

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**October 19, 2006**

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. 2006AP745-CR**

Cir. Ct. No. 2005CT64

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**AUSTEN D. WAYNE,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Crawford County:  
MICHAEL KIRCHMAN, Judge. *Affirmed.*

¶1 VERGERONT, J.<sup>1</sup> Austen Wayne appeals a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant (OWI) contrary to WIS. STAT. § 346.63(1)(a). He contends that the circuit court

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

erred in denying his motion to suppress evidence on grounds of an unlawful detention, because Wayne asserts, his detention for eight minutes prior to the initiation of any investigation was not reasonable and his arrest was not supported by probable cause. We conclude the detention was reasonable and there was probable cause to arrest him for OWI. We therefore affirm.

## BACKGROUND

¶2 Cale Woodhouse, deputy sheriff for Crawford County, arrested Wayne for OWI in the early morning of July 24, 2005. A criminal complaint charged Wayne with OWI, third offense, and operating a motor vehicle with a prohibited alcohol concentration (PAC) contrary to WIS. STAT. § 346.63(1)(b), third offense. Wayne moved to suppress evidence on two grounds: (1) after he was detained by Deputy Woodhouse, no investigation was undertaken for at least eight minutes; and (2) there was no probable cause to arrest him.

¶3 Deputy Woodhouse was the only witness at the hearing on the motion to suppress. He testified as follows. He had been a certified law enforcement officer in the State of Wisconsin since 1996—five years in his current position and, before that, four years as a law enforcement officer in other municipalities and with the Wisconsin DNR. He stopped Wayne’s vehicle as it was driving on State Highway 18 in the city of Prairie du Chien. Wayne’s vehicle was in front of his squad car and was “deviating in its lane, [crossing] the dividing line, [and crossing] over the center.” The officer also observed a white truck driving next to Wayne’s car; the white truck was “weaving, [and] deviating from the lane of traffic.” Deputy Woodhouse activated his emergency lights and pulled Wayne’s vehicle over; the truck at that point was behind the squad car and continued traveling.

¶4 Erin Baka, a second-year police science student at Southwestern Technical College, was a passenger in Deputy Woodhouse's squad car pursuant to a ride-along agreement. She was not in uniform and had neither a weapon nor a night stick. After Deputy Woodhouse pulled his squad car up behind Wayne's vehicle, he told Baka to get out of the car and stay with Wayne's vehicle until he returned. Deputy Woodhouse then followed the white truck and stopped it approximately three blocks away. He contacted dispatch to have an officer sent to that location; when the officer arrived, he returned to Wayne's vehicle. Deputy Woodhouse estimated that approximately eight minutes had elapsed between the time he stopped Wayne's vehicle and the time he returned to it.

¶5 When Deputy Woodhouse returned to Wayne's vehicle, Wayne was still in his car. Baka spoke to Deputy Woodhouse briefly and said she was familiar with Wayne from previous personal experiences; she said he appeared to be "under the influence ... [and] had asked her if there was anything that could be done." Deputy Woodhouse got out of his squad car and went to speak to Wayne. He observed Wayne to have slurred speech and an odor of an intoxicant on his person. Deputy Woodhouse asked Wayne if he had consumed any intoxicants and Wayne answered that "he'd had a couple." On cross-examination, Deputy Woodhouse acknowledged that he did not note that in his report.

¶6 Deputy Woodhouse asked Wayne to get out of his vehicle and asked him to take field sobriety tests. Wayne indicated that he would. Deputy Woodhouse first performed the horizontal gaze nystagmus (HGN) test, which he had been trained and certified to perform. This test checks how the eyes track a stimulus; there are six "clues" that are or may be indications of being under the influence of an intoxicant. Deputy Woodhouse observed all six clues. On cross-examination, Deputy Woodhouse acknowledged that he held the "stimulus"

approximately two feet away from Wayne's eyes, even though he was trained to hold it twelve to fifteen inches away from the subject's nose.

¶7 Deputy Woodhouse next had Wayne perform the "walk-and-turn test." This test involves taking nine steps, touching the toe of one foot to the heel of the other foot, and then turning around and taking nine steps back. After explaining and demonstrating the test to Wayne, Wayne performed the test. Wayne did not walk in a straight line, but stepped off to the side and had trouble balancing. Deputy Woodhouse testified on direct that Wayne stepped off the imaginary straight line on which he was supposed to be walking "probably four" times, but on cross-examination he acknowledged that he did not state this in his report. Deputy Woodhouse also testified that on the walk-and-turn test, Wayne had poor balance, tipping to one side as he stepped on a couple of occasions. On cross-examination, Deputy Woodhouse testified that failure to maintain balance was an "indicator" of intoxication, although he was not sure whether it was one of the eight standardized clues for this test; he believed that two out of eight standardized clues on this test indicated a probability of being under the influence of an intoxicant when combined with the other field sobriety tests.

¶8 The third field sobriety test Deputy Woodhouse had Wayne perform was the one-leg stand. This test involves standing with one's feet together, arms at one's side, raising whichever foot one prefers about six inches off the ground, and counting out loud while looking at your foot. Deputy Woodhouse explained and demonstrated this test to Wayne. Wayne put his foot down on three occasions during the test, had a difficult time balancing, raised his arms for balance, and "went way off to the side." On cross-examination, Deputy Woodhouse acknowledged that he did not note in his report that Wayne raised his arms and hopped during the test. For this test, there are four clues that indicate intoxication

and one of them is putting one's foot down. Deputy Woodhouse acknowledged that, no matter how many times one puts one foot down, this counts as just one clue; research indicates that in order to draw any conclusions on this test, two out of the four clues should be exhibited.

¶9 After Wayne had completed the three field sobriety tests, Deputy Woodhouse asked Wayne how he thought he did on them and Wayne's response was that "he didn't pass." Deputy Woodhouse estimated that from the time he asked Wayne to exit the vehicle until the time he placed him back in his squad car, twenty to twenty-five minutes elapsed.

¶10 After Deputy Woodhouse's testimony, the court summarized its factual findings, accepting the officer's testimony. In particular, it accepted Deputy Woodhouse's testimony that the defendant stated that he had been drinking. With respect to the field sobriety tests, the court found that Wayne did not "do well on these tests, especially the HGN." The court stated that the HGN was "not done, apparently, strictly according to the National Traffic Highway Safety Administration's standards" but nonetheless found that it was "effective in determining clues as to whether [Wayne] was under the influence."

¶11 The court concluded that Deputy Woodhouse was justified in stopping Wayne's vehicle because of the deviation within the lane and over the centerline. The court also concluded that it was reasonable for Deputy Woodhouse to leave the scene, follow the white truck, and return in eight minutes. The court stated that, based on Deputy Woodhouse's testimony, twenty to twenty-five minutes elapsed from the time he returned to the vehicle to the time he placed Wayne in his squad car and, thus, the entire length of the stop was approximately one-half hour. Finally, the court concluded that, based on all the information the

officer had, he had probable cause to arrest Wayne for OWI. The court denied Wayne's motion to suppress evidence.

¶12 Pursuant to a plea agreement, Wayne pleaded no-contest to OWI, third offense, and the State dismissed the PAC charge. The court accepted Wayne's plea and sentenced him to 125 days in jail with *Huber* privileges, license revocation for thirty-six months, alcohol assessment and fines and forfeitures totaling \$2,682.

## DISCUSSION

¶13 When we review a circuit court's decision on a motion to suppress evidence, we accept the circuit court's findings of fact unless they are clearly erroneous, but whether the facts fulfill the applicable constitutional standard is a question of law, which we review de novo. *State v. Fields*, 2000 WI App 218, ¶9, 239 Wis. 2d 38, 619 N.W.2d 279.

¶14 We first address Wayne's contention that his detention was unreasonable because he was detained eight minutes before Deputy Woodhouse began the investigation. In order to justify an investigatory seizure under the Fourth Amendment, the police must "have a reasonable suspicion, grounded in specific articulable facts and reasonable inferences from those facts, that an individual is [or was] violating the law." *State v. Colstad*, 2003 WI App 25, ¶8, 260 Wis. 2d 406, 659 N.W.2d 394 (citation omitted).

For the stop of a person to pass constitutional muster as investigatory, the detention must be temporary and last no longer than is necessary to effect the purpose of the stop. "Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." A hard and fast time limit rule has been rejected. In assessing a detention for purposes of determining whether it was too

long in duration, a court must consider “whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it is necessary to detain” the suspect. In making this assessment, courts “should not indulge in unrealistic second-guessing.” In assessing a detention’s validity, courts must consider the “totality of the circumstances—the whole picture,” because the concept of reasonable suspicion is not “readily, or even usefully, reduced to a neat set of legal rules.” The manner in which a temporary detention of a suspect is created must be gauged by a standard of reasonableness.

*State v. Wilkens*, 159 Wis. 2d 618, 625-26, 465 N.W.2d 206 (footnotes omitted, citations omitted).

¶15 Wayne does not contend that there was an absence of reasonable suspicion to stop him. Nor does he contend that the overall length of his detention was unreasonable. His sole objection is that he was required to wait for eight minutes with Baka while Deputy Woodhouse went after the white truck. However, an officer who has made a stop supported by reasonable suspicion may require the detained person to wait while the officer performs other tasks if that is reasonable under the circumstances. *See Colstad*, 260 Wis. 2d 406, ¶¶17-18 (officer reasonably directed detained person to wait while the officer provided medical assistance to the injured person and performed tasks related to the accident scene). We agree with the circuit court that Deputy Woodhouse acted reasonably in directing Baka to wait with Wayne while he stopped another vehicle that was driving erratically and made sure that another officer took over with that driver; had Deputy Woodhouse not done so, the erratic driving might have resulted in an accident. The resulting length of delay in the investigation of Wayne’s circumstances was short—eight minutes—and no longer than necessary to accomplish the reasonable purpose.

¶16 Because it was reasonable for Deputy Woodhouse to have Wayne wait with Baka for eight minutes before he began questioning Wayne, that time period did not transform the investigative stop into an a de facto arrest. *See id.*

¶17 We next consider Wayne’s contention that, when Deputy Woodhouse arrested Wayne, he did not have probable cause to believe Wayne was driving while under the influence of an intoxicant. “In determining whether probable cause exists, we must look to the totality of the circumstances to determine ‘whether the arresting officer’s knowledge at the time of the arrest would lead a reasonable police officer to believe ... that the defendant was operating a motor vehicle while under the influence of an intoxicant.’” *State v. Babbitt*, 188 Wis. 2d 349, 356, 525 N.W.2d 102 (Ct. App. 1994) (citation omitted). Probable cause is neither a technical nor a legalistic concept; rather, it is a “flexible, common-sense measure of the plausibility of particular conclusions about human behavior.” *State v. Petrone*, 161 Wis. 2d 530, 547-48, 468 N.W.2d 676 (1991), *cert. denied*, 502 U.S. 925 (1991). While the circumstances within the arresting officer’s knowledge need not be sufficient to make the defendant’s guilt more probable than not, the defendant’s guilt must be more than a possibility for the arrest to be constitutional. *State v. Paszek*, 50 Wis. 2d 619, 625, 184 N.W.2d 836 (1971). We conclude Deputy Woodhouse did have probable cause.

¶18 From Wayne’s slurred speech, the odor of intoxicants, and his acknowledgment that “he’d had a couple,” a reasonable officer could infer that Wayne had recently been consuming alcohol. From Wayne’s driving—weaving in the lane and crossing the centerline—and his performance on the field sobriety tests, a reasonable officer could conclude that Wayne had consumed enough alcohol to impair his ability to drive safely. *See* WIS. STAT. § 346.63(1)(a)



(“[u]nder the influence of an intoxicant ... to a degree which renders [one] incapable of safely driving”).

¶19 Wayne argues that the HGN test did not show any impairment because Deputy Woodhouse did not hold the stimulus the requisite twelve-to-fifteen inches from his (Wayne’s) nose. However, even if we disregard this test, Wayne’s unsteadiness and lack of balance on the other two tests indicate some impairment. Regardless of the exact number and definition of “clues,” unsteadiness and lack of balance are common-sense indicators of impairment because of alcohol consumption.

#### CONCLUSION

¶20 Because the investigatory stop was based on reasonable suspicion and was conducted in a reasonable manner and because Wayne’s arrest was supported by probable cause, the circuit court properly denied the motion to suppress.

*By the Court.*—Judgment affirmed.

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

