

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 27, 2005

Cornelia G. Clark
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. 2004AP3351-CR

Cir. Ct. No. 2003CF159

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RONALD E. ASHMORE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Grant County:
GEORGE S. CURRY, Judge. *Affirmed.*

Before Dykman, Deininger and Higginbotham, JJ.

¶1 PER CURIAM. Ronald Ashmore appeals his convictions for a fourth offense of operating a motor vehicle while intoxicated with a passenger under the age of sixteen (OWI-4th) and disorderly conduct. He challenges the

denial of his pretrial suppression motion, claiming the police lacked reasonable suspicion to detain him. We reject Ashmore's arguments and affirm.

BACKGROUND

¶2 Two police officers observed Ashmore's vehicle around 12:30 a.m., first traveling between five to ten miles an hour on an access road and then pulling into the parking lot of a bowling alley which was closed for the night and had been recently burglarized. They followed and parked their squad car behind Ashmore's parked vehicle in the parking lot, without turning on their siren or flashing lights. One of the officers exited the squad car and approached Ashmore, while the other activated the squad video camera and radioed Ashmore's license plate into dispatch. When the second officer exited the squad car, she heard the first officer asking Ashmore to exit his vehicle. The second officer noticed that Ashmore appeared disheveled and unsteady as he exited his vehicle, his eyes were bloodshot and glassy, his speech was slurred and his breath had an odor of intoxicants. After a brief conversation during which Ashmore admitted that he was not within his occupational license hours and one of the officers checked Ashmore's driver's license, the second officer asked Ashmore to take a preliminary breath test. When he refused, the officer informed Ashmore he was under arrest for operating after revocation.

DISCUSSION

¶3 The Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution prohibit unreasonable searches and seizures. *See State v. Drogsvold*, 104 Wis. 2d 247, 264, 311 N.W.2d 243 (Ct. App. 1981). The detention of a motorist by a law enforcement officer may constitute a "seizure" for Fourth Amendment purposes. *See Berkemer v.*

McCarty, 468 U.S. 420, 436-37 (1984). Law enforcement officers do not violate the Fourth Amendment merely by approaching an individual on the street or in a public place and asking him if he is willing to answer some questions, however. A person is seized only when his freedom of movement is restrained by means of physical force or a show of authority such that, in the view of the circumstances surrounding the incident, a reasonable person would believe that he was not free to leave. *United States v. Mendenhall*, 446 U.S. 544, 553 (1980); *State v. Williams*, 2002 WI 94, ¶20, 255 Wis. 2d 1, 646 N.W.2d 834.

¶4 Moreover, such detention is not “unreasonable” if the stop is brief in nature, and justified by a reasonable suspicion that the motorist has committed, or is about to commit, a crime. *See* U.S. CONST. amend. IV; *Berkemer*, 468 U.S. at 439; *see also* WIS. CONST. art. I, § 11; WIS. STAT. § 968.24 (2003-04).¹ According to *Terry v. Ohio*, 392 U.S. 1 (1968), the reasonable suspicion necessary to detain a suspect for investigative questioning must be based on specific and articulable facts, together with rational inferences drawn from those facts, sufficient to lead a reasonable law enforcement officer to believe that criminal activity may be afoot, and that action would be appropriate. *Id.* at 21-22. “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 (1989).

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶5 When we review a suppression motion, we will defer to the trial court's credibility determinations and will uphold its findings of fact unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2); *State v. Eckert*, 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996). We will independently determine, however, whether the facts establish that a particular search or seizure violated constitutional standards. *See State v. Richardson*, 156 Wis. 2d 128, 137-38, 456 N.W.2d 830 (1990).

¶6 Here, we agree with the trial court that the police did not effect a traffic stop merely by parking behind Ashmore's vehicle and approaching it to initiate a conversation, since they had not directed Ashmore to pull over. The earliest point at which Ashmore could be considered detained for Fourth Amendment purposes was when the first officer asked him to step out of his car. Although the first officer did not testify at the suppression hearing, it was immediately apparent to the second officer that Ashmore was exhibiting signs of intoxication. It is fair to infer that those signs were also immediately apparent to the first officer before he asked Ashmore to step out of the vehicle.² Taken in conjunction with Ashmore's unusually slow rate of speed driving along a frontage road, we are satisfied that the police had a reasonable suspicion that Ashmore had been driving under the influence by the time they detained him for additional questioning outside of his vehicle. Ashmore does not dispute that the officers collected sufficient information during the ensuing detention to give them

² The first officer confirmed this inference at the trial, where he testified that he could smell a strong odor of intoxicants emanating from the vehicle even as he approached it, and that he noticed Ashmore's eyes were bloodshot and glassy and his speech was slurred before asking him to step out of the car.

probable cause to arrest on a variety of charges. We therefore conclude the trial court properly denied Ashmore's suppression motion.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

