

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 4, 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. 97-1920-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DONALD E. POWERS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Jefferson County:
WILLIAM F. HUE, Judge. *Affirmed.*

ROGGENSACK, J.¹ Donald Powers appeals his conviction for operating a motor vehicle while intoxicated. He claims that the circuit court erred when it denied his motion to suppress evidence gathered after he was arrested by an off-duty state traffic patrol trooper prior to administering sobriety tests.

¹ This appeal is decided by one judge pursuant to § 751.31(2)(c), STATS.

However, because we determine that the trooper had statutory authority to make a traffic stop and probable cause to arrest, we affirm.

BACKGROUND

At approximately 8:20 p.m. on the evening of March 18, 1995, off-duty Wisconsin state traffic patrol trooper, Gregory Jenswold, was driving southbound on Highway 26 as the second vehicle in a group of four vehicles, when he observed Powers, who was operating the last vehicle of the four, pull out onto the right-side gravel shoulder and pass all three vehicles ahead of him. Powers passed at a high rate of speed, fishtailing and spraying gravel as he did so. Jenswold followed Powers and observed his vehicle weaving between the centerline and the shoulder. At times, Powers' vehicle was halfway over the white line which defined the edge of the roadway. When Powers came to a stop at a traffic light, Jenswold exited his vehicle, approached Powers' car, and identified himself as a state traffic patrol trooper.

Jenswold asked Powers for his driver's license. After fumbling through his wallet with slow and deliberate movements, Powers eventually provided Jenswold with an employee identification card. Jenswold returned the card and again asked Powers for his driver's license. Powers then handed Jenswold his fishing license. When Jenswold reiterated that he needed to see a driver's license, Powers responded that he had one, but could not find it. Throughout this exchange, Jenswold noticed a strong odor of intoxicants coming from Powers, and observed that his eyes were bloodshot and glassy. However, Powers denied that he had been drinking when directly asked.

Because traffic was beginning to back up, Jenswold asked Powers to move his vehicle into an adjacent travel plaza parking lot. Jenswold followed and

again asked whether Powers had located his driver's license, which he had not. Jenswold asked Powers to exit his vehicle and to accompany him into the gas station to discuss Powers' driving. When Powers got out of his vehicle, Jenswold observed that he swayed back and forth, and that he appeared unsteady on his feet as they walked toward the gas station. Jenswold again asked how many drinks Powers had had, and this time he responded that he had had two drinks.

Inside the building, Jenswold immediately used the telephone to call a state traffic patrol dispatch center. While he was on the phone, Jenswold noticed that Powers had a wet spot on his groin area, as if he had urinated in his pants. Powers said that he was going to the bathroom, but Jenswold told him to stay where he was. Powers became agitated and went into the bathroom anyway. Jenswold followed him. Powers turned around and said he was leaving, but Jenswold physically restrained him and told him he was under arrest for the traffic violations which Jenswold had observed, as well as his apparent intoxication. A struggle ensued, which ended when backup officers arrived.

Powers was charged with operating a motor vehicle while intoxicated (OMVWI) and with a prohibited alcohol level (PAC), contrary to § 343.63(1)(a) and (b), STATS. He filed a suppression motion, contending that the stop and the arrest were not supported by reasonable suspicion and probable cause. The issue of the trooper's authority to detain Powers while Jenswold was off-duty was raised for the first time at the suppression hearing. The circuit court denied the suppression motion, reasoning that Jenswold at least had probable cause to arrest Powers for passing on the right and for reckless driving when he asked him to move into the nearby parking lot. Powers then pled no contest to the OMVWI charge, but he continues to challenge the legality of his arrest on appeal.

DISCUSSION

Standard of Review.

When a suppression motion is reviewed, the circuit court's findings of fact will be sustained unless they are clearly erroneous. *State v. Roberts*, 196 Wis.2d 445, 452, 538 N.W.2d 825, 828 (Ct. App. 1995). However, we will independently determine when the established facts show a person was under arrest, as a question of law. *State v. Swanson*, 164 Wis.2d 437, 445, 475 N.W.2d 148, 152 (1991). Likewise, whether undisputed facts constitute probable cause is a question of law which we review without deference to the circuit court. *State v. Babbitt*, 188 Wis.2d 349, 356, 525 N.W.2d 102, 104 (Ct. App. 1994).

Authority of the State Traffic Patrol.

Powers first argues that, because Jenswold was off-duty at the time of the incident, he had no authority to detain him; and therefore, the legality of Powers' arrest depends on whether the circumstances fulfilled the criteria for Jenswold to make a citizen's arrest.² Powers contends that *City of Waukesha v. Gorz*, 166 Wis.2d 243, 247, 479 N.W.2d 221, 223 (Ct. App. 1991), in which this court held that a police officer acting outside of his territorial jurisdiction could make an arrest only for a felony or a serious misdemeanor amounting to a breach of the peace, supports his position because passing on the right and reckless driving are not breaches of the peace or felonies. However, because we disagree with Powers' initial premise that an off-duty state traffic patrol trooper acts outside

² The State claims that Powers waived this argument by failing to mention it in his written suppression motion. However, a review of the record discloses that the issue was raised at the suppression hearing, and that the circuit court did address it. Therefore, we will address it as well.

of his lawful authority when making a traffic stop, and because Jenswold had probable cause to believe Powers was operating a motor vehicle while intoxicated when he arrested him, we affirm the circuit court, without analyzing the criteria necessary to a valid citizen's arrest.

Section 110.07(1)(a)3., STATS., provides that a state traffic patrol officer shall have the authority "to stop such vehicles while en route *at any time* upon the public highways to examine the same and make arrests for all violations" of ch. 340 to 350, among other traffic laws. (Emphasis added.) Thus, contrary to Powers' assertion, statutory authority *does* exist for a state traffic patrol officer to make traffic arrests regardless of whether he or she is on-duty. This statutory authority is also in accord with common law principles which suggest that a law enforcement officer has the duty "to effectuate arrests at all time and all places." 5 AM. JUR. 2D *Arrest* § 47 (1995) ("This duty is not affected by whether the officer is in or out of uniform or is officially 'on duty' or 'off duty.'"). Therefore, territorial jurisdiction cases such as *Gorz* simply do not apply to an off-duty state traffic patrol officer such as Jenswold who *was* acting within his area of jurisdiction,³ and within his statutory authority.

Reasonable Suspicion to Stop.

The Fourth Amendment prohibits the unreasonable seizure of a person without a warrant supported by probable cause. U.S. CONST. amend. IV. The detention of a motorist by a law enforcement officer for a routine traffic stop constitutes a "seizure" of a person within the meaning of the Fourth Amendment.

³ Wisconsin traffic patrol officers have jurisdiction over all public highways in Wisconsin to enforce state traffic laws. Section 110.07, STATS.

Berkemer v. McCarty, 468 U.S. 420, 436-37 (1984). Statements given and items seized during a period of illegal detention are inadmissible. *Florida v. Royer*, 460 U.S. 491, 501 (1983). However, an investigative detention is not “unreasonable” if it is brief in nature, and is justified by a reasonable suspicion that the motorist has committed or is about to commit a crime. *Berkemer* at 439; *see also* § 968.24, STATS.

According to *Terry v. Ohio*, 392 U.S. 1 (1968), the reasonable suspicion necessary to detain a suspect for investigative questioning must rest on specific and articulable facts, together with rational inferences drawn from those facts, sufficient to lead a reasonable person to believe that criminal activity may be afoot, and that action would be appropriate. *Id.* at 22. “The question of what constitutes reasonable suspicion is a common sense test. Under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience?” *State v. Jackson*, 147 Wis.2d 824, 834, 434 N.W.2d 386, 390 (1989). The test is designed to balance the personal intrusion into the suspect’s privacy occasioned by the stop against the societal interests in solving crime and bringing offenders to justice. *State v. Guzy*, 139 Wis.2d 663, 680, 407 N.W.2d 548, 556 (1987).

In this case, Jenswold had an abundance of specific and articulable facts to support a reasonable suspicion that Powers had committed several traffic violations. He had observed Powers fishtailing on the gravel shoulder, while illegally passing three vehicles at 65 mph or more, in violation of §§ 346.08 (passing on the right) and 346.62(2), STATS., (reckless driving). In addition, he had watched Powers drifting from side to side in his lane for a period of eight miles, prior to the stop. These circumstances provided a reasonable basis for the

traffic stop, both to issue citations and to investigate the cause of Powers' erratic driving.

Moment of Arrest.

An arrest occurs when “a reasonable person in the defendant’s position would have considered himself or herself to be ‘in custody,’ given the degree of restraint under the circumstances.” *Swanson*, 164 Wis.2d at 446-47, 475 N.W.2d at 152. This is an objective test, focusing on what the officer’s actions and words would reasonably have communicated to the defendant, rather than on the subjective belief of either the officer or the defendant. *Id.* An officer who has reasonable suspicion that a person has been driving while under the influence is entitled to have the suspect perform tests which would either confirm or dispel the officer’s suspicions. *See Terry*, 392 U.S. at 28. However, the officers may not “seek to verify their suspicions by means that approach the conditions of arrest.” *Royer*, 460 U.S. at 499. Thus, while a suspect may be detained short of arrest during an investigatory traffic stop, such a stop differs from an arrest by its brevity, and its public nature. *Berkemer*, 468 U.S. at 438. Moreover, Wisconsin requires that investigative questioning “be conducted in the vicinity where the person was stopped.” Section 968.24, STATS.

Powers argues, and the circuit court concluded, that he was effectively arrested the moment Jenswold asked him to move his vehicle to a nearby parking lot. We disagree. While Powers was certainly not free to leave while being detained on a traffic stop, the degree of restraint used does not indicate that he was already in custody when Jenswold requested he move to the parking lot. Jenswold had not handcuffed or even touched Powers; he had not informed him that he was under arrest, and he had permitted Powers to drive his

own vehicle. None of those circumstances are consistent with arrest, but all are consistent with a routine, temporary investigative detention in which an officer is entitled to confirm or dispel his reasonable suspicion that a driver was intoxicated.⁴ Section 968.24, STATS. Therefore, we conclude that a reasonable person in Powers' position would not have considered himself to be in custody when he was asked to move his car from an intersection where he was blocking traffic, to an adjacent parking lot in the same vicinity.

Probable Cause to Arrest.

Every warrantless arrest must be supported by probable cause. *Molina v. State*, 53 Wis.2d 662, 670, 193 N.W.2d 874, 877 (1972); U.S. CONST. amend. IV; WIS. CONST. art. I, § 11; § 968.07(1)(d), STATS. A law enforcement officer has probable cause to arrest when the totality of the circumstances within that officer's knowledge at the time of the arrest would lead a reasonable officer to believe that the defendant probably committed a crime. *State v. Koch*, 175 Wis.2d 684, 701, 499 N.W.2d 152, 161 (1993). This is a practical test, based on "considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *State v. Drogsvold*, 104 Wis.2d 247, 254, 311 N.W.2d 243, 247 (Ct. App. 1981) (citation omitted). The objective facts before the police officer need only lead to the conclusion that guilt is more than a possibility. *State v. Richardson*, 156 Wis.2d 128, 148, 456 N.W.2d 830, 838 (1990).

⁴ By the time Jenswold asked Powers to pull into the parking lot, he had additional facts to support a reasonable suspicion that Powers had been driving while intoxicated—namely, the strong odor of intoxicants and Powers' inability, either physically or mentally, to find his driver's license.

Powers cites *Swanson* to support his position that Jenswold lacked probable cause to arrest him for OMVWI. A footnote in *Swanson* commented:

Unexplained erratic driving, the odor of alcohol, and the coincidental time of the incident [with bar closing] form the basis for a reasonable suspicion but should not, in the absence of a field sobriety test, constitute probable cause to arrest someone for driving while under the influence of intoxicants. A field sobriety test could be as simple as a finger-to-nose or walk-a-straight-line test. Without such a test, the police officers could not evaluate whether the suspect's physical capacities were sufficiently impaired by the consumption of intoxicants to warrant an arrest.

Swanson, 164 Wis.2d at 453-54 n.6, 475 N.W.2d at 155 n.6. However, the *Swanson* footnote has not been interpreted to require a field sobriety test before arrest in all cases. See, e.g., *State v. Wille*, 185 Wis.2d 673, 518 N.W.2d 325 (Ct. App. 1994) (holding that an officer had probable cause to arrest a suspect who had hit the rear end of a car parked along the highway, smelled of intoxicants, and stated in his hospital room that he had “to quit doing this”); *Babbitt*, 188 Wis.2d at 357-58, 525 N.W.2d at 104-05 (holding that an officer had probable cause to arrest when a suspect drove erratically, smelled of intoxicants, walked slowly and deliberately and was uncooperative). Thus, field sobriety tests are but part of the totality of circumstances which may be taken into account by the arresting officer.

The arresting officer in this case had significantly greater evidence of intoxication and impaired capacity than did the officer in *Swanson*. In addition to the erratic driving and the odor of intoxication, Powers had red, glassy eyes; he exhibited an inability to distinguish his driver's license from other various forms of identification which he had in his wallet; he was unsteady walking and he was unable to control his bladder. Furthermore, he initially lied to Jenswold when he said he had had nothing to drink, suggesting a guilty mind. See *Wille*, 185 Wis.2d at 684, 518 N.W.2d at 329. These facts would lead a reasonable officer to

conclude that there was more than a possibility that Powers had been driving while under the influence, in addition to committing the other traffic violations. Therefore, we conclude that Jenswold had probable cause to arrest Powers for OMVWI, as well as for the other traffic violations, when he physically restrained him from leaving the gas station.

CONCLUSION

State traffic patrol officers have territorial jurisdiction over all of the public highways in the state, as well as specific statutory authority to make traffic arrests at any time. Therefore, a Wisconsin state traffic patrol officer need not satisfy the requirements for a citizen's arrest in order to stop a suspected drunk driver, even when the officer is off-duty. Nor need an officer conduct sobriety tests before making an OMVWI arrest when, as here, there are facts sufficient to lead a reasonable officer to believe the defendant was operating a motor vehicle while under the influence. The suppression motion was properly denied.

By the Court.—Judgment affirmed.

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

