COURT OF APPEALS
DECISION
DATED AND FILED

March 28, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

No. 00-2437

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

CITY OF OSHKOSH,

PLAINTIFF-RESPONDENT,

V.

ROBERT M. SHEETS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Winnebago County: WILLIAM E. CRANE, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

¶1 SNYDER, J.[1] Robert M. Sheets appeals from a judgment of conviction for operating a motor vehicle with a prohibited alcohol concentration

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

(first offense) and from orders denying his suppression motion and for an adjournment of the trial. While we hold that the arresting officer had reasonable suspicion to stop Sheets, we conclude that the motion for an adjournment was improperly denied. We therefore reverse the order denying the adjournment and the judgment, and order a new trial.

FACTS

¶2 At approximately 1:50 a.m. on February 13, 2000, Officer Timothy Zielicke of the City of Oshkosh Police Department was on patrol and driving on North Main Street in the City of Oshkosh. At that time, it was lightly snowing, with approximately one inch of snow on the ground. Zielicke noticed a vehicle directly in front of him fishtailing in the lane of traffic. Zielicke observed the vehicle, a "larger SUV," fishtail about four times for approximately 150 feet.

¶3 Zielicke noticed that the vehicle was "taking up for sure the entire lane that it was driving in" and on at least one occasion crossed into the oncoming lane. Despite the snow, Zielicke himself did not have any trouble maintaining traction and did not note any reason, other than the light snow, for the driving behavior.

¶4 Based upon this driving behavior, Zielicke stopped the vehicle and identified Sheets by his driver's license. Zielicke immediately noted an odor of intoxicants on Sheets's breath when he spoke; after questioning, Sheets stated that earlier he had been drinking at a bar with his wife. Sheets stated that he and his wife had consumed approximately two pitchers of beer and were now returning home.

¶5 Based upon his observations and Sheets's statements, Zielicke asked Sheets to perform some field sobriety tests. Sheets failed three out of four of these

tests. Zielicke then placed Sheets under arrest for operating a motor vehicle while under the influence of an intoxicant. Sheets was also cited for operating a motor vehicle with a prohibited alcohol concentration.

¶6 On March 15, 2000, Sheets moved to suppress evidence based upon a lack of reasonable suspicion to detain him. A hearing on this motion was held on April 17, 2000. The trial court denied the motion, finding reasonable suspicion to stop Sheets's vehicle.

¶7 At the conclusion of this hearing, the trial court addressed scheduling. Sheets had previously asked the court for an adjournment of the scheduled April 24, 2000 trial because his attorney had a conflict. The trial court maintained that the jury trial would be the following week. Immediately thereafter the City asked for an adjournment due to witness unavailability. The trial court then granted the City's request for an adjournment, rescheduling the trial for June 12, 2000. When June 12, 2000 was mentioned as the next trial date, Sheets's attorney immediately stated that he had a witness who was not available on that date. The trial court stated, "I cannot – I am running out of days. In June we are in intake so we don't have a lot of jury dates so that is our jury date for June."

¶8 The morning of trial, Sheets again asked for an adjournment "to facilitate the availability of an expert witness." Sheets informed the court that his expert witness, who would testify regarding absorption elimination of alcohol and Sheets's placement on a blood alcohol curve, was not available that day. The trial court again denied the request for an adjournment.

¶9 A jury found Sheets not guilty of operating a motor vehicle while under the influence of an intoxicant, but guilty of operating a motor vehicle with a

prohibited alcohol concentration. Sheets appeals the denial of his suppression motion and the denials of his adjournment requests.

DISCUSSION

Suppression Motion

¶10 When we review a motion to suppress evidence, we will uphold a circuit court's findings of fact unless they are clearly erroneous. ***State v. Eckert***, 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996). However, the application of constitutional principles to those facts is a question of law that we decide de novo. ***State v. Patricia A.P.***, 195 Wis. 2d 855, 862, 537 N.W.2d 47 (Ct. App. 1995).

¶11 The Fourth Amendment prohibits unreasonable searches and seizures. U.S. CONST. amend. IV. The detention of a motorist by a law enforcement officer constitutes a "seizure" within the context of the Fourth Amendment. ***Berkemer v. McCarty***, 468 U.S. 420, 436-37 (1984). If a detention is illegal and violative of the Fourth Amendment, all statements given and items seized during this detention are inadmissible. ***Florida v. Royer***, 460 U.S. 491, 501 (1983). An investigative detention is not unreasonable if it is brief in nature and justified by a reasonable suspicion that the motorist has committed or is about to commit a crime. ***Berkemer***, 468 U.S. at 439; *see also* WIS. STAT. § 968.24.

¶12 According to ***Terry v. Ohio***, 392 U.S. 1 (1968), the reasonable suspicion necessary to detain a suspect for investigative questioning must be premised on specific facts, together with rational inferences drawn from those facts, sufficient to lead a reasonable law enforcement officer to believe that criminal activity may be in the works and that action is 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). This test is designed to balance the personal intrusion into a suspect's privacy generated 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 (1987).

¶13 Sheets argues that Zielicke did not have reasonable suspicion to stop his vehicle because "a vehicle fishtailing on a snow-covered roadway … is typical behavior." Under these circumstances, we disagree.

¶14 At the suppression hearing, Zielicke testified that he noticed a "larger SUV" fishtail at least four times for approximately 150 feet. Zielicke saw that the vehicle was "taking up for sure the entire lane that it was driving in" and at least once crossed into the oncoming lane of traffic. While it was snowing, and there was approximately one inch of snow on the ground, Zielicke did not notice any ice on the ground; he himself did not have any trouble maintaining traction and "did not see any reason for the driving behavior." Zielicke felt that the fishtailing driver was driving recklessly and that this reckless behavior posed a serious risk of death or great bodily harm "[b]ecause it appeared as though he was losing control of his vehicle."

¶15 Erratic driving is not excused by inclement weather conditions. Zielicke was driving in the same weather conditions as Sheets and had no difficulty maintaining control of his car. Zielicke thought that Sheets's driving was reckless and he had a reasonable suspicion that Sheets had committed a traffic crime by crossing the center line. Based upon this reasonable suspicion, Zielicke was justified in detaining Sheets for further investigation.

Motion for Adjournment/Continuance

¶16 A request for an adjournment or a continuance is addressed to the discretion of the trial court and will be reversed only upon an erroneous exercise of discretion. ***State v. Anastas***, 107 Wis. 2d 270, 272, 320 N.W.2d 15 (Ct. App. 1982). "A denial of a continuance potentially implicates the Sixth Amendment right to counsel and the Fourteenth Amendment right to due process of law." ***State v. Wollman***, 86 Wis. 2d 459, 468, 273 N.W.2d 225 (1979). In determining whether the trial court misused its discretion, we must balance "the defendant's constitutional right to adequate representation by counsel [and due process] against the public interest in the prompt and efficient administration of justice." ***Id***. In so doing, we consider: (1) the length of the delay requested; (2) whether other continuances have been requested and received by the movant; (3) the inconvenience to the parties, witnesses and the court; (4) whether the delay seems to be for legitimate reasons; and (5) other relevant factors. ***Id***. at 470.

¶17 The following exchange between Attorney Kirk Obear, Sheets's attorney, City Attorney Walter Bush, and the trial court took place at the April 17, 2000 suppression hearing:

> MR. OBEAR: Thank you, your Honor. Another issue, your Honor, with regard to scheduling of this case, I know the Court is aware that I had a conflict with regard to the jury trial next week on this case.
>
> THE COURT: Next week is our week for the jury trial.
>
> MR. BUSH: Your Honor, I have to admit that my officer will not be here also and so I would ask that the Court ... reschedule it.
>
> THE COURT: I am trying to hold these to a date. I am going to run out of jury trial dates pretty soon you know.
>
> THE CLERK: June 12.
>
> THE COURT: We have a lot of other cases on June 12 but we will put you on for that, and keep in touch with the clerk and she can advise you.

> MR. BUSH: She'll put it on another date?
>
> THE COURT: No, it is on the June 12.
>
> MR. BUSH: June 12. Thanks, I am sorry. June 12 is fine with me.
>
> MR. OBEAR: I have a witness that is not available on that particular date. I am not sure --
>
> THE COURT: I cannot -- I am running out of days. In June we are in intake so we don't have a lot of jury dates so that is our jury date for June. July we won't be around and after that I won't be here.
>
> MR. BUSH: June 12. 8:30?
>
> THE COURT: June 12. 8:30.

¶18 On June 12, 2000, prior to trial, Obear renewed the motion for an adjournment:

> MR. OBEAR: … Your Honor, there is one matter that I wanted to bring up preliminarily and that is just with regard to the status of my request to adjourn this case to facilitate the availability of an expert witness. That request was denied and the Court noted in a letter to myself last week that this case had been adjourned once previously and that was the basis for the denial of the adjournment.
>
> I would like to make a record what exactly happened with regard to this. When this case was originally set for trial I made a request for adjournment at that time based on a conflict that I had with another jury trial. That request was denied. When we had a motion hearing on this case previously the city attorney made a request for adjournment based on the availability of his police officers. That request was granted. Then when I had problems with the availability of an expert witness, a forensic toxicologist who would testify regarding absorption elimination of alcohol and the defendant's placement on a blood alcohol curve, the Court then denied that motion on the basis that there had been a previous adjournment.
>
> I would like to make it clear that adjournment was basically in favor of the prosecution previously and that I feel that the potential to offer exculpatory evidence on behalf of my client basically will be foregone by proceeding today because the expert is not available.
>
> THE COURT: Anything from the city attorney?

> MR. BUSH: I am sorry, your Honor. I don't remember asking for any adjournment. It may well be in the record but I have no memory of it.
>
> I know we did have a probable cause hearing and I thought there was one scheduled, but I don't know.
>
> MR. OBEAR: If it helps the Court, I do have a transcript of the motion hearing.
>
> THE COURT: I don't think I have to go back into it. We'll deny the motion because it is set for trial today. It has been set for some time, and we'll just go ahead with it. We are ready, the jury is ready.
>
> THE COURT: It is a civil case. First offense charge as I understand?
>
> MR. OBEAR: Yes.
>
> THE COURT: Okay. We are ready to proceed then?
>
> MR. OBEAR: I do think it should be clear from the record -- perhaps it is already clear on the record -- but I did make that request well in advance of trial.
>
> THE COURT: There is a letter in the file, right.[2]

¶19 In the instant case, the trial court failed to consider the appropriate factors when deciding Sheets's request for an adjournment. Sheets's original request for an adjournment was denied, but the City's request was granted. Immediately thereafter, when a new trial date was offered, Sheets asked for an adjournment because his expert witness was unavailable that day. This request was denied. The only grounds cited for that denial was that the court was "running out of days."

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[2] Here, the trial court acknowledged that Obear sent it a letter asking for an adjournment, and earlier, Obear mentioned receiving a letter from the court denying his request for an adjournment. However, neither of these letters appears in the record before us. The appellant is responsible for ensuring that the record is complete on appeal. ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 26-27, 496 N.W.2d 226 (Ct. App. 1993).

¶20 Although not included in the record, Sheets apparently made a written request for an adjournment via a letter to the trial court. This request was also denied, also via a letter not included in the record, because the case had already been adjourned once before. On the day of trial, Sheets renewed his motion for an adjournment. The trial court denied this motion because the trial had "been set for some time." However, Sheets had made his request well in advance of trial.

¶21 The trial court misused its discretion by failing to apply the required balancing test. Sheets himself had not previously been granted an adjournment, and the request was for a legitimate reason: the unavailability of an expert witness. Had the continuance been granted when Sheets originally requested it, on the day of the suppression hearing, the inconvenience to all parties would have been minimal. The trial court misused its discretion when it refused to grant Sheets's motion for an adjournment.

CONCLUSION

¶22 The officer had reasonable suspicion to stop Sheets's vehicle based upon the officer's observations of Sheets's erratic driving. Thus, Sheets's suppression motion was properly denied and we affirm this order. However, the trial court misused its discretion when it denied Sheets's motion for an adjournment. Consequently, we reverse the order of the trial court denying the motion and the judgment of conviction, and remand this matter for a new trial.

By the Court.—Judgment and orders affirmed in part; reversed in part and cause remanded with directions.

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