

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 27, 2003

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. 03-0418-CR

Cir. Ct. No. 02CT000259

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

THOMAS C. JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Manitowoc County: PATRICK L. WILLIS, Judge. *Affirmed.*

¶1 ANDERSON, J.¹ Thomas C. Johnson appeals from a judgment of conviction for operating a motor vehicle while intoxicated (OWI). He argues that the trial court erred in denying his motions to dismiss the charges on grounds of

¹ This case is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

illegal stop and illegal arrest. We conclude that Johnson was lawfully stopped and arrested, and so we affirm.

¶2 On the night of April 4, 2002, City of Manitowoc Police Officer Richard Ladwig was off duty and driving home from work in his own pickup truck. He was on North Eighth Street in Manitowoc when he noticed a car approaching behind him at what he perceived to be a high rate of speed. The speed limit in the area is twenty-five miles per hour and Ladwig estimated that he himself was traveling at about thirty miles per hour. After the car passed him, Ladwig followed it as it turned from North Eighth Street on to New York Avenue. Ladwig saw the car make several attempts to back into a driveway, striking the curb each time.

¶3 Ladwig then radioed dispatch to have an on-duty officer sent to the location. Ladwig got out of his truck and approached the car's driver, Johnson. Ladwig noticed a smell of intoxicants in the car. Ladwig identified himself as a police officer and asked if Johnson had a reason for speeding. Johnson asked to see his badge and Ladwig returned to his truck and retrieved it. While Ladwig was getting his badge, Johnson backed the car into the garage and when Ladwig returned, Johnson told him that "[Ladwig] was on private property and [Ladwig] should get the hell off of [Johnson's] property."

¶4 Johnson moved to get into the gated yard that led to his house. Ladwig told him that a uniformed officer was on the way to the scene and that Johnson would have to stay where he was. When Johnson again attempted to get past Ladwig, Ladwig took his arm, directed him to the ground, and held him there until Officer Jason Koenig arrived.

¶5 Koenig observed that Johnson's eyes were bloodshot and that his balance seemed poor. Koenig asked Johnson what he had been drinking. Johnson denied that he had been drinking, asserted that he had been "attacked by a male subject in a pick-up truck in his driveway" and refused to perform field sobriety tests. Koenig arrested Johnson for OWI and handcuffed him. Johnson then asked to take the field sobriety tests. Koenig told Johnson that he was no longer under arrest, but would be re-arrested if he failed the tests. Johnson failed the tests and Koenig arrested him.

¶6 Johnson argues that Ladwig had no right to stop or detain him because Ladwig was not on duty and that Ladwig arrested him illegally. Although he was off duty, Ladwig was a Manitowoc officer acting within the jurisdiction of Manitowoc. The City of Manitowoc Municipal Code states that

[t]he Chief of Police and members of the Police Department are hereby authorized, empowered and directed, with or without process or complaint, to arrest, retain and confine in such place as may be provided by the Common Council of this City, until a trial can be had in a proper Court, any and all persons violating the Ordinances or Regulations of this City, and any person who shall be detected by said Chief of Police or members of the Police Department in the act of offending against any of the provisions of the laws of the State of Wisconsin.

CITY OF MANITOWOC MUNICIPAL CODE § 5.03 (2000). Section 5.03 does not limit an officer's authorization to arrest and detain a suspect to on-duty hours. Its intent to be nonrestrictive is supported elsewhere in the code. For example, unlike § 5.03, § 5.06 specifies that officers must display their badges "when on duty." If an officer's authorization to arrest and detain were limited to his or her on-duty hours, the drafters would have specified this as they did in § 5.06. This is consistent with the common-law principle that a police officer's duty to maintain order "is not affected by whether the officer is in or out of uniform or is officially

‘on duty’ or ‘off duty.’” 5 AM. JUR. 2D *Arrest* § 47 (2003). In addition, the Wisconsin Supreme Court has held that in *Williams v. State*, 45 Wis. 2d 44, 48, 172 N.W.2d 31 (1969), when an off-duty police officer happened upon a fight and intervened to break it up, “as soon as he became aware of the situation and took action he was no longer off duty.”

¶7 Johnson argues that *Williams* does not apply in this case because Ladwig had no probable cause for suspecting Johnson of a crime and so there was no “situation” for Ladwig to become aware of. We do not agree. The question of whether undisputed facts constitute probable cause is a question of law which we review independently. *State v. Drosgvold*, 104 Wis. 2d 247, 262, 311 N.W.2d 243 (Ct. App. 1981). Upon our independent review, we hold that the trial court properly found that Ladwig’s observations of the speed at which Johnson’s car was traveling and Johnson’s difficulty in getting the car into the driveway constituted reasonable grounds for an investigative stop.

¶8 Johnson next argues that Ladwig’s use of physical force to detain him until Koenig arrived constituted an illegal arrest. Again, Johnson is wrong. An officer conducting an investigative stop does not violate the Fourth Amendment when he or she physically restrains, without arrest, a person who walks away from the officer’s investigation. *State v. Goyer*, 157 Wis. 2d 532, 534, 460 N.W.2d 424 (Ct. App. 1990). Moreover, in this case, Ladwig did not continue to question or search Johnson but merely held him until other officers arrived. An arrest occurs when “a reasonable person in the defendant’s position would have considered himself or herself to be ‘in custody’ given the degree of restraint under the circumstances.” *State v. Swanson*, 164 Wis. 2d 437, 446-47, 475 N.W.2d 148 (1991). A reasonable person in Johnson’s position would consider himself arrested.

¶9 Furthermore, the arrest was lawful because it was supported by probable cause. An officer has probable cause to make an arrest when the “totality of circumstances within the arresting officer’s knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant had probably committed a crime.” *State v. Koch*, 175 Wis. 2d 684, 701, 499 N.W.2d 152 (1993). The totality of circumstances in this case included not only the erratic driving that prompted the initial stop, but Ladwig’s subsequent observations of the smell of intoxicants and Johnson’s profane and uncooperative attitude. *See State v. Babbitt*, 188 Wis. 2d 349, 357, 525 N.W.2d 102 (Ct. App. 1994).

¶10 Finally, we are surprised that neither the State nor the defense has mentioned the law on citizen’s arrest. This court held in *City of Waukesha v. Gorz*, 166 Wis. 2d 243, 247, 479 N.W.2d 221 (Ct. App. 1991), that operating a motor vehicle while intoxicated is a breach of the peace for which a citizen’s arrest may be effectuated, whether by a private citizen or a law enforcement officer outside of his or her jurisdiction. A treatise on the law of drinking and driving summarizes the issue of citizen’s arrest this way:

A citizen may validly arrest another citizen for a drinking/driving offense when the violation has been committed in the citizen’s presence. The arresting citizen must have probable cause to believe that the individual was driving alcohol-impaired. A number of factors can be relied upon in determining whether probable cause for a citizen’s arrest exists; they include observation of erratic driving, odor of alcohol on defendant’s breath, staggering or unsteadiness, slurred speech, and bloodshot eyes. The presence of all these factors is not required for a valid arrest.

FLEM WHITED III & DONALD H. NICHOLS, 1 DRINKING/DRIVING LITIGATION: CRIMINAL AND CIVIL § 5:9 (2d ed. 2003). A police officer does not have less authority than a private citizen when he or she goes off duty. We affirm.

By the Court.—Judgment affirmed.

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

