow’s vehicle did not violate Pudlow’s Fourth Amendment rights because police had, at that time, reasonable suspicion that Pudlow had violated WIS. STAT. § 346.87. Accordingly, we affirm.

*By the Court.*—Judgment affirmed.

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



