# COURT OF APPEALS
# DECISION
# DATED AND RELEASED

April 4, 1996

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, STATS.

## NOTICE

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**No. 95-3133-CR**
**95-3134-CR**

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

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**DAVID J. FURY,**

**Defendant-Appellant.**

APPEALS from a judgment of the circuit court for Dane County: JACK F. AULIK, Judge. *Affirmed.*

DYKMAN, J. This is a single-judge appeal decided pursuant to § 752.31(2)(c), STATS. David J. Fury appeals from a judgment convicting him of operating a motor vehicle while under the influence of an intoxicant (OMVWI), contrary to § 346.63(1)(a), STATS.[1] The issues are: (1) whether the arresting

[1] The trial court consolidated two cases, this one, and a companion case, where the State alleged that Fury was guilty of possessing a controlled substance. This appeal, though it carries two case numbers, involves only the OMVWI conviction.

officer, having stopped Fury to investigate why he was parked in a no-parking zone, could expand his inquiry to include an investigation and ultimate arrest for OMVWI; and (2) whether the officer possessed reasonable suspicion to stop Fury for OMVWI. We conclude: (1) that the Fourth Amendment to the United States Constitution does not prohibit such an expansion of the investigation; and (2) that the officer had reason to suspect that Fury was operating a motor vehicle while under the influence of an intoxicant. We therefore affirm.

## FACTS

On the evening of March 10, 1995, Deputy Sheriff Christopher Nelson was patrolling a tavern parking lot, which had been the scene of several altercations, to make sure that nothing was going on between some people standing outside. As he was driving out of the lot, a car pulled up and stopped in a clearly marked no-parking zone. Deputy Nelson turned his car around and stopped across from the no-parking zone. He illuminated the car with his spotlight and advised the driver that he could not park in the no-parking zone but the driver did not roll his window down. The deputy made a U-turn and stopped behind the car. He approached the car to talk to its sole occupant and driver, David J. Fury. When he made contact with Fury, he noticed that Fury's eyes were red and glossy. He also detected an odor of intoxicants coming from the interior of the automobile. He asked Fury if he had been drinking and Fury said that he had not.

Deputy Nelson then asked Fury if he would be willing to step from his car so that he could conduct field sobriety tests. Fury agreed. The results of the field sobriety tests were stipulated to as evidence. Based upon his observations of Fury during the field tests and the odor of intoxicants on his breath, he concluded that Fury had been driving while under the influence of an intoxicant and arrested him.

Fury moved to suppress the evidence of intoxication that Deputy Nelson obtained at the scene because the stop violated the Fourth Amendment. He asserted that the scope of an investigation during a traffic stop under ***Terry v. Ohio***, 392 U.S. 1, 29 (1968), is limited to the justification for its initiation. Because the deputy's justification for stopping Fury was to investigate a parking

violation, Fury concluded that Deputy Nelson was constitutionally limited to an investigation of only that offense. The trial court denied his motion and Fury entered a no contest plea. Fury appeals.

## DISCUSSION

In ***Terry***, the Supreme Court decided that a police officer, who had only a reasonable suspicion that three men were planning an armed robbery, could stop and search the men for weapons. In so holding, the court said: "evidence may not be introduced if it was discovered by means of a seizure and search which were not reasonably related in scope to the justification for their initiation." ***Id.*** Fury asserts that this sentence limits the scope of Deputy Nelson's investigation to the parking violation, and that evidence of his intoxication must be suppressed. We disagree.

In ***State v. Washington***, 134 Wis.2d 108, 122-23, 396 N.W.2d 156, 162 (1986), the Wisconsin Supreme Court wrote:

> Since ***Terry***, the word "pat-down" has become a term of art in the legal profession. It is clearly understood, along with its synonym "frisk" to mean "a careful exploration of the outer surfaces of a person's clothing all over his or her body." ***Terry***, 392 U.S. at 16. Because a search is for the protection of the police and others nearby, it must be confined in scope to an intrusion reasonably designed to discover instruments which could be used to assault the officer. ***Id.*** at 29. Though a pat-down provides no justification to search for evidence of a crime, it does not mean that the police must ignore evidence of a crime which is inadvertently discovered.

In ***United States v. Perez***, 37 F.3d 510, 513 (9th Cir. 1994), the court determined that a police officer is not limited to raising questions relating to the reason for the stop if faced with other suspicious activity. The court wrote:

> [The defendant] contends that even if the officers' initial stop was justified, Officer Owens had no reason to ask him whether he had any guns, drugs, or money in the car. Questions asked during an investigative stop must be "reasonably related in scope to the justification for their initiation." An officer may broaden his or her line of questioning if he or she notices additional suspicious factors, but these factors must be "particularized" and "objective" ....

***Id.*** (citations and quoted source omitted).

Similarly, in ***Minnesota v. Dickerson***, 508 U.S. ___, ___, 113 S. Ct. 2130, 2136 (1993), the Court said:

> The question presented today is whether police officers may seize nonthreatening contraband detected during a protective patdown search of the sort permitted by ***Terry***. We think the answer is clearly that they may, so long as the officer's search stays within the bounds marked by ***Terry***.

Upon reaching Fury's car, Deputy Nelson noticed that Fury's eyes were red and glossy and he detected an odor of intoxicants emanating from the interior of the vehicle. Based upon these particular facts, we conclude that Deputy Nelson's investigation was not limited to the parking violation and that it was reasonable for him to broaden his questioning to an OMVWI investigation.[2]

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[2] While ***Minnesota v. Dickerson***, 508 U.S. ___, 113 S. Ct. 2130 (1993), ***State v. Washington***, 134 Wis.2d 108, 396 N.W.2d 156 (1986), and ***United States v. Perez***, 37 F.3d 510 (9th Cir. 1994), refute Fury's assertion that a ***Terry*** stop prohibits the use of evidence of his intoxication, we question whether Deputy Nelson's action constituted a ***Terry*** stop. Fury was seated in a parked vehicle when he was approached by Deputy Nelson. Deputy Nelson asked him some questions to which Fury replied. In ***Arizona v. Hicks***, 480 U.S. 321, 328 (1987), the Court noted: "As already noted, a truly cursory inspection—one that

Next, Fury argues that Deputy Nelson did not have a reason to suspect that Fury was guilty of OMVWI. His brief succinctly notes the issue:

> Properly considered, the record showed only that, when the deputy asked the defendant whether he'd been drinking and thereby moved the detention into a new and expanded scope, the deputy had observed an odor of intoxicants and red and glossy eyes.
>
> The question, therefore, is whether that observation permitted investigating the defendant for operating while intoxicated.

He notes that drinking and driving is not an offense. In making this argument, he concedes that a ***Terry*** stop may be expanded, for he asserts:

> For the deputy, therefore, to have a legal justification under ***Terry*** and ***Berkemer [v. McCarty***, 468 U.S. 420 (1984)] to expand the scope of this stop beyond parking violations, it was necessary that the officer first possess facts constituting a reasonable suspicion that the defendant's driving ability was impaired by consuming alcohol. That, and only that, is the offense created by Wis. Stat. § 346.63(1)(a).

Though Fury raises an interesting question—What is necessary to expand a ***Terry*** stop?—he cites no pertinent authority discussing this issue. We will ignore argument without citations to legal authority. ***State v. Shaffer***, 96 Wis.2d 531, 545-46, 292 N.W.2d 370, 378 (Ct. App. 1980). We see no reason to depart from that rule here.

(..continued)
involves merely looking at what is already exposed to view, without disturbing it—is not a `search' for Fourth Amendment purposes, and therefore does not even require reasonable suspicion." But the State does not contend that no stop occurred, thus we need not pursue this issue further.

As soon as Deputy Nelson approached Fury's car, he noted Fury's red and glossy eyes and an odor of intoxicants. He asked Fury if he would be willing to take field sobriety tests. Fury said yes, took the tests, and failed them. Fury does not explain at what moment Deputy Nelson expanded his investigation but the events occurred almost simultaneously. We agree that at some point Deputy Nelson's investigation shifted from a possible parking violation to an OMVWI investigation. We find nothing, however, in the Fourth Amendment which prevents the State from using Deputy Nelson's observations of Fury. When all of the facts are considered, Deputy Nelson had more than a reason to suspect that Fury was guilty of OMVWI—he had probable cause to so believe.

Fury also contends that: "The record is devoid of any evidence to show that the defendant had operated his vehicle erratically, or had committed any act indicating an impaired ability to drive." That may be true, but § 346.63(1)(a), STATS., does not require the State to show that a driver's ability to drive was impaired, only that he or she was under the influence of an intoxicant. ***City of Milwaukee v. Johnston***, 21 Wis.2d 411, 413-14, 124 N.W.2d 690, 692 (1963). Accordingly, we affirm.

*By the Court.*—Judgment affirmed.

Not recommended for publication in the official reports. *See* RULE 809.23(1)(b)4, STATS.