COURT OF APPEALS
DECISION
DATED AND RELEASED

October 5, 1995

No. 94-3395

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANN K. BEGLINGER,

Defendant-Appellant.

APPEAL from an order of the circuit court for Dane County: PATRICK J. FIEDLER, Judge. *Affirmed.*

SUNDBY, J. The defendant appeals from an order under § 343.305(9), STATS., of the Implied Consent Law revoking her operating privilege for two years from December 23, 1994.[1] She presents two issues:

[1] This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS. "We" and "our" refer to the court.

I. Did the trial court erroneously receive evidence that the defendant's vehicle was speeding, over defense objection, even though there was no foundation for establishing the reliability of the radar or visual estimate?

II. Did the officer expand the scope of the stop beyond that legally permissible to investigate a speeding offense when he asked the defendant to perform field sobriety tests?

The trial court issued its order after a hearing under § 343.305(9), STATS.[2] Defendant argues that the State failed to lay a foundation for the officer's testimony that based on a radar reading and his personal observations he had a reasonable suspicion that defendant was speeding. After stopping defendant, Officer Eric Novotny observed signs of intoxication and required defendant to perform field sobriety tests. He then arrested defendant, took her to the police station, where she refused to submit to a breath test or chemical test. Defendant does not claim that the results of the field sobriety tests did not provide Officer Novotny with probable cause to arrest her for operating while under the influence; she argues, however, that Novotny should never have stopped her, but that once he did, the scope of his investigation was limited to investigation of speeding and to that only. We disagree.

---

[2] Section 343.305(9)(a)5, STATS., provides in part:

> 5. ...[T]he issues of the hearing are limited to:
>
> a. Whether the officer had probable cause to believe the person was driving or operating a motor vehicle while under the influence of alcohol, a controlled substance or a combination of both ....
>
> ....
>
> c. Whether the person refused to permit the test. The person shall not be considered to have refused the test if it is shown by a preponderance of evidence that the refusal was due to a physical inability to submit to the test due to a physical disability or disease unrelated to the use of alcohol, controlled substances or other drugs.

We need not reach the question whether the officer was entitled to rely on the accuracy of his radar unit. The radar unit's reading of defendant's speed--seventy-five miles per hour--merely confirmed the officer's visual observations of defendant's speed. It is too often forgotten that the results of breath tests, chemical tests, field sobriety tests and personal observation are merely evidentiary. The absence of reliable tests does not mean that speeding charges must be dismissed; it merely means that other tests and observations must carry the State's burden.

Officer Novotny was asked the following questions and gave the following answers:

QBased on your visual observations of the vehicle, did your -- were you able to approximately estimate the speed for that vehicle?

AYes.

QAnd did that in any way match the radar speed?

AYes, it did.

....

QWhat was your visual estimate of the speed?

ASeventy-five miles an hour.

Officer Novotny was an experienced officer, having been a deputy sheriff for three years. We conclude that the trial court was entitled to rely on Officer Novotny's visual observation to determine that he had reason to believe that the defendant had violated and was violating a traffic law. *See* ***Terry v. Ohio***, 392 U.S. 1 (1968); ***Berkemer v. McCarty***, 468 U.S. 420 (1984).

Defendant argues that when he stopped her, Officer Novotny had no factual basis to suspect her of operating under the influence. The State does not claim otherwise. However, the State argues that "investigations into seemingly minor offenses sometimes escalate gradually into investigations into

more serious matters." ***Berkemer***, 468 U.S. at 431. Excessive speed is a factor which may lead an officer to reasonably anticipate that the offender's conduct may be affected by his or her consumption of alcohol or other drugs.

Officer Novotny observed the odor of alcohol coming from defendant's car and her breath, and that she was "extremely nervous." Certainly, these facts justified his request that defendant perform field sobriety tests. Novotny did not command defendant to perform such tests. She participated voluntarily.

We conclude that from his personal observations, Officer Novotny had an objectively reasonable suspicion that defendant was operating her vehicle substantially in excess of the applicable speed limit. His observations were sufficient for him to make an investigatory stop of defendant's vehicle. After the stop, his further observations gave him probable cause to believe that defendant was operating while under the influence. The requirements of the Implied Consent Law were thus satisfied and the trial court correctly ordered that defendant's operating privilege be revoked for twenty-four months for her failure to submit to a breath test or chemical test for intoxication.

By the Court.--Order affirmed.

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