COURT OF APPEALS
DECISION
DATED AND RELEASED

April 24, 1997

NOTICE

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.

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

No. 96-3129-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

WILLIAM T. ACKERMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Grant County: JOHN R. WAGNER, Judge. *Affirmed.*

ROGGENSACK, J. William T. Ackerman appeals his conviction for a third offense of operating a motor vehicle while intoxicated (OMVWI). Ackerman contends that his motion to suppress evidence was improperly denied by the trial court, and raises the following issues on appeal: (1) whether the officer impermissibly expanded the scope of his traffic stop for illegal parking to an investigation of a possible OMVWI violation; (2) whether Ackerman's detention

for sobriety tests was supported by reasonable suspicion; (3) whether Ackerman was formally arrested without probable cause when he was placed in the back of the squad car to perform field sobriety tests; and (4) whether the officer had sufficient probable cause to administer a preliminary breath test. For the reasons discussed below, this court concludes that the stop, the testing and the arrest were all proper. Accordingly, the judgment of the trial court is affirmed.[1]

BACKGROUND

In the early morning hours of February 14, 1996, during a cold snap with temperatures of approximately 20 to 30 degrees below zero, Deputy Sheriff Jay Fitzgerald of the Grant County Police Department observed Ackerman's vehicle sitting on the road, in a lane of traffic, with its lights off. Fitzgerald approached the vehicle in his squad car in order to ascertain whether the occupants were stranded or needed help. As Fitzgerald pulled up, Ackerman turned on his lights and began driving away. Fitzgerald turned his red and blue emergency lights on and pulled Ackerman over.

When Ackerman rolled down his window to speak with Fitzgerald, the officer smelled the odor of intoxicants, and noticed some beer cans on the floor of the vehicle. Ackerman's wife was seated in the passenger side. Fitzgerald asked Ackerman for identification, and watched him fumble through his checkbook for his license. Ackerman explained that he had been parked on the road waiting for his windows to defrost. Fitzgerald asked Ackerman how much he had had to drink, and Ackerman admitted that he had had six beers. Due to the cold, Fitzgerald asked Ackerman to sit in the front passenger seat of his squad car in

[1] This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

order to perform some field sobriety tests, and noticed that Ackerman was unsteady on his feet as he walked back to the squad car.

In the squad car, Fitzgerald began by having Ackerman recite the alphabet. The officer noticed that Ackerman skipped letters G and N, his speech was slurred, and his eyes were red. Fitzgerald next asked Ackerman to perform the finger dexterity test, but Ackerman refused, stating that he could not perform that test because his hands were too big. Ackerman then submitted to Fitzgerald's request to take a PBT, which registered .21%. Fitzgerald then placed Ackerman under arrest for OMVWI. Fitzgerald transported Ackerman to the Grant County Sheriff's Department, where he administered an intoxilyzer test indicating the defendant had .21 grams of alcohol per 210 liters of breath.

Ackerman was charged with one count of OMVWI, contrary to § 346.63(1)(a), STATS., and one count of operating with a prohibited alcohol concentration (PAC) contrary to § 346.63(1)(b). He moved to suppress all evidence gained during or after his traffic stop, on the grounds that the arresting officer had exceeded the permissible scope of the traffic stop without reasonable suspicion to do so; that Ackerman had been formally arrested without probable cause before the administration of the field dexterity tests; and that the administration of the PBT had not been supported by probable cause. After the trial court denied his motion to suppress, Ackerman pleaded no contest to OMVWI, and the PAC count was dismissed. The trial court adjudged Ackerman guilty, fined him $2,602, revoked his license for 36 months, ordered an alcohol assessment, and sentenced him to 245 days in jail with Huber privileges, subject to a forty-five day reduction for cooperating in an alcohol treatment program.

DISCUSSION

Standard of Review.

Whether Ackerman's arrest was valid presents a mixed question of fact and law. The trial court's findings on disputed factual issues will be upheld unless clearly erroneous. Section 805.17(2), STATS. Whether those facts establish reasonable suspicion or probable cause to arrest are questions of law which we review *de novo*. ***State v. Richardson***, 156 Wis.2d 128, 137-38, 456 N.W.2d 830, 833 (1990); ***State v. Babbitt***, 188 Wis.2d 349, 356, 525 N.W.2d 102, 104 (Ct. App. 1994). Likewise, the level of suspicion required to fulfill the statutory prerequisite for requesting that a driver submit to a PBT is a question of law reviewed without deference to the trial court. *See* ***State v. Nordness***, 128 Wis.2d 15, 36, 381 N.W.2d 300, 305-06 (1986).

Permissible Scope of the Traffic Stop.

The Fourth Amendment prohibits the unreasonable seizure of a person without a warrant supported by probable cause. U.S. CONST., amend. IV. The detention of a motorist by police for a routine traffic stop constitutes a "seizure" of a person within the meaning of the Constitution. ***Berkemer v. McCarty***, 468 U.S. 420, 436-37 (1984). However, such a detention is not "unreasonable" if it is brief in nature, and is justified by a reasonable suspicion that the motorist has committed or is about to commit a crime. ***Id.*** at 439.

Ackerman concedes on appeal that Fitzgerald had reasonable suspicion to stop him for illegally parking in the traffic lane of a highway. However, he contends that the purpose of his detention was limited to investigating that traffic violation; and therefore Fitzgerald exceeded the

permissible scope of the stop when he asked him whether he had been drinking. We disagree. Recent Fourth Amendment cases conclude that the scope of the stop need not be limited to the initial reason for the stop, if the period of detention is not unreasonably extended past the length of time required for the initial stop. *See, e.g.,* ***United States v. Shabazz***, 993 F.2d 431, 436-38 (5th Cir. 1993). Police questioning on a subject unrelated to the initial reason for the stop does not violate the constitution unless it unreasonably extends the duration of the detention. ***State v. Gaulrapp***, 207 Wis.2d 598, 607, 558 N.W.2d 696, 700 (Ct. App. 1996). ***Gaulrapp*** is consistent with the Supreme Court's conclusion that no constitutional violation occurs when police ask a motorist stopped for speeding to consent to a search of his car for drugs, and he agrees. *See* ***Ohio v. Robinette***, 117 S.Ct. 417 (1996).

As in ***Gaulrapp*** and ***Robinette***, Fitzgerald's asking about the amount of alcohol which Ackerman had consumed did not extend the duration of his detention, and did not exceed the permissible scope of the stop. Indeed, the officer may have been remiss if he had failed to inquire about the source of the odor of intoxicants and simply sent the driver on his way. Nonetheless, the administration of field sobriety tests did extend the duration of the stop beyond what could be justified by Ackerman's illegal parking. Therefore, the appellant is correct that his removal from his vehicle for sobriety testing must have been supported by independent reasonable suspicion that he had been driving while intoxicated. ***Robinette***, 117 S.Ct. at 420.

Reasonable Suspicion to Expand Scope of Stop.

Under ***Terry v. Ohio***, the reasonable suspicion necessary to detain a suspect for investigative questioning must rest on specific and articulable facts,

along with rational inferences drawn from those facts, sufficient to lead a reasonable person to believe that criminal activity may be afoot, and that action would be appropriate. ***Terry v. Ohio,*** 392 U.S. 1, 22 (1968). "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, 390 (1989). The test is designed to balance the personal intrusion into the suspect's privacy occasioned by the stop against the societal interests in solving crime and bringing offenders to justice. ***State v. Guzy***, 139 Wis.2d 663, 680, 407 N.W.2d 548, 556 (1987).

Ackerman argues that, because Wisconsin has declined to adopt a "not a drop" law, it is insufficient for an officer to have a reasonable suspicion that a driver has been drinking; he must have reason to suspect that the driver has drunk more than the legal limit. However, Ackerman's contention ignores the focus upon reasonableness with which this court views an officer's actions. Police officers do not need to rule out the possibility of innocent behavior before they carry out an investigative stop. ***State v. Anderson***, 155 Wis.2d 77, 84, 454 N.W.2d 763, 766 (1990). "[S]uspicious conduct by its very nature is ambiguous, and the principle function of the investigative stop is to quickly resolve that ambiguity." ***Id***. The sobriety tests are a reasonable method for an officer to resolve his suspicion that a motorist has been driving while intoxicated.

Examining the facts of the present case, we conclude that Fitzgerald had ample basis from which to form a reasonable suspicion that Ackerman had been driving while intoxicated before he asked him to step from his car. Not only did Ackerman smell of intoxicants and admit drinking six beers, but he had parked his car on a highway, without lights, and then tried to drive away when he saw the

police car. Flight from police may be considered as an indication of *mens rea*, or a guilty mind, and give rise to a reasonable suspicion, in and of itself. ***Anderson***, 155 Wis.2d at 79, 454 N.W.2d at 764.

Moment of Formal Arrest.

While an officer who has reasonable suspicion that a person has been driving while under the influence is entitled to have the suspect perform tests which would either confirm or dispel the officer's suspicions, *see* ***Terry***, 392 U.S. at 22, the police may not "seek to verify their suspicions by means that approach the conditions of arrest." ***Florida v. Royer***, 460 U.S. 491, 499 (1983). An arrest occurs when "a reasonable person in the defendant's position would have considered himself or herself to be 'in custody,' given the degree of restraint under the circumstances." ***State v. Swanson***, 164 Wis.2d 437, 446-47, 475 N.W.2d 148, 152 (1991). This is an objective test, focusing on what the officer's actions and words would reasonably have communicated to the defendant, rather than the subjective belief of either the officer or the defendant. ***Id***. Therefore, in order for a suspect to be detained short of arrest during an investigatory traffic stop, the stop must be brief and public in nature. ***Berkemer***, 468 U.S. at 438 (1984). In addition, Wisconsin requires that investigative questioning "be conducted in the vicinity where the person was stopped." Section 968.24, STATS.

Ackerman's detention in the squad car in order to perform sobriety tests fell short of formal arrest. Ackerman was not handcuffed, and was not told that he was under arrest. He was asked to sit in the front passenger seat of the officer's car. All of these facts are contrasted by Ackerman's treatment after he failed the sobriety tests, when he was told he was under arrest, handcuffed and placed in the back of the squad car. In addition, while sobriety tests are typically

performed on the roadside, it was entirely reasonable, in light of the dangerously cold weather conditions, to perform them in the relative warmth of the squad car. And we note that the squad car was certainly "within the vicinity" of the traffic stop as required by § 968.24, STATS. Therefore, a reasonable person in Ackerman's position would have understood that the officer was still in the process of gathering information, and that if Ackerman were able to demonstrate that he was not intoxicated by successfully performing the sobriety tests, he would be allowed to go.

This does not mean that Ackerman should have felt free to leave while the sobriety tests were being performed. As discussed above, the officer had reasonable suspicion sufficient to detain Ackerman temporarily while he investigated his suspicion that Ackerman had been driving under the influence. But the facts simply do not show that Ackerman's detention or the degree of restraint ripened into formal arrest until after he had failed the sobriety tests and PBT.

Level of Probable Cause Required to Administer a PBT.

Taking a breath sample from a suspected drunk driver constitutes a search and seizure under the United States and Wisconsin constitutions. ***Milwaukee County v. Proegler***, 95 Wis.2d 614, 623, 291 N.W.2d 608, 612 (Ct. App. 1980). However, consent constitutes a well-recognized exception to the rule against admitting evidence seized from a warrantless search. *See* ***State v. Douglas***, 123 Wis.2d 13, 22, 365 N.W.2d 580, 584 (1985). In this case, Ackerman voluntarily gave Fitzgerald the breath sample which he requested, thus eliminating any constitutional concerns. Therefore, despite Ackerman's contentions to the contrary, the only question before this court concerning the administration of the

PBT is whether Fitzgerald had the statutory authority to request the breath sample in the first place.

By virtue of Wisconsin's regulatory scheme, a law enforcement officer may request an individual to submit to a PBT when the officer has "probable cause to believe" that the individual has violated § 346.63(1), STATS. The result of the PBT then becomes part of the totality of circumstances which the officer may consider in determining whether to arrest. Section 343.303, STATS.; ***State v. Beaver***, 181 Wis.2d 959, 969, 512 N.W.2d 254, 258 (Ct. App. 1994); ***County of Dane v. Sharpee***, 154 Wis.2d 515, 520, 453 N.W.2d 508, 511 (Ct. App. 1990).

Ackerman attempts to equate the probable cause necessary to request a PBT under § 343.303, STATS., with the probable cause necessary to arrest a motorist for driving under the influence, citing cases such as ***State v. Krause***, 168 Wis.2d 578, 484 N.W.2d 347 (1992) and ***State v. Swanson***, 164 Wis.2d 437, 475 N.W.2d 148 (1991) to support his position that Fitzgerald lacked probable cause to believe that he had violated § 346.63(1), STATS. No appellate decision has directly addressed the quantum of proof necessary to sustain the probable cause which § 343.303 requires prior to requesting a PBT. When we construe a statute, our aim is to ascertain the intent of the legislature, looking first to the language of the statute itself. ***State v. Eichman***, 155 Wis.2d 552, 566, 456 N.W.2d 143, 149 (1990). We must determine whether a statute is clear and unambiguous on its face or whether the language of the statute is capable of being understood by reasonably well informed persons in two or more ways and is therefore ambiguous. *See* ***D.S. v. Racine County***, 142 Wis.2d 129, 134, 416 N.W.2d 292, 294 (1987). When a statute is ambiguous, we will look to the scope, subject matter and object of the statute to discern the legislative intent. We must interpret the

statute to avoid an absurd or unreasonable result. ***DeMars v. LaPour***, 123 Wis.2d 366, 370, 366 N.W.2d 891, 893 (1985).

Following this methodology, we first note that § 343.303, STATS., refers to "probable cause to believe" that a driver has violated § 346.63(1), STATS., rather than "probable cause to arrest." Therefore, it is not clear that the term, "probable cause," has the same meaning in both contexts. Because "probable cause" is a term of art which could be understood in more than one way by reasonably well informed people, we turn to the scope, subject matter and object of the statute in order to discern its proper interpretation.

The purpose of the implied consent law is to facilitate the taking of tests for intoxication, not to inhibit the ability of the State to remove drunken drivers from the highway. ***Scales v. State***, 64 Wis.2d 485, 494, 219 N.W.2d 286, 292 (1974). In light of that purpose, the law should be liberally construed "to give a police officer the authority to request a driver to submit to a PBT." ***Beaver***, 181 Wis.2d at 969, 512 N.W.2d at 258. Furthermore, the statute is designed to allow an officer to administer the PBT *before* requesting other chemical tests whose results would be admissible in court. We conclude that, given the statutory scheme, the quantum of proof required for an officer to have "probable cause," sufficient to request a PBT under § 343.303, STATS., can be no greater than that level of proof required to sustain the degree of probable cause necessary to support the arrest element at a refusal hearing, pursuant to § 343.305(9)(a)5.a., STATS.

This court has already held that the quantum of proof necessary to sustain probable cause at a refusal hearing is significantly less than that required to

sustain probable cause at a suppression hearing.[2] ***State v. Wille***, 185 Wis.2d 673, 681, 518 N.W.2d 325, 328 (Ct. App. 1994). At a refusal hearing, the State must simply show that the officer's belief is plausible. A court does not weigh evidence for and against probable cause or determine the credibility of witnesses, as is done at a suppression hearing. ***Id.*** Additionally, a court properly takes into account the officer's knowledge, training, and prior personal and professional experiences, when determining if his belief is plausible. *See* ***State v. DeSmidt***, 155 Wis.2d 119, 134-35, 454 N.W.2d 780, 787 (1990), *citing* ***United States v. Crozier***, 777 F.2d 1376, 1380 (9th Cir. 1985).

When he administered the PBT, Fitzgerald knew that Ackerman smelled of intoxicants; he admitted to having drunk six beers; he had red eyes and slurred speech. He was unable to accurately recite the alphabet and had difficulty walking and getting his driver's license out; he declined to perform the finger dexterity test; and he had tried to drive away when the officer arrived. We conclude the totality of these circumstances make the officer's belief that Ackerman had violated § 346.63, STATS., entirely plausible. Fitzgerald had probable cause to believe that Ackerman was driving while intoxicated, and properly requested that he submit to a PBT under § 343.303, STATS.

CONCLUSION

Fitzgerald properly pulled Ackerman over to investigate why he had been parked in the traffic lane of a highway, at night, with his lights off. Fitzgerald

[2] An officer must have probable cause to arrest a driver for operating in contravention of § 346.63(1), (2m), or (5), STATS., before he or she can request a chemical test under § 343.305(3), STATS., the refusal of which sets the stage for a refusal hearing under § 343.305(9).

did not exceed the scope of the traffic stop when, upon smelling the odor of intoxicants, he asked Ackerman how much he had had to drink. When Ackerman answered that he had had six beers, and demonstrated difficulty getting out his license, Fitzgerald had sufficient reasonable suspicion that Ackerman was intoxicated to require him to step out of his vehicle to perform sobriety tests. Given the frigid temperatures, it was not unreasonable for Fitzgerald to perform the sobriety tests in the front seat of his squad car, and the degree of restraint of Ackerman did not ripen into formal arrest at that time. When Ackerman, whose eyes were red and speech was slurred, was also unable to recite the alphabet, those facts, in conjunction with all the other information which the officer had at that time, gave him probable cause to believe that Ackerman had violated § 346.63(1)(a), STATS., and thus gave him statutory authority to request Ackerman to submit to a PBT. The results of the PBT were properly considered as part of the totality of the circumstances giving Fitzgerald probable cause to arrest Ackerman.

By the Court.—Judgment affirmed.

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