

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 24, 2012

Diane M. Fremgen
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. 2012AP59-CR

Cir. Ct. No. 2011CT71

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

v.

MARY ALICE GENTRY,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Grant County:
CRAIG R. DAY, Judge. *Reversed.*

¶1 SHERMAN, J.¹ The State of Wisconsin appeals a circuit court order suppressing evidence obtained from field sobriety tests of

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.

Mary Alice Gentry on the basis that the officer lacked reasonable suspicion to request Gentry perform those tests. I reverse.

BACKGROUND

¶2 At approximately 12:53 a.m. on June 4, 2011, Platteville police officer Joe Klein observed Gentry drive her vehicle through an intersection and turn left without stopping for the posted stop sign. Klein initiated a traffic stop. During the stop, Klein noticed that Gentry was “extremely sweaty” and asked Gentry if she’d had anything to drink that night. Gentry replied that she had consumed two beers, but did not remember when, and she informed Klein that she had been at two bars in downtown Platteville and had been dancing. Klein left Gentry’s vehicle to run a check on Gentry’s driver’s license. When Klein returned to Gentry’s vehicle, he observed that Gentry was making a telephone call relating to the care of her child. Klein testified that at this point, Gentry asked him if he was going to put her through field sobriety tests.

¶3 Based on his observations, Klein asked Gentry to perform field sobriety tests. Following the field sobriety tests, Klein cited Gentry with five offenses, including operating while intoxicated (OWI), fourth offense, and operating a motor vehicle with a prohibited alcohol concentration, fourth offense.

¶4 Gentry moved to suppress evidence obtained from the field sobriety tests on the basis that Klein lacked the requisite reasonable suspicion to request that she perform those tests following the traffic stop. The circuit court granted Gentry’s motion. The State appeals.

DISCUSSION

¶5 The State contends the circuit court erred in granting Gentry's motion to suppress because Klein had reasonable suspicion to ask Gentry to perform field sobriety tests. On review of a circuit court's decision on a motion to suppress, an appellate court will uphold the circuit court's factual findings unless those findings are clearly erroneous. *State v. Popke*, 2009 WI 37, ¶10, 317 Wis.2d 118, 765 N.W.2d 569. However, the application of constitutional principles to those facts is a question of constitutional law, which an appellate court reviews de novo. *Id.*

¶6 A traffic stop is a seizure within the meaning of the Fourth Amendment to the United States Constitution, which provides protections against unreasonable search and seizure. *State v. Malone*, 2004 WI 108, ¶24, 274 Wis. 2d 540, 683 N.W.2d 1. To satisfy the Fourth Amendment, a traffic stop must be justified at its inception and must be reasonably related in scope to the circumstances that justified the stop. *Id.* However, if, during a valid traffic stop, an officer becomes aware of additional suspicious factors or additional information that would give rise to a reasonable suspicion that further criminal activity was afoot, the initial stop may be extended and a new investigation begun. *Id.* The validity of the extension is tested in the same manner, and under the same criteria, as the initial stop. *State v. Colstad*, 2003 WI App 25, ¶19, 260 Wis. 2d 406, 659 N.W.2d 394. Thus, to extend a traffic stop to request that the driver perform a field sobriety test, an officer ““must have a reasonable suspicion, grounded in specific articulable facts and reasonable inferences from those facts,”” that the driver has consumed enough alcohol to impair his or her ability to drive. *Id.*, ¶¶8, 19 (citation omitted).

¶7 The question of what constitutes reasonable suspicion is a common sense test that asks what a reasonable police officer would reasonably suspect in light of his or her training and experience under all of the facts and circumstances present. *State v. Jackson*, 147 Wis. 2d 824, 834, 434 N.W.2d 386 (1989). In evaluating reasonable suspicion, we must examine whether all the facts, when taken together, could constitute reasonable suspicion. *State v. Allen*, 226 Wis. 2d 66, 75, 593 N.W.2d 504 (Ct. App. 1999).

¶8 The State acknowledges Klein did not observe many of the hallmark signs of intoxication—slurred speech, bloodshot eyes, odor of intoxicants, or balance problems. The State nevertheless argues, however, that Klein had a reasonable suspicion to suspect that Gentry was operating her motor vehicle under the influence of an intoxicant in light of the following facts, that Gentry: failed to stop at a posted stop sign; admitted to consuming two beers; was stopped at 1:00 a.m.; was “extremely sweaty”; and was making childcare arrangements when the officer returned from checking Gentry’s license.

¶9 The parties both devote substantial argument over the importance of Klein’s observation that Gentry was “extremely sweaty” and was making a telephone call regarding care arrangements for her child. I do not address whether those observations are factors which could lead an officer to believe that the driver was operating while impaired because I conclude that his other observations—the failure to stop at the stop sign, admission of drinking, the time of day the stop took place, and Gentry’s inquiry as to whether she would be asked to perform field sobriety tests—could reasonably have led Klein to suspect that she was impaired. *See, e.g., State v. Lange*, 2009 WI 49, ¶32, 317 Wis. 2d 383, 766 N.W.2d 551 (time of night is a factor when considering the existence of probable cause to

arrest for OWI, a standard more stringent than reasonable suspicion to make a traffic stop). Accordingly, I reverse the order of suppression.

CONCLUSION

¶10 For the reasons discussed above, I reverse.

By the Court.—Order reversed.

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

