

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 23, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

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.

No. 97-1650-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

TIMOTHY NETZER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dodge County:
ANDREW P. BISSONNETTE, Judge. *Affirmed.*

DEININGER, J.¹ Timothy Netzer appeals a judgment convicting him of operating a motor vehicle while under the influence of an intoxicant (OMVWI), contrary to § 346.63(1)(a), STATS., as a second offense. He claims the trial court erred by not granting his motion in limine to deny the admissibility of a

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

videotape which portrayed his driving and subsequent actions the night of his arrest. Netzer argues that the taping of his communications with the law enforcement officer violated certain provisions of Chapter 968 and his constitutional right of privacy.² We disagree and conclude the trial court did not err in denying Netzer's motion. Accordingly, we affirm the conviction.

BACKGROUND

A state trooper was traveling westbound on State Highway 33 around 11:00 p.m. when his attention was drawn to two vehicles traveling in the eastbound lane. As he passed by the vehicles, the trooper noticed that a pickup truck "appeared to be weaving back and forth" and following the vehicle ahead of it too closely. The trooper made a U-turn and pursued the vehicles. While making the U-turn, he activated a video camera mounted on the dashboard of his squad car and narrated his subsequent observations. The trooper observed the truck as it continued to weave and "go off the edge of the road," and it was at this point that he activated his emergency lights and siren and stopped Netzer's truck.

The trooper approached Netzer's truck and entered into a conversation during which Netzer admitted to drinking that evening. The trooper

² The supreme court has described the statutory provisions at issue in this case as follows:

That statute prohibits the interception of any "wire" or "oral" communication, as defined, without prior judicial approval. The contents of any communication obtained in violation of the strictures of secs. 968.27-968.33, Stats., cannot be received in evidence in a Wisconsin court. Sec. 968.30(8) and (9). In fact, to intercept such a communication may be punishable by criminal sanctions. Sec. 968.31.

State v. Smith, 149 Wis.2d 89, 93, 438 N.W.2d 571, 573 (1989).

then asked Netzer to step out of the truck, and in doing so, Netzer lost his balance. The conversation and Netzer's movements were all videotaped. Netzer, at the trooper's request, then performed field sobriety tests which were also videotaped. Following the tests, Netzer was arrested for OMVWI.

The trial court heard numerous pretrial motions filed by Netzer, including one to suppress the videotape evidence. Netzer claimed that the videotape camera "intercepted" his "oral communications" without proper authorization in violation of §§ 968.27 through .31, STATS. The court determined that those provisions of Chapter 968 do not apply here and ruled that the jury could view and listen to portions of the videotape, specifically the eight to ten minutes of videotape from the time of the stop until just before Netzer's arrest. Netzer subsequently entered a plea of no contest and now appeals the trial court's denial of his motion in limine.

ANALYSIS

Netzer argues that the verbal communications between himself and the trooper that were captured on the videotape were intercepted without proper authority under Chapter 968, in violation of his right to privacy guaranteed by the Fourth Amendment to the U.S. Constitution and Article 1, section 11 of the Wisconsin Constitution.³ The issue involves the interpretation and application of statutory and constitutional provisions to undisputed facts, which is a question of law we review de novo. *Millers Nat'l Ins. Co. v. City of Milwaukee*, 184 Wis.2d 155, 164, 516 N.W.2d 376, 378 (1994).

³ Both constitutional provisions provide, in relevant part, as follows: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...."

This court has ruled that a videotape containing statements made by a defendant during field sobriety tests is admissible at trial. *State v. Haefer*, 110 Wis.2d 381, 328 N.W.2d 894 (1982). In *Haefer*, we rejected the defendant's contention that his Fifth Amendment privilege against self-incrimination had been violated:

In this case, defendant's words show the physical manifestations of intoxication. The words were admitted into evidence by means of videotape to show their physical characteristics. The videotape is a visual and aural corroboration of the deputy sheriff's testimony. The recorded statements were not testimonial. Defendant's fifth amendment rights were not abridged. The trial court properly admitted the videotape into evidence.

Haefer, 110 Wis.2d at 386, 328 N.W.2d at 897. (We also rejected in *Haefer* a challenge grounded on the Sixth Amendment right to counsel. *Id.*) The trial court here concluded that the videotape showed Netzer's driving and his subsequent performance on the field sobriety tests and that a jury should be allowed to see Netzer's physical agility, hear his speech pattern and observe his demeanor by viewing the videotape.

Netzer, however, asserts that the *Haefer* analysis is not controlling because it does not discuss the requirements of Chapter 968 or Fourth Amendment concerns. He claims that § 968.30, STATS., precludes the introduction of the videotape at trial because his verbal communication with the trooper was an "oral communication" entitled to protection under Chapter 968. Section 968.28, STATS., requires that a law enforcement officer "apply to a circuit court for an order authorizing or approving the interception of a wire or oral communication." *State ex. rel. Arnold v. County Court of Rock County*, 51 Wis.2d 434, 440, 187 N.W.2d 354, 357 (1971). The trooper here had not obtained prior authorization to videotape Netzer.

We conclude, however, as did the trial court, that the videotape did not intercept an “oral communication” as defined in § 968.27(12), STATS.:

“Oral Communication” means any oral communication uttered by a person *exhibiting an expectation that the communication is not subject to interception under circumstances justifying the expectation.* “Oral communication” does not include any electronic communication.

(Emphasis added.) An oral communication under § 968.27(12), STATS., requires not only a subjective belief that the communication is private but this belief in privacy must also be one that a reasonable person would have under the circumstances. *State v. Smith*, 149 Wis.2d 89, 94-95, 438 N.W.2d 571, 573 (1989). The trial court concluded that the circumstances surrounding Netzer’s statements that were captured on the videotape would cause a reasonable person to believe that his communications were subject to interception by law enforcement. We concur with the trial court’s reasoning:

[I] think the purpose of [the statute] is to protect citizens from a number of things; in particular, illegal interception of communications by law enforcement. When you’re standing on the roadside, looking at the face of a State Trooper, who’s uniformed, and he’s got his squad car there and the lights going, you know this communication is being received by law enforcement. So I’m indicating it doesn’t fly. This is not such an aural [sic] communication; and that that section would not bar the use of this type of a videotape of a field sobriety test, even though the defendant has not been advised it’s being taped audibly or even video.

We have no quarrel with Netzer’s assertion that a driver does not “lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation.” *Delaware v. Prouse*, 440 U.S. 648, 662 (1979) (footnote omitted). The Fourth Amendment, however, “protects people, not places,” and what one knowingly exposes to the public is not protected by the Fourth Amendment. *Katz v. United States*, 389 U.S. 347, 351 (1967)

(citation omitted). If Netzer had, as he claims, any actual or subjective expectation of privacy in his actions in driving on a public highway and in his oral communications with a law enforcement officer, such expectation was not reasonable. His actions and communications were thus beyond the protections afforded by Chapter 968 and the Fourth Amendment. *See Smith*, 149 Wis.2d at 95 and n.4, 438 N.W.2d at 573.

We conclude that §§ 968.27 through .31, STATS., do not apply to the videotaping of Netzer's traffic stop and his performance of field sobriety tests because he could have no reasonable expectation of privacy regarding actions taken and words spoken in the physical presence of a law enforcement officer. Accordingly, we affirm the conviction.

By the Court.—Judgment affirmed.

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

