COURT OF APPEALS
DECISION
DATED AND RELEASED

January 8, 1997

No. 96-2155-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DONALD G. KESTER,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Sheboygan County: JAMES J. BOLGERT, Judge. *Affirmed*.

SNYDER, P.J. Donald G. Kester appeals from a judgment of conviction for operating a motor vehicle with a prohibited blood alcohol concentration, second offense, contrary to § 346.63(1)(b), STATS.[1] He raises the following issues on appeal: (1) the officer's stop was not based on reasonable suspicion; (2) the trial court erred by denying him the right to cross-

[1] The jury also found him guilty of the companion charge of operating a motor vehicle while under the influence of an intoxicant. *See* § 346.63(1)(a), STATS.

examine the Intoxilyzer operator regarding the machine's ability to detect residual mouth alcohol; and (3) his conviction was violative of the double jeopardy clause of the Fifth Amendment because his license had already been administratively suspended for the same act. Because we conclude that there is no legal merit to Kester's first two claims and that the double jeopardy argument is controlled by ***State v. McMaster,*** No. 95-1159-CR (Wis. Dec. 13, 1996), we affirm.

Sometime after 10:00 p.m., while on his way to work, Officer Todd Priebe of the Sheboygan police department observed a car pull out in front of him while making a right turn. As he continued on his way to work, Priebe saw the vehicle deviate from its lane of travel and cross a clearly marked centerline on at least two occasions. Upon arriving at work, Priebe relayed his observations to an on-duty officer, who unsuccessfully attempted to locate the vehicle.

Priebe began his shift at 11:00 p.m. and approximately two hours later noticed the same vehicle parked outside of a tavern. He then observed an individual get into the car and drive away. Priebe followed the car; at one point it came upon a parked car and he observed the car "overcompensate" as it passed the parked vehicle and proceed into the oncoming traffic lane, coming to within three to four feet of the left-hand curb. Shortly thereafter, the car pulled into a driveway and Priebe approached the driver.

After failing to properly perform field sobriety tests, the driver of the car, Kester, was arrested and transported to the police station. He then

submitted to an Intoxilyzer test, which showed a reading of 0.18%. The case proceeded to trial; however, prior to trial, defense counsel filed a motion to dismiss based upon double jeopardy, and a motion to suppress, claiming that police lacked reasonable suspicion for the stop. The trial court denied both motions.

Kester requested a jury trial. At trial, defense counsel attempted to cross-examine Priebe about his statement that the Intoxilyzer detects residual mouth alcohol by introducing a study which disputes this. The trial court held that Priebe could not be subjected to cross-examination on this issue because Priebe did not hold himself out as an expert in the science behind the Intoxilyzer. The trial court held that the sought-after evidence should have been admitted through expert testimony or through admission as a learned treatise. Kester was found guilty of operating a motor vehicle while intoxicated and operating with a prohibited blood alcohol concentration. He now appeals.

Kester first contends that Priebe's stop was not based upon reasonable suspicion and was violative of the Fourth Amendment's prohibition against unreasonable searches and seizures. Whether the officer possessed reasonable suspicion such that stopping Kester was not violative of his constitutional protections presents an issue of constitutional fact. A review of constitutional principles as applied to established facts is de novo. *See* ***State v. Turner,*** 136 Wis.2d 333, 344, 401 N.W.2d 827, 832 (1987).

It is well settled that stopping an automobile and detaining its occupants constitutes a seizure under the Fourth Amendment. *See* ***State v.***

Baudhuin, 141 Wis.2d 642, 648, 416 N.W.2d 60, 62 (1987). The validity of such a stop depends upon whether the individual was lawfully stopped. *See* ***id.*** An officer has authority to stop a vehicle where the officer has reasonable grounds to believe that a violation of a traffic regulation has occurred. *See* ***id.*** The test for determining the constitutionality of an investigative stop is an objective test of reasonableness. *See* ***State v. Guzy,*** 139 Wis.2d 663, 675, 407 N.W.2d 548, 554 (1987).

The reasonableness of an investigative stop depends upon the facts and circumstances that are present at the time of the stop. *See* ***id.*** at 679, 407 N.W.2d at 555. "Given a triggering fact or facts of suspicion, law enforcement officers and reviewing courts may also consider the circumstances that were present in determining the weight to be given those facts in making the balance between the intrusion and the societal interest." ***Id.*** As long as there exists a correct legal theory to justify the stop and articulable facts fitting a traffic law violation, the stop is a legal one. *See* ***Baudhuin,*** 141 Wis.2d at 651, 416 N.W.2d at 63.

At the time that Priebe made the traffic stop, he had the following facts: several hours earlier, the same car had executed an unsafe right turn, causing Priebe to brake in order to avoid a collision; just after that, he had observed the car cross a marked centerline several times; he later observed the same vehicle being operated; and just prior to the stop, he observed the driver of the car overcompensate while passing a parked car and move into the oncoming traffic lane, only three to four feet from the curb.

All of these observations, taken together, provided Priebe with a reasonable basis for making a brief investigative stop. Once Kester was approached, further observations by Priebe led him to conclude that Kester was an impaired driver. We affirm the trial court's ruling that the stop was sustained by enough reasonable suspicion to support a brief investigative stop.

Kester next argues that the trial court erred when it denied him the opportunity to cross-examine Priebe, who operated the Intoxilyzer, regarding the machine's ability to detect residual mouth alcohol. The introduction or exclusion of evidence rests within the sound discretion of the trial court. *See* ***Ritt v. Dental Care Assocs.,*** 199 Wis.2d 48, 72, 543 N.W.2d 852, 861 (Ct. App. 1995). The issue on appeal is whether the trial court exercised its discretion in accordance with acceptable legal standards and the facts of record. *See* ***State v. Pharr****,* 115 Wis.2d 334, 342, 340 N.W.2d 498, 501 (1983). A discretionary determination must be the product of a rational mental process, whereby the facts of record and the law relied upon are stated together, leading one to conclude that the court has made a reasoned determination. *See* ***Hartung v. Hartung,*** 102 Wis.2d 58, 66, 306 N.W.2d 16, 20-21 (1981).

On direct examination, Priebe testified as to certain occurrences which would cause the Intoxilyzer to invalidate a sample received.[2] One such

[2] Priebe was asked on direct examination:

Q:[F]rom your training and experience, are there certain things that would be printed out on the Intoxilyzer printout card if the instrument was malfunctioning?

A:Yes, there is.

occurrence was if it detected "residual mouth alcohol" since a true measure of an individual's level of intoxication must utilize deep lung air. When asked on cross-examination to comment on the process by which residual mouth alcohol causes the Intoxilyzer to invalidate a test result, Priebe responded, "I'm not an expert in the Intoxilyzer 5000, so I'm not -- I'm not sure."[3] Defense counsel, however, continued:

> Q:Are you aware of a study that was done sponsored by the Wisconsin State Laboratory of Hygiene which concluded that the residual mouth alcohol detector doesn't always work in the Intoxilyzer 5000? Are you aware of anything like that?

An objection was made by the State that this line of questioning was "[b]eyond the scope of [Priebe's] expertise through his previous testimony." After a sidebar conference, the court dismissed the jury and a discussion ensued in open court.

Defense counsel sought to introduce the conclusion of an article from a scientific journal that the "residual mouth alcohol flagging program" of the Intoxilyzer 5000 is not entirely reliable. The State argued that introduction

(..continued)
Q:Can you give me some examples?

A:There would be an indicator of r.f.i., which means radio frequency interference; residual mouth alcohol; blowing too early; starting the test procedures too early; pulling the test record out of the machine from the printer. That would also be indicated. Also, if the diagnostic check is not okay, that would also be indicated.

[3] On direct examination, Priebe had agreed to the statement that he was "a certified Intoxilyzer operator on the date [in question]."

of the article called for expert testimony and Priebe had not been held out as an expert. Defense counsel countered that he was using the treatise for impeachment on cross-examination and that this was allowed under § 908.03(18)(a), STATS.

The statutory authority defense counsel offered as allowing the introduction of the treatise provides in pertinent part:

> **(18)** LEARNED TREATISES. A published treatise, periodical or pamphlet ... is admissible as tending to prove the truth of a matter stated therein if ... a witness expert in the subject testifies, that the writer of the statement ... is recognized in the writer's profession or calling as an expert in the subject.
>
> (a) No published treatise ... may be received in evidence, except for impeachment on cross-examination, unless the party proposing to offer such document in evidence serves notice in writing upon opposing counsel at least 40 days before trial.

Section 908.03(18), STATS. Defense counsel argued that because he wanted to use the treatise to cross-examine Priebe, it was admissible.

We conclude, as did the trial court, that this argument misconstrues this subsection. The statute initially provides for the admissibility of any treatise which is substantiated by an expert witness as to its authenticity within the scientific community. Paragraph (a) then allows for the use of such a treatise for purposes of cross-examination. We agree with the trial court's reasoning that para. (a) allows a treatise to be used to cross-examine an *expert*, but not to impeach a witness without any particular expertise in the area in question. The trial court reasoned:

> You will not be permitted to introduce the conclusions of the Journal of Forensic Sciences through cross-examination of this witness. If you want to introduce those types of conclusions, I understand there's a couple ways of doing it. You can bring in an expert or you can file learned treatises.
>
> This person is present as a trained operator of this device. You asked him if he was an expert in the science behind it. He said no. I don't think that opens the door for you to parade a series of conclusions or even one conclusion past him in an area that's not within his expertise.
>
> There are many ways you could have introduced this into evidence, and you chose to do it on cross-examination of a witness who doesn't have an expertise in the area which you're questioning him.

The trial court made a well-reasoned decision not to allow the admission of this evidence in this way. We conclude that it was a proper exercise of discretion.

As a final issue, Kester claims that his conviction is violative of constitutional double jeopardy protections because he was previously administratively suspended for the same act. This issue is controlled by ***McMaster,*** in which the supreme court rejected this claim.

By the Court. – Judgment affirmed.

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