

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 23, 2009

David R. Schanker
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. 2009AP990-CR

Cir. Ct. No. 2008CM317

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GARRIC E. ROBERTS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waupaca County:
PHILIP M. KIRK, Judge. *Affirmed.*

¶1 HIGGINBOTHAM, J.¹ Garric Roberts appeals his judgment of conviction for operating under the influence of a controlled substance, third

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(d) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

offense. He argues that the circuit court erred when it denied his motion to suppress evidence because the stop that led to his arrest violated his constitutional protections against unreasonable searches and seizures. The issue on this appeal is whether the officer had reasonable suspicion to believe that a traffic violation had occurred in order to justify the stop. We conclude that the officer had reasonable suspicion to believe that Roberts' vehicle had a muffler that violated traffic regulations. Consequently, we conclude that the stop was constitutional and that the circuit court's denial of his motion to suppress was proper. We therefore affirm.

BACKGROUND

¶2 The following facts are taken from the suppression hearing. Deputy Kevin Studzinski was monitoring traffic on U.S. Highway 10 in Waupaca County around midnight on January 27, 2008, when he observed a car with a loud muffler traveling eastbound. The deputy testified that the muffler was louder than other vehicles on the road at that time and louder than what he believed to be legally appropriate. The deputy was trained in motor vehicle equipment, mufflers in particular, and believed that the loud muffler had been modified because it had a distinct tone and was larger than normal mufflers. Further, he testified that the muffler did not adequately reduce the noise of the vehicle and believed that it violated the muffler statute. Deputy Studzinski activated his lights and pulled over the driver, Roberts. The stop led to Roberts' arrest for operating under the influence of a controlled substance.

¶3 During the traffic stop, Roberts told Deputy Studzinski that his muffler was not modified. However, Roberts later testified that he had replaced the exhaust tip with a non-stock piece.

¶4 Roberts moved to suppress evidence of his intoxicated condition. At the conclusion of an evidentiary hearing, the court denied Roberts' motion. Roberts subsequently pled guilty to operating under the influence of a controlled substance, and a judgment of conviction was entered. Roberts appeals the order denying his motion to suppress, and the judgment of conviction.

DISCUSSION

¶5 Both parties focus their arguments on whether Roberts' vehicle violated the traffic statute prohibiting excessive muffler noise and certain modifications to a muffler, WIS. STAT. § 374.39. Roberts argues that the traffic stop was not justified because the muffler did not violate the statute. Specifically, he asserts that the officer made a subjective determination that the muffler was too loud, rather than an objective determination as required by the statute. The State argues that the evidence shows that the muffler did not effectively reduce the vehicle's noise as required by the statute and thus justified the deputy's stop.

¶6 A traffic stop constitutes a "seizure" within the meaning of the Fourth Amendment. *Whren v. United States*, 517 U.S. 806, 809-10 (1996). The United States Constitution and the Wisconsin Constitution protect against unreasonable searches and seizures. U.S. CONST. amend. IV; WIS. CONST. art. 1, § 11. An investigative stop is reasonable and thus constitutional if an officer "reasonably suspects that a person is violating the non-criminal traffic laws." *County of Jefferson v. Renz*, 231 Wis. 2d 293, 310, 603 N.W. 2d 541 (1999). The officer's suspicion must be based on specific and articulable facts as well as reasonable inferences from those facts. *State v. Guzy*, 139 Wis. 2d 663, 675, 407 N.W.2d 548 (1987). We review the facts and the surrounding circumstances to determine whether the stop was constitutionally reasonable. *Id.* at 679.

¶7 When reviewing a motion to suppress evidence, we uphold the circuit court’s findings of fact unless they are clearly erroneous and review constitutional issues de novo. *State v. Jackson*, 147 Wis.2d 824, 829, 434 N.W.2d 386 (1989). Therefore, we independently review whether the deputy’s observation of Roberts’ muffler was sufficient to justify the stop of the vehicle.

¶8 Under Wisconsin law, a person must maintain a muffler “to prevent any excessive or unusual noise.” WIS. STAT. § 347.39(1).² Further, a person must not modify a vehicle’s exhaust system “in a manner which will amplify or increase the noise emitted” by the vehicle’s original muffler. WIS. STAT. § 347.39(2).³

¶9 At the evidentiary hearing, the deputy testified that, while monitoring traffic along U.S. Highway 10 in Waupaca County, he observed a vehicle traveling eastbound with a “loud” muffler. He characterized the sound as being louder than the other vehicles on the roadway and that he believed the

² WISCONSIN STAT. § 347.39(1) reads as follows:

No person shall operate on a highway any motor vehicle subject to registration unless such motor vehicle is equipped with an adequate muffler in constant operation and properly maintained to prevent any excessive or unusual noise or annoying smoke. This subsection also applies to motor bicycles.

³ WISCONSIN STAT. § 347.39(2) states:

No muffler or exhaust system on any vehicle mentioned in sub. (1) shall be equipped with a cutout, bypass or similar device nor shall there be installed in the exhaust system of any such vehicle any device to ignite exhaust gases so as to produce flame within or without the exhaust system. No person shall modify the exhaust system of any such motor vehicle in a manner which will amplify or increase the noise emitted by the motor of such vehicle above that emitted by the muffler originally installed on the vehicle, and such original muffler shall comply with all the requirements of this section.

muffler was louder than appropriate. The deputy testified that he had received training on equipment of motor vehicles, and mufflers in particular, and that based on his training and experience he knew that the muffler was modified because it had a distinct tone and was larger than normal mufflers. He stated that this type of muffler was known as a “fart muffler” because of its size and distinctive tone and that these characteristics were similar to other amplified mufflers he had previously observed.

¶10 We conclude, based on the above facts and the reasonable inferences arising from those facts, that the deputy had reasonable suspicion to believe that Roberts had violated a traffic regulation. The deputy knew the difference between a stock muffler and a muffler that had been modified. He could tell that Roberts’ muffler was modified, and identified it by its type as a “fart muffler” based on his observation of its distinctive tone and size. Moreover, the deputy observed that the modified muffler was louder than the mufflers of other vehicles in the vicinity, loud enough to draw the deputy’s attention to the vehicle. All of these factors, considered together, support our conclusion that the deputy had reasonable suspicion to believe that Roberts was violating the muffler statute, WIS. STAT. § 347.39.

¶11 Roberts argues that the deputy made a subjective⁴ determination based on insufficient articulable facts that Robert’s muffler was too loud based on

⁴ We observe that the trial court erred in stating that, because WIS. STAT. § 347.39 does not define what constitutes a defective muffler, the statute establishes a subjective standard for determining whether a muffler is defective. In *County of Jefferson v. Renz*, 222 Wis. 2d 424, 437, 588 N.W.2d 267 (1998), we concluded that WIS. STAT. § 347.39 provides an objective standard for law enforcement officers to apply. However, the trial court’s error does not affect the outcome. Applying the objective standard called for under the statute, we affirm the court’s conclusion that the deputy had reasonable suspicion to stop Roberts’ motor vehicle for a traffic law violation.

a vague notion that the muffler was “louder than it should have been.” Consequently, in Roberts’ view, the deputy did not reasonably conclude that Roberts was violating a traffic regulation based on sufficient articulable facts.⁵ We disagree.

¶12 As we explained above, the deputy relied on a number of factors in determining that Roberts’ vehicle was in violation of the muffler statute, notably his observation based on his training on muffler equipment and his four and one-half years on patrol as a deputy sheriff that the muffler’s distinctive tone contrasted with the sound of a stock muffler. The deputy testified that the muffler failed to appropriately reduce the sound of the muffler to a level consistent with stock mufflers. The deputy relied on specific and articulable facts in determining that Roberts’ muffler was in violation of the statute. *See Jackson*, 147 Wis. 2d at 829.

CONCLUSION

¶13 For the reasons stated above, we conclude that Deputy Studzinski had reasonable suspicion to believe that Roberts’ vehicle had a muffler that violated the traffic statute prohibiting excessive muffler noise and certain modifications to a muffler, WIS. STAT. § 374.39. We therefore conclude that the stop was lawful and affirm the court’s denial of Roberts’ motion to suppress the evidence and the judgment of conviction.

⁵ Roberts relies in part on *State v. Faken*, No. 1998AP1974, unpublished slip op. (WI App Dec. 9, 1998). Unpublished opinions issued before July 1, 2009, are of no precedential value and may not be cited except in limited circumstances not present in this case. WIS. STAT. RULE 809.23(3). Thus, we do not consider Roberts’ arguments based on *Faken*.

By the Court.—Judgment affirmed.

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

