

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 6, 2011

A. John Voelker
Acting 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. 2010AP2501-CR

Cir. Ct. No. 2009CT1033

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RAFAEL LABEDZKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County:
JOHN S. JUDE, Judge. *Affirmed.*

¶1 REILLY, J.¹ Rafael Labedzki appeals from a judgment of the circuit court convicting him of operating while under the influence of an

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

intoxicant. Labeledzki argues that his conviction should be reversed as the trooper who conducted the traffic stop did not have reasonable suspicion to ask Labeledzki to perform a series of field sobriety tests. We disagree and affirm his conviction.

FACTS

¶2 In the early evening of May 31, 2009, Wisconsin State Patrolman Mark Barlar pulled over Labeledzki for driving seventy-seven miles per hour in a sixty-five mile an hour speed zone. After he pulled Labeledzki over for speeding, the trooper approached the vehicle on the passenger side and observed two people in Labeledzki's vehicle. The trooper also noticed the smell of alcohol emanating from the vehicle. Based on the passenger's "mannerisms," the trooper suspected that he was drunk. Labeledzki was wearing sunglasses, which the trooper asked him to remove. Once Labeledzki removed his sunglasses, the trooper noticed that his eyes were "bloodshot and glassy." When asked if he had been drinking, Labeledzki stated that he had one drink.

¶3 At this point, the trooper asked Labeledzki to get out of his car. As the trooper was speaking with Labeledzki, he noticed the smell of alcohol on Labeledzki's breath. Based on his suspicion that Labeledzki was intoxicated, the trooper asked Labeledzki to perform a series of field sobriety tests. Based upon Labeledzki's performance, the trooper arrested him for operating a motor vehicle while intoxicated.

¶4 Labeledzki was subsequently charged with operating a motor vehicle while intoxicated and operating a motor vehicle with a prohibited alcohol concentration (both second offenses). Labeledzki filed a motion to suppress the evidence of intoxication on the grounds that the trooper did not have reasonable suspicion to stop him nor probable cause to arrest him. The circuit court denied

the motion and Labedzki was later convicted of operating while under the influence of an intoxicant. Labedzki appeals, arguing that the trooper did not have reasonable suspicion to ask him to take his glasses off or to ask him to perform a series of field sobriety tests.

STANDARD OF REVIEW

¶5 Whether reasonable suspicion exists is a question of constitutional fact. *State v. Powers*, 2004 WI App 143, ¶6, 275 Wis. 2d 456, 685 N.W.2d 869. When reviewing questions of constitutional fact we apply a two-step standard of review. *Id.* First, we uphold the circuit court’s factual finding unless they are clearly erroneous. *Id.* Second, we apply the facts and conduct a de novo review of whether there was reasonable suspicion. *Id.*

¶6 “The question of what constitutes reasonableness is a common sense test.” *State v. Waldner*, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996). Examining the totality of the facts, we ask ourselves “[w]hat would a reasonable police officer reasonably suspect in light of his or her training and experience[?]” *Id.* at 56, 58.

DISCUSSION

¶7 The facts in the record, which Labedzki does not dispute, support the conclusion that the trooper had reasonable suspicion to ask Labedzki to remove his sunglasses and to ask Labedzki to perform field sobriety tests. When the trooper approached Labedzki’s vehicle on the passenger side, he noticed the smell of alcohol emanating from the vehicle. He also suspected that the passenger was drunk based upon his “mannerisms.” Confronted with this situation, it was reasonable for the trooper to investigate whether Labedzki was drinking as well by asking Labedzki to remove his sunglasses. After Labedzki removed his

sunglasses, the trooper noticed that his eyes were “bloodshot and glassy.” As bloodshot and glassy eyes are consistent with alcohol consumption, the trooper asked Labedzki if he had been drinking. Labedzki responded that he had one drink.

¶8 The trooper then decided that he would ask Labedzki to exit the vehicle. According to the trooper, he asked Labedzki to get out of his vehicle because the trooper wanted to see if Labedzki’s breath smelled like alcohol. The trooper testified that while he was speaking to Labedzki “I could smell the odor of intoxicating beverage actually coming from him.” While Labedzki continued to insist that he only had one drink, the trooper testified that “[i]t’s been my experience that if you have one drink, you don’t get the smell of the intoxicating beverage that I was smelling so I thought I better do standardized field sobriety tests to see if he was actually intoxicated.” The trooper asked Labedzki to perform a series of field sobriety tests. Given that the trooper observed an alcoholic smell coming from Labedzki’s vehicle, a passenger who appeared drunk, bloodshot and glassy eyes on Labedzki, and a strong alcoholic smell coming from Labedzki’s breath, it was entirely reasonable for the trooper to ask Labedzki to perform field sobriety tests.

CONCLUSION

¶9 As we hold that the trooper had reasonable suspicion, we affirm the circuit court’s denial of Labedzki’s motion to suppress. Labedzki’s conviction is affirmed.

By the Court.—Judgment affirmed.

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

