COURT OF APPEALS
DECISION
DATED AND RELEASED

June 20, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0228-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STEVEN A. HIPWOOD,

Defendant-Appellant.

APPEAL from an order of the circuit court of Dane County: STUART SCHWARTZ, Judge. *Affirmed.*

DYKMAN, J. This is a single-judge appeal decided pursuant to § 752.31(2)(c), STATS. Steven A. Hipwood appeals from an order convicting him of one count of operating a motor vehicle while under the influence of an intoxicant (OMVWI), contrary to § 346.63(1)(a), STATS. The issues are: (1) whether the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution bars criminal prosecution of Hipwood for OMVWI under § 346.63(1)(a) following an administrative suspension of his operating license; and (2) whether the request to take a field sobriety test constitutes a seizure under the Fourth Amendment where refusal to comply may be used as a factor

in determining probable cause. We conclude: (1) prosecuting Hipwood for OMVWI does not violate the Double Jeopardy Clause because an administrative agency suspension does not constitute a second punishment for double jeopardy purposes; and (2) requesting that a motorist submit to a field sobriety test does not violate the Fourth Amendment to the United States Constitution.

BACKGROUND

On June 3, 1995, Officer Darnell was patrolling the Northeast sector of Dane County when he observed a vehicle exceeding the speed limit and without any tail lights illuminated. Officer Darnell followed the vehicle. While doing so, he saw that the vehicle was weaving within its lane. Officer Darnell stopped the vehicle and when he approached the driver, Steven A. Hipwood, he noticed an odor of intoxicants. Hipwood admitted to drinking approximately six or eight alcoholic beverages that evening.

Officer Darnell asked Hipwood if he was willing to exit the vehicle in order to perform some field sobriety tests. Hipwood agreed. Based upon Officer Darnell's observations of Hipwood during the field tests and the odor of intoxicants on his breath, he concluded that Hipwood had been driving while under the influence of an intoxicant and arrested him.

Hipwood moved to dismiss the criminal charges, arguing that the Double Jeopardy Clause of the Fifth Amendment prohibited criminal proceedings against him because the administrative suspension of his operating privileges was a punishment and further prosecution would violate the Double Jeopardy Clause.

Hipwood also moved to suppress the evidence of intoxication that Officer Darnell obtained at the scene because the stop violated the Fourth Amendment. Specifically, Hipwood contended that Officer Darnell exceeded the scope of the investigation during a traffic stop by requesting him to submit

to a field sobriety test. The trial court denied Hipwood's motions. Hipwood pled no contest to OMVWI and was convicted. Hipwood now appeals.[1]

DOUBLE JEOPARDY

Hipwood's objection to this prosecution on the basis that it violates the Double Jeopardy Clause of the Fifth Amendment has been previously decided in ***State v. McMaster***, 198 Wis.2d 542, 543 N.W.2d 499 (Ct. App. 1995), *review granted*, ___ Wis.2d ___, 546 N.W.2d 468 (1996). In ***McMaster***, we held that criminal prosecution for OMVWI is not barred because the defendant's driver's license was suspended. ***Id.*** at 553, 543 N.W.2d at 503. The suspension of the license and the conviction for OMVWI did not constitute multiple punishments for purposes of double jeopardy. ***Id.*** While Hipwood correctly notes that the Wisconsin Supreme Court has accepted a petition to review ***McMaster***, until a change in law is made, ***McMaster*** is precedential and is dispositive of this issue.

FOURTH AMENDMENT VIOLATION

Not every contact between law enforcement officers and citizens constitutes a Fourth Amendment violation. ***Terry v. Ohio***, 392 U.S. 1, 19 n.16 (1968). Certain seizures are justifiable if the police have an articulable suspicion that a person has committed or is about to commit a crime. ***Florida v. Royer***, 460 U.S. 491, 498 (1983). Such suspicion must be based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." ***Terry***, 392 U.S. at 21.

Upon stopping an individual, an officer may make reasonable inquiries to dispel or confirm suspicions that justified the stop. ***Berkemer v. McCarty***, 468 U.S. 420, 439 (1984). The scope of this intrusion "will vary to some extent with the particular facts and circumstances of each case." ***Royer***, 460 U.S. at 500. However, as a general rule, an investigative stop "must be temporary

[1] Section 971.31(10), STATS., provides that "an order denying a motion to suppress evidence ... may be reviewed upon appeal from a judgment of conviction notwithstanding the fact that such statement was entered upon a plea of guilty."

and last no longer than is necessary to effectuate the purpose of the stop." ***Id.*** at 500. In other words, the length and the scope of the detention must be strictly related to, and justified by, the circumstances that rendered the initiation of the stop permissible. ***Terry***, 392 U.S. at 19.

It is undisputed that the initial stop of Hipwood was a routine traffic investigatory stop. The issue is whether this detention rose to the level of an arrest when the officer requested that Hipwood submit to a field sobriety test.

The Wisconsin Supreme Court has addressed this issue in the case of ***State v. Swanson***, 164 Wis.2d 437, 475 N.W.2d 148 (1991). In ***Swanson***, the court held that a reasonable person would not believe that he or she was under arrest simply by being requested to submit to a field sobriety test. ***Id.*** at 449, 475 N.W.2d at 153. *See also* ***Berkemer***, 468 U.S. at 437-40. Instead, the court determined that the limited scope and duration of a field sobriety test militates against a finding of a formal arrest. ***Swanson***, 164 Wis.2d at 448, 475 N.W.2d at 153. Further, the court noted that the clear implication of the request to take a field sobriety test is that if the motorist passes the test, he or she would be free to leave. ***Id.*** at 448, 475 N.W.2d at 153.

However, Hipwood argues that the proposition in ***Swanson*** has been modified by ***State v. Babbitt***, 188 Wis.2d 349, 525 N.W.2d 102 (Ct. App. 1994). In ***Babbitt***, the court held that a person's refusal to take a field sobriety test was evidence of consciousness of guilt and may be considered as a factor in determining the existence of probable cause. ***Id.*** at 359-60, 525 N.W.2d at 105. Thus, Hipwood contends that because the refusal to take a field sobriety test may be used to establish probable cause, a detained motorist is no longer free to decline to take the test when requested to do so. Accordingly, Hipwood concludes that this lack of an alternative transforms a ***Terry*** stop into an arrest as soon as the detainee is asked to submit to a field sobriety test.

Hipwood's argument fails for three reasons. First, a person is not compelled to submit to a field sobriety test simply because refusal may be considered later as a factor in establishing probable cause to arrest for driving under the influence. The court in ***Babbitt*** noted that a refusal to take a field sobriety test is never sufficient to establish probable cause; it is only one factor

that the police may consider. The ***Babbitt*** decision does not make performing a sobriety test compulsory.

Second, a request to take a field sobriety test is reasonable under the circumstances of an investigatory stop. It is a justifiable and least intrusive means to determine whether a motorist should be arrested. The length of the stop and the performance of a field sobriety test is temporary and does not impose needless delay on the motorist. Further, the scope of the detention is strictly related to and limited by the circumstances that initiated the stop. Thus, this request does not violate the scope of a ***Terry*** stop.

Last, Hipwood misreads ***Babbitt***. He asserts that ***Babbitt*** leaves open the possibility that a request to take a sobriety test may be considered a formal arrest for purposes of the Fourth Amendment. However, the ***Babbitt*** court impliedly determined that the request to take a field sobriety test was not an arrest. Otherwise, the court would not have undertaken a further discussion about whether there was probable cause to arrest after the detained motorist refused to take the test.

We conclude that the officer's request that Hipwood submit to a field sobriety test did not transform the ***Terry*** investigative stop into an arrest.

By the Court.—Order affirmed.

Not recommended for publication in the official reports. *See* RULE 809.23(1)(b)4, STATS.