

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 27, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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. 2014AP1473-CR

Cir. Ct. No. 2013CF535

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAN O. CLEARY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County:
KATHRYN W. FOSTER, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Dan Cleary appeals from a judgment convicting him of operating while intoxicated (5th or 6th offense) on his no contest plea. On

appeal, he challenges the denial of his motion to suppress evidence due to an unlawful stop and seizure.¹ We affirm.

¶2 At the suppression hearing, Deputy Zinda testified that dispatch alerted him to a possibly intoxicated driver leaving a Waukesha PDQ store in a maroon Dodge truck. The caller was Cleary's wife. The deputy was familiar with the Cleary family because law enforcement had received previous calls about Cleary's drunk driving. The deputy did not locate the truck in the vicinity of the PDQ, and he then travelled to Cleary's residence where Cleary's wife gave the deputy permission to be on the property. At that time, Cleary's vehicle was not on the property. Cleary's wife informed the deputy that the truck had a GPS unit, and she went upstairs to review the GPS computer program to determine the location of Cleary's truck. Cleary's wife then advised the deputy that Cleary had arrived home. The deputy was at Cleary's home for approximately two to three minutes before Cleary arrived in the driveway.

¶3 Zinda approached Cleary's truck, which was in the driveway with the engine running; the windshield wipers were clearing the heavy rain. The deputy directed Cleary to turn off the engine and hand him the keys. The deputy noted that Cleary's speech was slightly slurred, but Cleary denied that he had been drinking. The deputy did not, as part of the driveway encounter, detect the odor of intoxicants emanating from Cleary. The deputy called for further assistance at the scene. After additional deputies arrived, the deputies had Cleary exit his truck. Cleary agreed that they could all adjourn to Cleary's open garage to get out of the

¹ On appeal, Cleary concedes that once he demonstrated signs of intoxication during standard field sobriety tests, the deputies had probable cause to arrest him for driving while intoxicated.

heavy rain. As Zinda was speaking with Cleary in the more enclosed space of the garage, he detected the odor of intoxicants. The deputy asked Cleary to perform field sobriety tests because the deputy was aware from dispatch that Cleary had four prior convictions for operating while intoxicated, Cleary had to comply with the reduced limit of .02 blood alcohol concentration (BAC), and Cleary had slurred speech and an odor of intoxicants. Cleary exhibited signs of intoxication, and his preliminary breath test was .09. Cleary was arrested.

¶4 Deputy Baumann testified that when he arrived at Cleary's property, Zinda and Deputy Thompson were standing in the rain outside Cleary's truck, speaking with him. Cleary was still in his truck. Baumann suggested adjourning to the garage to get out of the heavy rain, Cleary agreed, and Cleary led the deputies into a workshop area adjacent to the garage. At close proximity, Baumann detected the odor of intoxicants.

¶5 Cleary did not testify at the suppression hearing.

¶6 The circuit court made the following findings of fact. Cleary's wife reported that Cleary might be driving while intoxicated and that she had placed a GPS unit on Cleary's truck. Cleary's wife invited law enforcement officers onto the property when she admitted Zinda into the house while she checked the GPS program for information on Cleary's whereabouts. When Zinda encountered Cleary in his driveway, Cleary had only recently arrived in the driveway. At the time Zinda asked Cleary to shut off the engine and turn over his keys, Cleary was being detained under *Terry*.² Because it was raining heavily, Cleary agreed to

² *Terry v. Ohio*, 392 U.S. 1 (1968).

accompany the deputies to his garage and then to an adjacent workshop area. The deputies conferred with Cleary's wife for two to ten minutes before asking Cleary to perform field sobriety tests. Zinda was aware of Cleary's prior convictions for operating while intoxicated, that he was subject to the .02 BAC rule, and that his speech was slightly slurred.

¶7 The circuit court found plausible that while Cleary remained in his truck, Zinda, who was standing in a heavy rain, could not necessarily detect the odor of intoxicants. Nevertheless, the deputies had reasonable suspicion to detain Cleary in his driveway. Cleary appeals.

¶8 On appeal, Cleary argues that the circuit court erred when it concluded that law enforcement officers conducted a lawful *Terry* stop on his property. Cleary argues that his wife's consent to the presence of law enforcement on the property did not allow the deputies to detain Cleary in his truck or in the garage. Cleary argues that because he encountered the deputies on his property, the deputies had to have probable cause, not reasonable suspicion, to detain him to determine whether he had been drinking and driving. We disagree with Cleary's view of the applicable facts and law.

¶9 We will uphold the circuit court's findings of fact on a motion to suppress evidence unless the findings are clearly erroneous. *State v. Stout*, 2002 WI App 41, ¶9, 250 Wis. 2d 768, 641 N.W.2d 474. We independently apply constitutional principles to those findings of fact. *Id.*

¶10 “[W]hen a police officer observes behavior that he or she reasonably believes is suspicious, the officer may briefly stop the person to inquire” *Id.*, ¶10. “An investigatory stop is constitutional if the police have reasonable suspicion that a crime has been committed, is being committed, or is

about to be committed.” *State v. Young*, 2006 WI 98, ¶20, 294 Wis. 2d 1, 717 N.W.2d 729. The investigatory stop allows an officer to briefly detain a person to investigate possible criminal behavior even though the officer lacks, at that time, probable cause to arrest. *Id.* “Reasonable suspicion requires that a police officer possess specific and articulable facts that warrant a reasonable belief that criminal activity is afoot.” *Id.*, ¶21. In determining whether the law enforcement officer had an objectively reasonable suspicion that criminal activity was afoot, we consider the totality of the circumstances. *State v. Allen*, 226 Wis. 2d 66, 74, 593 N.W.2d 504 (Ct. App. 1999).

¶11 Here, the totality of the circumstances permitted an objectively reasonable suspicion that Cleary had been drinking and driving. The stop occurred in Cleary’s driveway after law enforcement officers were dispatched in response to a call from Cleary’s wife. A crucial fact is that the deputy was on Cleary’s property with permission³ when Cleary pulled into the driveway. *Stout*, 250 Wis. 2d 768, ¶¶15-17. The deputy’s presence on Cleary’s property with permission permitted the deputy to undertake an investigatory detention when he encountered Cleary in the driveway with the engine running. *Id.*, ¶18 (entry onto private property with permission allowed even if the sole purpose was to question an individual suspected of criminal activity). The detention in the driveway yielded evidence that Cleary was operating⁴ his vehicle and that his speech was slightly slurred. From this evidence, Zinda had a basis to prolong the detention

³ Cleary does not argue that his wife could not give permission for Zinda to be on the property.

⁴ Pursuant to WIS. STAT. § 346.63(3)(b) (2013-14), “operate” means “the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.”

based on a reasonable suspicion that Cleary had been drinking and driving. After Cleary agreed to adjourn to his garage due to the weather, the odor of intoxicants became apparent. Field sobriety tests followed.⁵

¶12 The Fourth Amendment protection against unreasonable searches and seizures, *Young*, 294 Wis. 2d 1, ¶18, was not offended by Cleary's detention in his driveway by law enforcement officers with permission to be on the property and based on reasonable suspicion that Cleary had been drinking and driving. The undisputed testimony is that Cleary was detained in his garage to accommodate the weather. Under the totality of the circumstances, the move from the driveway to the garage did not change the nature of the detention to one requiring probable cause. While in the garage, additional evidence that Cleary had been drinking and driving developed. The circuit court properly denied Cleary's motion to suppress.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2013-14).

⁵ The odor of alcohol combined with the knowledge of the law enforcement officer that the driver was subject to the .02 BAC limit creates probable cause to administer a preliminary breath test. *State v. Goss*, 2011 WI 104, ¶26, 338 Wis. 2d 72, 806 N.W.2d 918.

