

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

December 28, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

NOTICE

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No. 95-1600-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL D. GUNDLACH,

Defendant-Appellant.

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

VERGERONT, J.¹ Michael Gundlach appeals from a judgment convicting him of operating a motor vehicle while under the influence of an intoxicant, in violation of § 346.63(1)(a), STATS. He contends the trial court erroneously denied his motion to suppress all testimony and evidence obtained following his stop by a police officer from the Mount Horeb Police Department. He alleges that: (1) the traffic stop was unlawfully expanded to investigate whether he was intoxicated without a reasonable suspicion; (2) he was unlawfully detained after he successfully performed field sobriety tests; and

¹ This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

(3) there was no probable cause to arrest because he successfully performed the field sobriety tests. We reject each of these contentions and affirm.

Only Officer Timothy Milas of the Village of Mount Horeb Police Department testified at the suppression hearing. He has been a sergeant with the department for nine years. He has been employed by the department for fifteen years. During his fifteen years of service, he has stopped or arrested approximately 275 people under the influence of intoxicants. He has attended numerous in-service training sessions on signs of people who are under the influence of intoxicants, including standard field sobriety test training, the old alcohol sensor training and intoxilyzer training.

On August 6, 1994, Milas stopped Gundlach on West Main Street in Mount Horeb because the motorcycle Gundlach was operating had a defective turn signal or parking lamp. He knew Gundlach from previous contacts. When Gundlach stopped the motorcycle, he leaned to the right, nearly tipping the motorcycle over. He also had difficulty maintaining the balance of his motorcycle. Milas noticed a strong odor of alcohol on Gundlach's breath. Milas asked for Gundlach's driver's license and found that Gundlach had an instructional permit to operate the motorcycle. This permit allows operation of a motorcycle during daylight hours with eye and head protection and does not allow passengers. Gundlach had a passenger on the motorcycle.

On his initial contact, Milas asked Gundlach to remove his sunglasses, which he did. Gundlach told Milas that his right eye was bloodshot, not from drinking, but from an accident or fight. Milas noted that the left eye was also slightly bloodshot.

Milas asked Gundlach if he would perform field sobriety tests for him and Gundlach said he would. For the first test, Milas instructed Gundlach to recite the alphabet from A to Z. Gundlach recited the letters slowly, with a slightly slurred speech that caused a bit of difficulty in reciting the letters. For the finger-to-nose test, Milas told Gundlach he would demonstrate the test for him. While Milas was explaining this test, Gundlach began to perform it. Milas asked Gundlach to wait until he was finished explaining. After Milas finished the instructions, Gundlach performed this test very slowly and precisely.

Milas next explained and demonstrated the one-leg balance stand to Gundlach. He explained that Gundlach was to stand with his feet together, arms at his side, raise one foot off the ground approximately six inches, and count to thirty, as in one-one-thousand, two-one-thousand and so on. Gundlach counted to twenty-one before he had to put his foot down to maintain his balance. He had to hold his arms out to maintain his balance. Gundlach told Milas both before and after he performed this test that he was unable to perform this test, but did not give any physical or medical reason why he could not. Milas then explained the heel-and-toe walk test and Gundlach did "fairly well" on that, though not "real well."

While Gundlach was waiting for test instructions, Milas observed him weaving back and forth while he was standing, in a figure-eight-type motion. Gundlach also seemed nervous, pacing and shifting weight, and his hands were trembling. Milas knew Gundlach because Gundlach lives down the street and around the corner from him and Milas had seen him numerous times; they had talked in the past. Because of this, Milas did not believe that Gundlach's nervousness was the result of being stopped by him as a police officer.

The next test Milas asked Gundlach to perform was the horizontal gaze nystagmus (HGN). Milas observed that Gundlach's left eye did not pursue smoothly and the right and left eyes had jerkiness before the forty-five degree onset. Jerkiness of the eye is an uncontrollable response to drinking and indicates a certain degree of alcohol concentration.

Gundlach told Milas that he had come from a Packer football game at the stadium in Madison, that he had approximately six to eight sixteen-ounce beers there, and that he had stopped at Jake's Bar in Pine Bluff where he had consumed approximately two twelve-ounce beers. Milas did not ask Gundlach at that time when he had the beers.

Based on Gundlach's difficulty with the motorcycle and maintaining his balance when he was stopped, his weaving back and forth, the strong odor of alcohol, and his performance on the field sobriety tests, Milas formed the opinion that Gundlach's ability to safely operate the motorcycle was

greatly impaired. Milas considered Gundlach to be an experienced operator because he knew Gundlach did off-road bike riding with Milas's son.

The trial court concluded that the detention was lawful because the defective turn signal and/or parking light was a valid reason for the stop initially, and the tipping of the motorcycle when being stopped and the odor of alcohol created a reasonable suspicion that justified Milas investigating further. Gundlach's performance on each of the tests, the court found, was a reasonable basis for continuing with the next test. The court stated that the question of probable cause to arrest was a "closer call," but it concluded that all the circumstances combined, and considering Milas's experience, did constitute probable cause to arrest for driving while under the influence of an intoxicant.

In reviewing a trial court's denial of a motion to suppress evidence, we must uphold the court's findings of fact unless they are against the great weight and clear preponderance of the evidence. *See State v. Whitrock*, 161 Wis.2d 960, 973, 468 N.W.2d 696, 701 (1991). However, whether a search and seizure meets constitutional standards is a question of law, which we review de novo. *State v. Richardson*, 156 Wis.2d 128, 137-138, 456 N.W.2d 830, 833 (1990).

To execute a valid investigatory stop consistent with the Fourth Amendment prohibition against unreasonable searches and seizures, a law enforcement officer must reasonably suspect, in light of his or her experience, that some kind of criminal activity has taken or is taking place. *Richardson*, 156 Wis.2d at 139, 456 N.W.2d at 834. An investigatory stop is permissible when the person's conduct may constitute only a civil forfeiture. *State v. Krier*, 165 Wis.2d 673, 678, 478 N.W.2d 63, 65-66 (Ct. App. 1991). Upon stopping the individual, the officer may make reasonable inquiries to dispel or confirm the suspicions that justified the stop. *Terry v. Ohio*, 392 U.S. 1, 22 (1968).

In assessing whether there exists reasonable suspicion for a particular stop, we must consider all the specific and articulable facts, taken together with the rational inferences from those facts. *State v. Dunn*, 158 Wis.2d 138, 146, 462 N.W.2d 538, 541 (Ct. App. 1990). The question of what constitutes reasonable suspicion is a common sense test: under all the 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, 390 (1989).

Gundlach argues that when Milas stopped him, he had reasonable suspicion for the stop because of the defective lamp, but that there was no basis for investigating further by asking him to perform the field sobriety tests. We disagree.

In addition to the strong odor of alcohol that Milas noted when he stopped Gundlach, Gundlach had difficulty maintaining his balance on the motorcycle when he stopped it, nearly tipping it over. Also, Milas noticed that Gundlach's eyes were bloodshot. We conclude that these facts, together with reasonable inferences drawn from them, provide a basis for a reasonable suspicion that Gundlach had consumed alcohol and that his ability to operate the motorcycle was impaired as a result, such that Milas could investigate further by asking Gundlach to take field sobriety tests.

Gundlach argues that he could have had difficulty in maintaining the balance of the motorcycle because he had a passenger and was just learning to operate a motorcycle. But Milas could reasonably rely on his knowledge that Gundlach was experienced in operating off-road vehicles. While there may be an innocent explanation for Gundlach's difficulty in balancing, Milas was not required to draw that inference as long as the inference he did draw was reasonable. Similarly, while Gundlach offered an innocent explanation for his right eye being bloodshot, Milas was not required to accept that explanation given that the left eye was also slightly bloodshot. "[I]f any reasonable suspicion of past, present, or future criminal conduct can be drawn from the circumstances notwithstanding the existence of other inferences that can be drawn, officers have the right to temporarily freeze the situation in order to investigate further." *Jackson*, 147 Wis.2d at 835, 434 N.W.2d at 391.

We also conclude that detaining Gundlach to perform each successive field sobriety test was not unlawful. Upon detaining a suspect, the officer must act diligently to confirm or dispel the suspicion that justified the detention. *United States v. Sharpe*, 470 U.S. 675, 686 (1985). The question is not how long the detention lasts, but whether the officer diligently pursued a means of investigation that was likely to confirm or dispel his or her suspicions

quickly. *Id.* Here there was a reasonable basis, considering all the circumstances surrounding Gundlach's performance of each test, to request that Gundlach perform the next test.

Although Gundlach was able to recite the alphabet, he did this with difficulty and his speech was slurred. Milas knew Gundlach and had spoken to him before. He was also familiar, from his experience, with the fact that slurred speech is a sign of alcohol consumption. These facts, together with rational inferences from these facts, reasonably warrant further testing.

It was also reasonable that Gundlach's performance on the finger-to-nose test did not dispel Milas's suspicion that Gundlach was under the influence of intoxicants. Gundlach did not wait for the demonstration, as Milas instructed him. When Gundlach performed the test, he did it slowly and precisely. It was reasonable for Milas to draw the inference from these facts that Gundlach's concentration might be impaired and to request that he perform another test to dispel this suspicion.

Gundlach could not maintain his balance on one leg up to the count of thirty. Even up to the count of twenty-one, he could not do so while keeping his arms at his side. The fact that Gundlach told Milas before performing this test that he could not do it does not mean that it is not rational to draw the inference that Gundlach's inability to perform might be due to intoxication. Since Gundlach offered no medical or physical explanation of his inability to perform, his prior excuse could reasonably be interpreted as an expression of his knowledge that he would not be able to perform the test in his intoxicated condition.

Although Gundlach did "fairly well" on the heel-and-toe test, Milas observed that Gundlach was weaving back and forth while he was standing waiting for instructions. This unsteadiness was a reasonable basis for administering another test--the HGN test. It is reasonable that Milas's suspicions were not dispelled in spite of Gundlach's performance of the heel-and-toe test, given Gundlach's other behavior.

On the HGN test, Gundlach's left eye did not pursue smoothly and the right and left eyes had a jerkiness, all clues to intoxication.

Gundlach next argues that he successfully performed each of the five field sobriety tests and therefore there was no probable cause to arrest him for operating while under the influence of an intoxicant. In support of this argument, Gundlach relies on the cross-examination of Milas, in which Milas acknowledged that Gundlach said the ABC's correctly, did touch his finger to his nose as instructed, and did pass the heel-and-toe test. Milas also acknowledged that the United States Department of Transportation guidelines define the fail line for the HGN test as four clues out of six, and he observed only three. Gundlach did not ask Milas the fail line for the one leg stand test, but Milas did testify that there were eight clues for that test and he observed two--Gundlach's putting his leg down at the count of twenty-one and raising his arms.

Probable cause requires that a police officer have facts and circumstances within his or her knowledge sufficient to warrant a reasonable person to conclude that the defendant has committed or is in the process of committing an offense. *Richardson*, 156 Wis.2d at 148, 456 N.W.2d at 838. The information available to the officer must lead a reasonable person to believe that guilt is more than a mere possibility. *Id.* In determining whether or not an officer has probable cause, the court must look at the totality of the circumstances within the officer's knowledge at the time. *Id.* The evidence need not reach the level of beyond a reasonable doubt or even show that guilt is more likely than not. *Id.*

We reject Gundlach's proposition that Milas could not consider any of the surrounding circumstances as long as Gundlach was able to perform the act requested for a particular test. We also reject the proposition that Milas could not consider the clues indicating intoxication for a particular test if the number of clues was below the fail line established by the Department of Transportation for a particular test. Gundlach offers no authority for these propositions. All of the facts and circumstances within Milas's knowledge must be examined to determine if probable cause exists. This includes all of Gundlach's behavior observed by Milas, as well as Milas's training and experience and his prior knowledge of Gundlach.

We agree with the trial court that the probable cause question is a close one, but we are satisfied that the evidence meets the constitutional standard. Gundlach's speech was slurred. He had balance problems, not only when he initially stopped the motorcycle, but during and between the tests. His behavior indicated difficulty in concentrating and also nervousness. His eyes were bloodshot. There was a strong odor of alcohol. Milas also had information from knowing Gundlach previously. He knew Gundlach's normal speech, that Gundlach is experienced in driving off-road vehicles, and that Gundlach is familiar with him and would not normally be nervous in his presence, even if he were in uniform. Although Milas did not know the time of Gundlach's alcohol consumption when he arrested Gundlach, the amount of alcohol consumed, in combination with all the other circumstances, was a factor he could properly take into account.

We also agree with the trial court that Milas's experience in detaining and arresting intoxicated persons is a significant factor in evaluating probable cause. Milas expressed his opinion that Gundlach did not pass all the field tests. He considered the jerkiness of Gundlach's eyes significant. He considered his performance of the one leg test to be deficient. He considered the manner in which Gundlach performed other tests to indicate intoxication.

Gundlach's approach is to analyze each factor separately and either offer an alternative innocent explanation or contend that that factor does not show probable cause. However, when we analyze the totality of the circumstances, in light of Milas's training, experience and prior knowledge of Gundlach, we are satisfied that Milas had facts and circumstances within his knowledge sufficient to warrant a reasonable belief that Gundlach was operating a motor vehicle while under the influence of an intoxicant.

By the Court. – Judgment affirmed.

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