COURT OF APPEALS
DECISION
DATED AND RELEASED

May 23, 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

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-2590

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

COUNTY OF DANE,

Plaintiff-Respondent,

v.

WENDY A. LAUFENBERG,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Dane County: SARAH B. O'BRIEN, Judge. *Affirmed*.

SUNDBY, J. Defendant-Appellant Wendy A. Laufenberg appeals from a judgment entered September 11, 1995, convicting her of operating a motor vehicle while under the influence of an intoxicant and operating a motor vehicle with a prohibited blood alcohol content. She presents two issues:

(1) Did the officer expand the scope of the stop beyond that legally permissible for investigating a speeding offense when he questioned Laufenberg about how much

she had to drink? We[1] conclude that the officer had a reasonable suspicion that Laufenberg was operating a motor vehicle while intoxicated which justified his investigation.

(2) Did the trial court err in giving weight to the horizontal gaze nystagmus test even though that test was administered incorrectly? We conclude that the evidence supports the judgment even if the test was administered incorrectly.

We therefore affirm the judgment.

The only witness was Dane County Sheriff's Deputy Kurt A. Pierce. He testified that on April 4, 1995, at approximately 10:15 p.m., he stopped Laufenberg for traveling approximately seventy miles per hour in a fifty-five mile per hour speed zone. In response to Pierce's question, Laufenberg said that she thought she was operating at approximately sixty miles per hour. While he was talking to Laufenberg, Pierce detected a moderate odor of intoxicants from her breath, and observed that she was chewing gum. He asked her how much she had to drink that evening and she responded that she was coming from a party and had three margaritas. He then administered field sobriety tests to Laufenberg. The tests included the walk-and-turn test, the one-leg stand test, the preliminary breath test (PBT), and the horizontal gaze nystagmus (HGN) test. Laufenberg claims that Pierce administered the latter test incorrectly. While we disagree, we conclude that the record otherwise supports Pierce's conclusion from the field sobriety tests that Laufenberg was under the influence.

Laufenberg does not claim that Pierce incorrectly administered the other field sobriety tests. Pierce described at length the results of these tests. He also testified that the preliminary breath test showed that her blood alcohol content was .18. On the basis of these observations, he concluded: "[Laufenberg] did very poorly in the field sobriety tests, and the PBT confirmed my opinion of the field sobriety tests."

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

Increasingly, defendants charged with operating a vehicle while under the influence seem to believe that if one of the investigative tests used by police departments to determine whether an operator is under the influence is not performed or is performed inaccurately, the operator is entitled to dismissal of a charge for operating under the influence. However, the result of any test used by the police to determine whether an operator is intoxicated is merely evidence. For example, the weight of the most commonly used test for intoxication, a chemical test under § 885.235, STATS., is determined according to the percent of alcohol in the operator's blood or breath as shown by the test but the result of any such test is, at most, *prima facie* evidence. Even if this court gives the HGN test no weight, Officer Pierce's testimony as to his personal observations of Laufenberg and the results of the field sobriety tests, including the PBT, fully support Laufenberg's conviction.

We now turn to the question whether Officer Pierce had sufficient evidence to test Laufenberg's possible intoxication. First, police action must be judged on the basis of its intrusiveness. *See* ***Terry v. Ohio***, 392 U.S. 1, 17 (1968). Laufenberg argues that the only circumstance exciting Officer Pierce's suspicion was the odor of intoxicants from Laufenberg's breath, and that is not enough to constitute "reasonable suspicion" under ***State v. Swanson***, 164 Wis.2d 437, 453 n.6, 475 N.W.2d 148, 155 (1991). In ***Swanson***, the supreme court cited three indicia of defendant's behavior which justified a reasonable suspicion that the defendant was operating under the influence of an intoxicant: first, erratic driving; second, the odor of intoxicants; and third, the approximate time of the incident. ***Id***. The court said: "*Taken together*, these indicia form a basis for a reasonable suspicion that Swanson was driving while intoxicated." ***Id***. (emphasis added). *See* ***State v. Seibel***, 163 Wis.2d 164, 183, 471 N.W.2d 226, 235 (1991), where we held that similar factors add up to a reasonable suspicion but not probable cause.

Here, Laufenberg was not operating her vehicle in an erratic manner; she was, however, exceeding the speed limit by fifteen miles per hour and was uncertain as to her speed. She was also chewing gum, which Officer Pierce testified frequently concealed the ingestion of alcoholic beverages. Finally, Laufenberg admitted she had been to a party at which there was drinking and that she had drunk three margaritas. We conclude that these factors, taken together, were sufficient to excite in Officer Pierce a reasonable suspicion that Laufenberg was under the influence and to justify further investigation.

For these reasons, we affirm the judgment.

By the Court.—Judgment affirmed.

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