

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 9, 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. 97-1678-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ROBERT G. BUSCH,

DEFENDANT-APPELLANT.

APPEAL from judgment of the circuit court for Grant County:
JOHN R. WAGNER, Judge. *Affirmed.*

VERGERONT, J.¹ Robert Busch appeals from a judgment of conviction for driving while under the influence of an intoxicant in violation of § 346.63(1)(a), STATS. He contends that his arrest was unlawful because he did

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

not consent to leave his garage to speak to the officer, and, without the information the officer observed and learned once Busch came out of his garage, there was no probable cause for the arrest. We conclude the arrest was lawful and we therefore affirm.

The pertinent allegations in the complaint are the following. In the late evening of December 30, 1994, Daniel Pepich, a police officer for the Village of Dickeyville, Wisconsin, observed a vehicle roll through a stop sign at Domi Avenue and U.S. Highway 151. The officer followed a vehicle, which turned off the highway and eventually pulled into the driveway of a residence. As he pulled up in front of the residence, Officer Pepich turned on the red and blue emergency lights of his squad car. As he was getting out of his squad car, he observed an individual, later identified as Busch, get out of the driver's side of the vehicle and walk from the garage toward the squad car. Officer Pepich observed that Busch was unsteady, spoke with slurred speech and referred to him (Pepich) as "Chief Mike" even though Pepich told Busch several times he was Dan Pepich. Busch met Pepich approximately four to five feet from the roadway. Pepich detected an odor of alcohol coming from Busch and asked for his driver's license which he provided. Pepich told Busch he had failed to correctly stop at the stop sign and asked Busch if he had been drinking. Busch said that, to be honest, he had had too much to drink; he had been drinking beer since 6:30 p.m. at Kueper's Bar. Pepich asked Busch if he would perform field sobriety tests and Busch refused, saying it would be admitting he did something wrong, and later saying he would not pass anyway because he was too drunk. Pepich then arrested Busch for driving under the influence of an intoxicant.

Busch moved to suppress evidence on the ground that the arrest was unlawful because Pepich had entered without a warrant onto the premises of

Busch's residence to arrest for the civil, nonjailable ordinance violation of failure to stop at a stop sign. At the hearing on Busch's motion, no testimony was presented because the prosecutor and Busch's attorney agreed that there were no disputed facts. This is the dialogue that established the undisputed facts at the hearing:

[PROSECUTOR'S COUNSEL]: ... I think if I indicate, and Mr. Witt can either agree or disagree as to the basic concept that when the officer followed, ultimately finding the person to be Mr. Busch to his home, he drove into the garage, the officer pulled up perpendicular to the garage and at that time turned on the red and blue lights. He started to get out of his squad car.

At that time Mr. Busch or a person found ultimately to be found Mr. Busch came from his garage, out of the garage directly toward the officer and they met about four, five feet from the roadway. Mr. Pepich, Officer Pepich isn't sure, but he thought there was a sidewalk in that area, and they met about four or five feet from the roadway. I don't know that that's disputed in its factual basis between the parties.

[BUSCH'S COUNSEL]: There's really no dispute there, Your Honor, as long as I guess I understand there that at this time this wasn't a pursuit situation, but the officer did not activate his lights until the Defendant was actually in his garage and the officer pulled up. If that's not [sic] the stipulation I think we can argue based on those facts.

[PROSECUTOR'S COUNSEL]: He would have been on his property at the time the red and blue lights would have been turned on. I don't think he was quite in his garage, but basically he was in his driveway.

THE COURT: Okay.

[BUSCH'S COUNSEL]: Okay....

The trial court rejected Busch's argument that he had involuntarily presented himself to the police. The trial court concluded that there was probable cause to arrest Busch for driving while under the influence of an intoxicant because of his statements and conduct which Officer Pepich observed after Busch left his garage, together with Busch having failed to stop at the stop sign.

Busch does not challenge the conclusion that there was probable cause based on Officer Pepich's observations of and conversation with Busch. Rather he challenges the voluntariness of Busch leaving his garage and coming up to the officer, which was what enabled Pepich to make the observations and obtain the information that formed the basis for probable cause to arrest.

Because the undisputed facts were described rather informally at the hearing, the parties' briefs are not entirely consistent on what they are. In his first brief Busch asserts, without a citation to the record, that Pepich activated his emergency lights after pulling into Busch's driveway. Busch argues, citing *Welsh v. Wisconsin*, 466 U.S. 740, 750 (1984), that there were no exigent circumstances, which are required before entering one's home without a warrant. Busch contends that he did not consent to speak to the officer but merely acquiesced to the show of his authority—pulling into his driveway and activating his emergency lights—and that this does not constitute the showing of free, intelligent, unequivocal and specific consent required by *State v. Johnson*, 177 Wis.2d 224, 501 N.W.2d 876 (Ct. App. 1993) (warrantless entry into apartment violates Fourth Amendment because State did not establish consent).

The State responds that because Busch came from his garage and met Officer Pepich four to five feet from the curb, the officer was not within the area of a person's home that is protected for Fourth Amendment purposes. The

State disputes the assertion in Busch's brief that Officer Pepich pulled into the driveway, arguing that the stipulated facts show he stopped his squad car in the roadway perpendicular to the driveway. The State contends this was not a seizure within the meaning of the Fourth Amendment and that Busch voluntarily came out of the garage to speak to the officer.

In his reply brief, Busch agrees with the State's understanding of the stipulated facts, arguing that they show that "after the defendant pulled his vehicle into his garage, the arresting officer parked his squad car perpendicular to the defendant-appellant's driveway, thereby blocking any means of exit, and activated his red and blue emergency lights." Busch contends that this constituted a stop and that it shows that Busch's coming out of the garage to speak to the officer was involuntary.

Because of Busch's agreement in the reply brief, we will accept as fact that Officer Pepich parked his squad car in the street, perpendicular to the driveway. We will also assume that this blocked Busch's ability to leave the driveway in his vehicle. We nevertheless conclude that this was not an unconstitutional seizure, as Busch contends it was.

To execute a valid investigatory stop consistent with the Fourth Amendment prohibition against unreasonable searches and seizures, a law enforcement officer must reasonably suspect, in light of his or her experience, that some kind of criminal activity has taken or is taking place. *State v. Richardson*, 156 Wis.2d 128, 139, 456 N.W.2d 830, 834 (1990). An investigatory stop is permissible when the person's conduct may constitute only a civil forfeiture. *State v. Krier*, 165 Wis.2d 673, 678, 478 N.W.2d 63, 65-66 (Ct. App. 1991). Upon stopping the individual, the officer may make reasonable inquiries to dispel

or confirm the suspicions that justified the stop. *Terry v. Ohio*, 392 U.S. 1, 22 (1968).

Officer Pepich had reasonable suspicion to believe that Busch had violated a traffic ordinance. Since it was constitutionally permissible to stop Busch to inquire about that, the State does not need to establish Busch's consent. If Busch went to talk to Pepich because he felt compelled to do so, that is no more than Officer Pepich could constitutionally require. The cases Busch cites to the effect that an officer may not enter a person's home without consent and without a warrant, except in exigent circumstances, are therefore not applicable. An officer's presence in the roadway and four to five feet from the curb does not constitute entry into the "curtilage" to the home, that is, the constitutionally protected area around one's home. *See United States v. Dunn*, 480 U.S. 294 (1987).

Once Officer Pepich stopped Busch to investigate the traffic violation, his observations of Busch's manner of speech and gait provided a reasonable suspicion to believe that Busch had been driving while under the influence of an intoxicant. Officer Pepich could therefore constitutionally question Busch on whether he had been drinking, and the information obtained through that inquiry provided probable cause to arrest for driving while under the influence of an intoxicant. We conclude that the arrest was lawful.

By the Court.—Judgment affirmed.

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

