

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

January 18, 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. 95-1416-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CARL H. ZAHN,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Dane County:
MICHAEL B. TORPHY, JR., Judge. *Affirmed.*

VERGERONT, J.¹ Carl Zahn appeals from a judgment convicting him of operating a motor vehicle while intoxicated in violation of § 346.63(1)(a), STATS. Zahn contends that certain evidence should have been suppressed because he was driven to the police station to perform field sobriety tests without his consent and without probable cause for an arrest. We conclude that Zahn consented to go to the police station for the field sobriety tests. We therefore affirm the conviction.

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

City of Madison Police Officer Susan Carnell was the only witness to testify at the suppression hearing. She testified on direct examination as follows. She was driving on Lakeside Street in Madison at approximately 8:50 p.m. on January 3, 1994, when a pickup truck with a snowplow attached, coming from the opposite direction, encroached into her lane such that she had to move to the right of her lane to avoid being struck. She activated her vehicle emergency lights, made a U-turn, and followed the pickup onto Gilson Street. The truck pulled into a lit driveway. She got out of her squad car and went up to the truck. The sidewalk and street conditions were icy and snowy and she almost fell. At Carnell's request, Zahn showed her his driver's license. There was an odor of intoxicants coming from him even as she stood outside his vehicle. She also observed from the garage light that his eyes were bloodshot. Zahn denied having consumed alcohol, stating that he had taken cough medicine.

Officer Carnell asked Zahn if he would be willing to take field sobriety tests and he said yes. She told him that due to weather conditions she did not feel it was to his advantage to do the field sobriety tests on slippery, snowy pavement and she suggested that they go to the police station downtown to take the field sobriety tests. He said that was okay. She drove him in her squad car to the station. He was not handcuffed. On the way to the station, she told him that he would be receiving a ticket for deviating from his lane of traffic, but that he was not under arrest for operating a motor vehicle while under the influence. She told him that that determination would be made after the results of the field sobriety tests which he had consented to take. The drive to the police station took five minutes.

On cross-examination, Zahn's counsel read to Officer Carnell this portion of her report on the incident which, Carnell testified, she made the day after the stop:

I then asked Zahn if he would be willing to submit to field sobriety tests and he told me that he would.... I asked him to exit his vehicle with his dog and asked if it would be okay if Officer Tripke could legally park his vehicle and he said that would be okay.... Mr. Zahn and his dog were placed temporarily in the rear of my marked squad and I asked Zahn if there was a phone

number of somebody who I could call to come and pick up the dog as it would be necessary to transport him to the Madison Police Department to complete the field sobriety tests.... He was taken from the scene with his consent to the Madison Police Department to complete the field sobriety tests due to the fact that conditions on nearby sidewalks and streets were slippery and not conducive to providing optimal conditions for Mr. Zahn to perform the tests.

Officer Carnell testified that the report was true. She also testified on cross-examination as follows. It did not occur to her to ask the squad car, which she had called as back-up, to bring a shovel. That squad car brought a portable breath test which she did not use. Two of the four field sobriety tests she performed at the station--the alphabet test and the horizontal gaze nystagmus test--are not affected by slippery conditions. There was a flat surface free of snow closer than the station--Kohl's Supermarket--but she did not ask Zahn about that. Officer Carnell explained on redirect that she did not take Zahn to Kohl's because that is a public place and there was no place suitable there to do a field sobriety test.

The trial court issued a brief written decision stating that the evidence presented at the hearing provided no dispute on the violation of § 346.13(1), STATS., which requires that drivers drive entirely within a single lane, and that § 345.22, STATS., allows for arrest without a warrant for traffic regulations. The decision also stated, "In the Court's view, the evidence presented provided no real dispute that the defendant consented to the transportation to and further testing at the City-County Building." The court concluded that, "Either or both of these circumstances defeats the motion [to suppress]."

We first consider whether Zahn consented to go with Officer Carnell to the police station for the field sobriety tests rather than have them performed at the location of the stop, or some other location nearer than the police station. Zahn does not dispute that the stop, Carnell's questioning of him, and the administration of field sobriety tests in the vicinity of the stop are constitutional under *Terry v. Ohio*, 392 U.S. 1 (1968). Zahn's argument is that taking him to the police station for the tests violated *Terry*, as codified in § 968.24, STATS., which provides:

After having identified himself or herself as a law enforcement officer, a law enforcement officer may stop a person in a public place for a reasonable period of time when the officer reasonably suspects that such person is committing, is about to commit or has committed a crime, and may demand the name and address of the person and an explanation of the person's conduct. Such detention and temporary questioning shall be conducted in the vicinity where the person was stopped.

Zahn apparently concedes that if he consented to go to the police station for the tests, there would be no statutory or constitutional violation. However, he contends that he did not consent, in the constitutional sense, because he simply "acquiesced in [Carnell's] display of authority." He bases this argument on this phrase in Carnell's report, in particular, the italicized portion: "I asked Zahn if there was a phone number of somebody who I could call to come and pick up the dog *as it would be necessary to transport him to the Madison Police Dept. to complete the field sobriety tests.*" (Emphasis added.)

We assume, without deciding, that Zahn is correct in asserting that the standard for consent in this context is the same as that established for consent to a warrantless search. In the context of a warrantless search, the burden is on the State to show by clear and positive evidence that the consent was free, intelligent, unequivocal and specific, without any duress or coercion, actual or implied. *State v. Johnson*, 177 Wis.2d 224, 233, 501 N.W.2d 876, 879 (Ct. App. 1993). The test for voluntariness of consent is whether, under the totality of the circumstances, it was coerced. *Id.*

In reviewing a trial court's denial of a suppression motion, we will not disturb the court's findings of historical fact unless they are clearly erroneous; however, the application of the facts to the constitutional requirement of consent presents a question of law, which we review de novo. *Id.* at 230-31, 501 N.W.2d at 878.

With respect to the issue of consent, the trial court stated only that, "the evidence presented provided no real dispute that the defendant consented to the transportation to and further testing at the City-County Building."

Although the trial court did not make specific findings of fact as to the conversation between Officer Carnell and Zahn concerning going to the police station to take the field sobriety tests, we may assume on appeal that such findings were made implicitly in favor of its decision. See *State v. Hubanks*, 173 Wis.2d 1, 27, 496 N.W.2d. 96, 105 (Ct. App. 1992), *cert. denied*, 114 S. Ct. 99 (1993). We assume, therefore, that the trial court found Officer Carnell's direct testimony to be credible, and that it found her report did not conflict with her direct testimony. These implicit findings are supported by the record. Zahn has emphasized the sentence in Officer Carnell's report that states she said it was "necessary" that they go to the police station for the field sobriety tests. However, if the next sentence is considered as well, a reasonable interpretation of both sentences is that it was necessary to transport Zahn to the police station, without his dog, because Zahn had agreed that the conditions at the location of the stop were not optimal for him to take the field tests. Officer Carnell's direct testimony supports this interpretation of the report.

We now consider whether the facts, as implicitly found by the trial court, show by clear and positive evidence that Zahn freely, intelligently, unequivocally and specifically agreed to go to the police station for the tests without any duress or coercion, actual or implied. We conclude they do.

Taking the facts as implicitly found by the trial court, Officer Carnell suggested to Zahn that they go to the police station to take the field sobriety tests because of the slippery conditions at the scene of the stop. He said that was okay. There is nothing to suggest he felt he had to agree, or that his consent was equivocal. The conditions at the scene were slippery and it was reasonable for him to want the best conditions for the field sobriety tests, two of which involve either walking or balance. He was not handcuffed, and he was told in the car that he was not under arrest for driving while under the influence. The fact that Officer Carnell did not suggest that they go to Kohl's, which was closer than the police station, does not imply any coercion: Officer Carnell's explanation that Kohl's is a public place and that there was no suitable place there for administering a field sobriety test is a reasonable one. Nor does Officer Carnell's failure to ask the back-up squad car to bring a shovel imply coercion.

Zahn relies on *Bumper v. North Carolina*, 391 U.S. 543 (1968), in which the Court concluded there was no consent because there was simply "acquiescence to a claim of lawful authority." In *Bumper*, the officer announced

that he had a warrant to search a house and an occupant therefore allowed the search. This did not constitute consent, the Court held, because the announcement that the officer had a warrant was, in effect, an announcement that the occupant had no right to resist the search; the agreement to the search in those circumstances was "coerced" by the show of authority. *Id.* at 550. There is nothing comparable in the facts of this case.

The facts in *Johnson* are also dissimilar in significant ways. In that case, both the officer and Johnson testified that the officer did not request permission to enter the apartment and Johnson did not give permission. The court refused to infer consent from Johnson's failure to object to the entry. *Johnson*, 177 Wis.2d at 234, 501 N.W.2d at 880. In marked contrast to those facts, Zahn said "okay" when Officer Carnell suggested they go to the station for the field sobriety tests because of the slippery conditions.

By the Court.—Judgment affirmed.

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