COURT OF APPEALS DECISION DATED AND FILED

December 3, 1998

**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. 98-1655-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES A. FISCHER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Portage County: JOHN V. FINN, Judge. *Affirmed.*

DEININGER, J.[1] James Fischer 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. Fischer contends that the trial court erred in denying his motion to suppress evidence obtained during an investigative

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

detention and following his subsequent arrest. We conclude, contrary to Fischer's assertions, that the arresting deputy had reasonable suspicion to conduct an investigatory detention, and that the deputy had probable cause to arrest Fischer for OMVWI. Accordingly, we affirm Fischer's conviction.

BACKGROUND

While on an evening foot patrol at the "Almond Tater Toot," an outdoor community festival, two Portage County sheriff's deputies were informed by an unidentified citizen that an individual, who turned out to be Fischer, had been drinking and was "apparently passed out" in a car. The citizen pointed out the car, which was parked on a street within an area closed to traffic for the festival. Live band music, carnival rides, food concessions and a large number of people on foot were within the festival area. The deputies observed Fischer sleeping in the driver's seat of the vehicle, which was not in operation at the time. They determined that the situation warranted no immediate intervention, but that they would periodically monitor the vehicle as they continued their patrol of the festival area.

Some time later, the deputies observed that Fischer, now awake, was still seated behind the wheel of the vehicle and was conversing with a person outside the car. They approached the vehicle to "see how he was doing." As they did so, the deputies observed some combination of the headlights and the brake or back-up lights of the car go on, and the deputies then ran toward the car. They "were concerned that if this person had indeed been drinking and he was now operating the vehicle, that this would pose a danger to the people that were walking around inside that barricaded area." As they approached the car, the deputies observed that the car's engine was running, and they shouted to Fischer to

turn off the car. When they reached the car, the arresting deputy smelled "a strong odor of alcoholic beverage" emanating from the interior of the vehicle. The other deputy attempted to reach into the open window and unlock the car door. Fischer turned off the vehicle after several requests.

The deputies asked Fischer to get out of the vehicle. As he complied, the deputies observed that he was "groggy," had difficulty getting out of the vehicle, had trouble maintaining his balance, and that his eyes were bloodshot. When he identified himself, the deputies observed that his speech was slurred and he "had a strong odor of alcoholic beverage on his breath." After checking Fischer's driving record, the deputies determined that Fischer's driver's license had been revoked. Fischer told the arresting deputy that "he had been consuming some beer."

The deputies took Fischer to their squad car, which was "on the next block," to avoid possible difficulty with some friends or relatives of Fischer's who were nearby and seemed upset by the deputies' actions. Fisher "swayed" as he walked to the squad car. At the squad car, the deputy requested Fischer to perform the Horizontal Gaze Nystagmus (HGN) field sobriety test, following which Fischer was arrested for OMVWI and was taken to the Portage County Jail for an Intoxilyzer test.[2]

Fischer moved to suppress evidence obtained during the stop and following his arrest. The trial court determined that the deputies had reasonable

[2] The trial court disregarded the results of the Horizontal Gaze Nystagmus (HGN) sobriety test in determining probable cause, agreeing with Fischer that the State had not laid a sufficient foundation for the admission of the test result into evidence. Also, the arresting deputy testified that he placed Fischer under arrest prior to taking him to the location of the squad car, and thus, prior to the performance of the HGN test.

suspicion to make an investigatory stop, and that they had probable cause to arrest Fischer for OMVWI. After the denial of his motion to suppress, Fischer pled no contest to OMVWI. Fischer appeals his conviction, contending that the trial court erred in denying his motion to suppress.

ANALYSIS

When reviewing the denial of a suppression motion, we will uphold the trial court's findings of fact unless they are clearly erroneous. *See* ***State v. Gaulrapp***, 207 Wis.2d 600, 604, 558 N.W.2d 696, 698 (Ct. App. 1996), *review denied*, 208 Wis.2d 213, 562 N.W.2d 603 (1997). Whether the facts as found by the trial court satisfy the Fourth Amendment's requirement of reasonableness is a question of law which we decide de novo. *See* ***State v. Waldner***, 206 Wis.2d 51, 54, 556 N.W.2d 681, 683 (1996).

a. Reasonable suspicion for investigative detention.

Fischer's first contention on appeal is that the deputies did not have a reasonable suspicion on which to base their investigative detention. The temporary detention of an operator of a motor vehicle during a police stop, even if brief, constitutes a "seizure" under the Fourth Amendment. *See* ***Whren v. United States***, 517 U.S. 806, 809-10 (1996). Thus, the basis for a motor vehicle stop must be reasonable under the Fourth Amendment. *See* ***Florida v. Royer***, 460 U.S. 491, 500 (1983). The initial stop of a motor vehicle is "generally reasonable if the officers ... have grounds to reasonably suspect a violation has been or will be committed." ***Gaulrapp***, 207 Wis.2d at 605, 558 N.W.2d at 698-99 (citation omitted). "[R]easonable suspicion must be based on 'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant

the intrusion.'" ***State v. Richardson***, 156 Wis.2d 128, 139, 456 N.W.2d 830, 834 (1990).

Fischer asserts that the deputies lacked a reasonable suspicion because the only information the deputies had when they detained him was an anonymous tip, and the deputies had no reason to believe that the tip was reliable. We disagree.

We first note that although the tip was arguably "anonymous," in that the deputies did not recognize the citizen who reported Fischer's condition and whereabouts, the information was provided in a face-to-face communication. A citizen who personally presents himself to the police to provide information, thereby risking identification or further interrogation, is entitled to greater credibility than an anonymous caller or the writer of an anonymous letter. Moreover, the tip was partially corroborated when the deputies confirmed the fact that there was a man sleeping in the car the citizen pointed out to them. A partially corroborated tip can give rise to reasonable suspicion, even though only innocent details of the tip are corroborated. As our supreme court held in ***Richardson***:

> [T]he corroboration by police of innocent details of an anonymous tip may under the totality of the circumstances give rise to reasonable suspicion to make a stop. The corroborated actions of the suspect, as viewed by police acting on an anonymous tip, need not be inherently suspicious or criminal in and of themselves. Rather, the cumulative detail, along with reasonable inferences and deductions which a reasonable officer could glean therefrom, is sufficient to supply the reasonable suspicion that crime is afoot and to justify the stop.

Id. at 142, 456 N.W.2d at 835.

We conclude that on the present facts, the cumulative detail and reasonable inferences drawn by the deputies gives rise to a reasonable suspicion sufficient to justify the investigative detention. They received a face-to-face report that an individual who had been drinking was passed out in a car. Fischer was in fact asleep in the car, which was parked within an area closed to traffic for a community festival that was taking place on the street. The area was noisy and large numbers of people were walking and dancing nearby. It would have been highly unusual, to say the least, for a sober citizen to choose that location for a nap. These circumstances give rise to a reasonable suspicion that Fisher had been drinking and was under the influence of intoxicants. When the deputies later observed the car lights go on, with Fischer behind the wheel and the engine running, they formed a reasonable suspicion that Fisher was OMVWI.

Accordingly, we conclude that the deputies' investigative detention of Fischer was proper.

b. Probable cause to arrest.

Fischer next contends that the deputies lacked probable cause to arrest him, and that any evidence obtained after the arrest should have been suppressed. In order to determine whether the deputies had probable cause, we face a preliminary question: At what point did the deputies arrest Fisher? Fisher contends that he was arrested when he was ordered to get out of his car and one of the deputies reached into his car trying to unlock the door. Thus, according to Fischer, the deputies could not rely on any information they obtained after that point in establishing probable cause.

We must determine the moment of arrest under the objective test articulated by the supreme court in ***State v. Swanson***, 164 Wis.2d 437, 446-47,

475 N.W.2d 148, 152 (1991): "The standard generally used to determine the moment of arrest in a constitutional sense is whether 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." In ***Swanson***, the court made clear that the level of restraint typical of the routine traffic stop is not formal arrest. *See **id***. at 447, 475 N.W.2d at 152. Furthermore, causing a suspect to go a short distance from the scene in order to continue the investigation, so long as it is still "in the vicinity" of the stop, does not convert an investigative detention into an arrest. *See* § 968.24, STATS.; ***United States v. Vanichromanee***, 742 F.2d 340 (7th Cir. 1984) (transfer from parking garage to apartment in same building reasonable; court emphasizes "the transfer here was not to a more institutional setting").

In Fischer's case, the deputies' actions when they asked Fischer to get out of the car were consistent with a routine traffic stop. Fischer contends that the deputies "shouted at him to turn the engine off," "ordered" him out of the car, and "reached in his car window in an attempt to open the car door." The deputies used no force, threats or weapons. These actions on the part of the deputies do not meet the standard illustrated in ***Swanson***. As the court suggested in ***Swanson***, "far more intrusive circumstances than this," have been held to constitute investigative detention rather than arrest. *See* ***Swanson,*** 164 Wis.2d at 448-49, 475 N.W.2d at 153. We conclude, therefore, that Fischer was not arrested when the deputies asked him to get out of his car. We also conclude that it is immaterial whether the arrest occurred just prior to Fischer's being escorted away from his vehicle, or following the administration of the HGN test at the deputies' squad car. The results of the HGN test were effectively stricken from the record of the suppression hearing, and the observation of Fischer's "swaying" while he walked

to the squad car added little to their observation that he had difficulty maintaining his balance after he got out of his car.

We turn now to the question whether the information known to the deputies at the moment of arrest constituted probable cause. Probable cause exists when a reasonable police officer believes that the defendant probably committed a crime. *See* ***State v. Nordness***, 128 Wis.2d 15, 35, 381 N.W.2d 300, 308 (1986). In the context of OMVWI, we have determined that:

> In determining whether probable cause exists, we must look to the totality of the circumstances to determine whether the "arresting officer's knowledge at the time of the arrest would lead a reasonable police officer to believe ... that the defendant was operating a motor vehicle while under the influence of an intoxicant."

State v. Kasian, 207 Wis.2d 611, 621, 558 N.W.2d 687, 691 (Ct. App. 1996) (citation omitted). We note further that § 346.63(1)(a), STATS., does not prohibit operating a motor vehicle after having consumed alcohol, but prohibits driving "[u]nder the influence of an intoxicant ... to a degree which renders [one] incapable of safely driving."

In ***Kasian***, we determined that probable cause was established by the arresting officer's observation of three indicia of intoxication: a one-vehicle accident; the odor of intoxicants emanating from the defendant; and the defendant's slurred speech. *See* ***id***. at 622, 558 N.W.2d at 691-92. We concluded that "[i]n some cases, the field sobriety tests may be necessary to establish probable cause; in other cases, they may not." *See* ***id***. at 622, 558 N.W.2d at 692. More recently, in ***County of Jefferson v. Renz***, No. 97-3512, slip op. at 19 (Wis. Ct. App. Oct. 15, 1998, ordered published November 18, 1998), we concluded that minimal deviations during field sobriety testing did not establish probable cause that the defendant could not drive safely where the defendant's "speech was not

slurred, there was no testimony that his eyes were glassy, and he was not unsteady when walking or standing."

The matters observed by the deputies who arrested Fischer are at least as compelling as those in ***Kasian***, and they satisfy the very omissions we noted in ***Renz***. We conclude that the deputies' knowledge at the time of Fischer's arrest would have led a reasonable officer to believe that Fischer was operating under the influence. The deputies had received information that a man in a car, who was later identified as Fischer, had been drinking and was passed out. The vehicle in which the deputies observed Fischer sleeping was parked within a noise-filled area closed to traffic. The arresting deputy smelled "a strong odor of alcoholic beverage" emanating from the interior of the vehicle and from Fischer himself. The deputies observed that Fisher was "groggy," had difficulty getting out of the vehicle, had trouble maintaining his balance, and that his eyes were bloodshot. When he identified himself, his speech was slurred, and he admitted to having consumed beer. We conclude that the deputies had probable cause to arrest Fischer for OMVWI, and that field sobriety tests would have added little, if anything, to the inferences the deputies reasonably made regarding Fischer's inability to drive safely.

For the reasons discussed above, we affirm the judgment convicting Fischer of OMVWI.

By the Court.—Judgment affirmed.

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