

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 26, 2002

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. 02-1576-CR
STATE OF WISCONSIN**

Cir. Ct. No. 01-CT-1257

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LEE R. POLACHEK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: GERALD P. PTACEK, Judge. *Affirmed.*

¶1 SNYDER, J.¹ Lee R. Polacheck appeals from a judgment of conviction for operating a motor vehicle while intoxicated (OWI), second offense,

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.

contrary to WIS. STAT. § 346.63(1)(a), and an order denying his pretrial motion. Polacheck argues that the police officer did not have reasonable suspicion to detain him. We disagree and affirm the judgment and order.

FACTS

¶2 While on routine patrol on September 20, 2001, Trooper Patricia Zdziarski of the Wisconsin State Patrol observed a car traveling southbound on a frontage road abutting Interstate 94 in Racine county; this car was traveling approximately twenty-five to thirty miles per hour in a fifty-five miles per hour zone and there were three other cars behind it, unable to pass. Zdziarski also noticed the car drive on the fog line for approximately fifty feet and leave the lane of traffic. In addition, the car had its left turn signal on but failed to turn left. Zdziarski then conducted a traffic stop and made contact with the driver, Polacheck.

¶3 Upon approaching Polacheck, Zdziarski noticed an odor of intoxicants. Polacheck failed the field sobriety tests administered by Zdziarski and was arrested for OWI. Polacheck was charged with OWI, second offense, and operating a motor vehicle with a prohibited alcohol concentration (PAC), second offense.

¶4 Polacheck filed a pretrial suppression motion, alleging Zdziarski did not have reasonable suspicion to stop and detain him. A hearing on this motion was held on February 19, 2002, after which the trial court denied the motion. On April 9, 2002, Polacheck pled guilty to the OWI charge and the PAC charge was dismissed. Polacheck appeals.

DISCUSSION

¶5 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).

¶6 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, 437 (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.

¶7 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 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).

¶8 Reasonable suspicion is based upon specific and articulable facts that, together with reasonable inferences therefrom, reasonably warrant a suspicion that an offense has occurred or will occur. *State v. Longcore*, 226 Wis. 2d 1, 8, 594 N.W.2d 412 (Ct. App. 1999), *aff'd*, 2000 WI 23, 233 Wis. 2d 278, 607 N.W.2d 620. The test of reasonable suspicion is an objective one and must be a suspicion "grounded in specific articulable facts and reasonable inferences from those facts." *State v. Waldner*, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996).

¶9 Polacheck argues that Zdziarski did not have reasonable suspicion to detain him because the speed limit for the road on which he was traveling was thirty-five miles per hour, not fifty-five miles per hour, and thus "there could have been no objective reasonable suspicion that a violation of the law was afoot." We disagree.

¶10 At the suppression hearing, conflicting testimony was presented about the exact speed limit on the road Polacheck was traveling; after hearing all the evidence, the trial court made a specific factual finding, based upon Zdziarski's testimony, that the speed limit was fifty-five miles per hour. We must uphold a circuit court's findings of fact unless they are clearly erroneous. *Eckert*, 203 Wis. 2d at 518. This factual finding is not clearly erroneous. Driving twenty-five to thirty miles per hour in a fifty-five miles per hour zone is a violation of WIS. STAT. § 346.59(1), which states:

No person shall drive a motor vehicle at a speed so slow as to impede the normal and reasonable movement of traffic

except when reduced speed is necessary for safe operation or is necessary to comply with the law.

Thus, Zdziarski had reasonable suspicion to stop and detain Polacheck.

¶11 Furthermore, slow driving was not the only traffic violation Zdziarski observed; Zdziarski observed Polacheck's car deviate from its lane of traffic, in violation of WIS. STAT. § 346.13(3), and fail to follow an indicated left turn, in violation of WIS. STAT. § 346.31(1). These traffic violations alone constitute reasonable suspicion to stop and detain but the added violation of WIS. STAT. § 346.59(1) more than satisfies the requirements of reasonable suspicion.²

CONCLUSION

¶12 We conclude that Zdziarski had reasonable suspicion to detain Polacheck. We therefore affirm the order denying the pretrial motion and the judgment of conviction.

By the Court.—Judgment and order affirmed.

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

² In his brief-in-chief, Polacheck argues that the traffic stop was based only on his vehicle traveling twenty-five to thirty miles per hour in a suspected fifty-five miles per hour zone, ignoring two other traffic observations that the officer used in supporting the stop. In his late reply brief, Polacheck acknowledges the existence of one of the officer's other observations (lane of travel violation), but continues to ignore the third. Misleading factual omissions can be the basis for sanctions. See *Weiland v. Paulin*, 2002 WI App 311, ¶¶21-29, No. 02-0826.

