COURT OF APPEALS
DECISION
DATED AND FILED

DECEMBER 9, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1974

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DANIEL M. FAKEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sheboygan County: TIMOTHY M. VAN AKKEREN, Judge. *Reversed.*

ANDERSON, J. In order to express a reasonable and articulable suspicion that will support a warrantless stop for operating a vehicle with an excessively loud muffler in violation of § 347.39, STATS., a law enforcement officer must be able to testify as to the objective standard he or she used to measure the noise from the defendant's vehicle. We reverse the trial court's denial of Daniel M. Faken's motion to suppress because an officer's

opinion that Faken's exhaust was "quite loud" does not constitute a reasonable and articulable suspicion.

At approximately 6:30 p.m. on September 21, 1997, Motor Carrier Inspector George Wright of the Wisconsin State Patrol was headed into the city of Sheboygan on STH 42. Wright had his vehicle's window rolled down when he observed an "older Chevy coupe hot rod" proceeding in the opposite direction; the driver of the hot rod "had stepped on it and took off" and Wright "could hear it was quite loud." Wright turned around and stopped the vehicle after having the opportunity to observe the driving pattern. Wright did not issue the driver of the vehicle, Faken, a warning or a citation for a defective exhaust; however, after closer contact, he issued citations for second offense operating a motor vehicle while intoxicated and with a prohibited blood alcohol concentration contrary to §§ 346.63(1)(a) and (b), and 346.65(2)(b), STATS.

Prior to trial for the intoxicated driving charges, the trial court denied Faken's motion to suppress all evidence obtained as a result of the September 21 stop. At the evidentiary hearing, the court found that there had been a sufficient showing that Wright had a reasonable and articulable suspicion that Faken had violated a traffic regulation to justify his stop of the vehicle. Faken appeals.

DISCUSSION

A law enforcement officer's stop of a vehicle and detention of 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 search and seizure initially depends upon whether the vehicle was lawfully

stopped. *See **id***. We independently review the legality of the initial stop as a matter of law. *See **id***.

> Section 347.39, STATS., provides:
>
> **(1)** No person shall operate on a highway any motor vehicle subject to registration unless such motor vehicle is equipped with an adequate muffler in constant operation and properly maintained to prevent any excessive or unusual noise or annoying smoke. This subsection also applies to motor bicycles.
>
> **(2)** No muffler or exhaust system on any vehicle mentioned in sub. (1) shall be equipped with a cutout, bypass or similar device nor shall there be installed in the exhaust system of any such vehicle any device to ignite exhaust gases so as to produce flame within or without the exhaust system. No person shall modify the exhaust system of any such motor vehicle in a manner which will amplify or increase the noise emitted by the motor of such vehicle above that emitted by the muffler originally installed on the vehicle, and such original muffler shall comply with all the requirements of this section.
>
> **(3)** In this section, "muffler" means a device consisting of a series of chambers of baffle plates or other mechanical design for receiving exhaust gases from an internal combustion engine and which is effective in reducing noise.

Pursuant to § 345.22, STATS., an officer may arrest an individual for the violation of a traffic regulation without a warrant if the officer has reasonable grounds to believe that the person is violating or has violated a traffic regulation. *See **Baudhuin***, 141 Wis.2d at 648, 416 N.W.2d at 62. Implicit in this statutory authority to arrest for a traffic violation is the authority to stop the vehicle when the officer has reasonable grounds to believe that a violation has occurred. *See **id***.

At the evidentiary hearing, Wright testified that he had his window down and could hear Faken accelerating as he approached his squad. He characterized the sound of Faken's exhaust system as being "quite loud." He did

concede that the noise of the exhaust might have been enhanced because Faken was going through an overpass. However, Wright testified that he was a heavy equipment mechanic, owned a shop and dealt with many types of exhaust systems. Wright had been a state trooper for approximately six years and a motor carrier inspector for almost the same amount of time. One of his duties as an inspector was to conduct inspections of reconstructed vehicles. He further testified that he routinely inspected the exhaust systems on hot rods. During cross-examination he stated that it was possible Faken was exceeding the posted speed limit but he did not have any equipment to confirm that belief. Finally, Wright acknowledged that he did not observe Faken drive erratically, swerve or squeal the tires.

On appeal, Faken contends that from this evidence the trial court did not have "sufficient, articulated facts that a violation of a traffic law had occurred." The State retorts that short of having a sound meter, Wright articulated a reasonable suspicion that Faken's exhaust system was too loud based upon his experience and background. The trial court found a sufficient showing that Wright had a reasonable and articulable suspicion that Faken had violated § 347.39, STATS., to justify his stop of the vehicle.[1]

Under the reasonable grounds standard, an officer should have before him or her articulable facts to believe that a defendant has violated a traffic regulation. *See* ***Baudhuin***, 141 Wis.2d at 650, 416 N.W.2d at 63. In ***Baudhuin***,

[1] The motion to suppress was based on the question of whether Wright had a reasonable and articulable suspicion to justify the traffic stop. Inexplicably, the trial court considered evidence Wright gathered after the initial stop—the odor of an intoxicant coming from Faken and the results of field sobriety tests—and found that this provided an additional basis to justify the stop. The fact that Wright found evidence, after the stop, that permitted him to articulate a reasonable suspicion that Faken was driving drunk cannot be used after the fact to bootstrap that suspicion into a reasonable and articulable suspicion that Faken had violated a traffic regulation before the stop. *See* ***State v. Ford***, 211 Wis.2d 741, 750, 565 N.W.2d 286, 290 (Ct. App. 1997).

the officer stopped the defendant for impeding traffic and subsequently detected the odor of intoxicants on his breath, leading to charges that he had violated § 346.63, STATS. *See* ***Baudhuin***, 141 Wis.2d at 646, 416 N.W.2d at 61.

In upholding the legality of the stop, the supreme court noted that the officer had before him "objective facts" of Baudhuin's apparent violation of the law that prompted the initial stop. *See* ***id***. at 650, 416 N.W.2d at 63. Significantly, in support of the officer's opinion that Baudhuin was impeding traffic, the officer noted that Baudhuin was traveling 17 miles per hour in a 25 miles per hour zone, there were eight to ten vehicles backed up behind the officer while he paced Baudhuin's speed and there were no obvious signs of flat tires, defective lights or any other condition to explain the slow speed. *See* ***id***. at 645, 416 N.W.2d at 61. Based on all of these articulated facts, the officer believed that Baudhuin was impeding traffic. *See* ***id.***

Here, we have no such articulation of the facts. All we have is Wright's conclusionary testimony that does not demonstrate articulable facts to support his opinion that the vehicle was emitting noise disruptive enough to be classified as "excessive or unusual" pursuant to § 347.39, STATS.

We recently had the occasion to address the circumstances in which a law enforcement officer can conclude that an exhaust system is making excessive or unusual noise. In ***County of Jefferson v. Renz***, No. 97-3512 (Wis. Ct. App. Oct. 15, 1998, ordered published Nov. 17, 1998), Renz asserted that § 347.39, STATS., was unconstitutionally vague because it does not contain any objective standard that law enforcement officers can use to apply the statute. *See* ***Renz***, slip op. at 7-9. In rejecting his challenge, we concluded that an objective standard was sufficiently spelled out in the statute.

> The first subsection requires that a vehicle be equipped with 'an adequate muffler in constant operation and properly maintained to prevent any excessive or unusual noise.…' Section 347.39(1), STATS. The second subsection prohibits specific modifications to a muffler or exhaust system, as well as any modification that 'will amplify or increase the noise emitted by the motor of such vehicle above that emitted by the muffler originally installed on the vehicle, and such original muffler shall comply with all the requirements of this section.' Section 347.39(2). The third section defines 'muffler.' These sections make clear that excessive or unusual noise is to be judged against the noise emitted by a muffler that meets the statutory requirements when originally installed on the vehicle. This is a sufficiently specific context in which to judge the reasonableness of the noise emitted by a muffler.

Renz, slip op. at 10.

Renz is also instructive on how this objective standard can be applied. The arresting officer's attention was drawn to Renz's vehicle because he was able to hear the exhaust with his squad's windows closed and the radio on. The officer testified that he had taken a course on equipment of motor vehicles at the Wisconsin State Patrol Academy. *See* ***id.*** at 3. "He had learned as a basic rule of thumb that if a vehicle made after 1979 was louder than a car with a muffler that had just 'come from the factory,' there was a violation of the statute." ***Id.*** Renz's vehicle was a 1991 Chevy Camaro and the officer testified that he knew the muffler was defective and had leaks, otherwise it would not be as loud as it was. In his opinion, it was "excessively loud." ***Id.*** In discussing this evidence, we concluded:

> [The arresting officer] understood that the standard for a reasonable, usual or normal amount of noise was that amount of noise emitted when a muffler was originally installed on a car. He knew what that sounded like and he knew this sound was louder, so loud that he could hear it with his windows up and his radio on. His judgment that the muffler was defective and the noise was greater than that of a car with a properly maintained muffler was

> confirmed by Renz, who acknowledged that the muffler 'had leaks and was loud.'

Id. at 10-11.

In this case, we have no testimony from Wright that he knew what the standard was for a "reasonable, usual or normal amount of noise." There is no evidence that the muffler on Faken's vehicle was the factory installed muffler or a muffler Faken purchased from an auto parts store. There is no testimony that Wright knew what a "legal" muffler for Faken's type of vehicle sounded like and that the installed muffler was louder. There is no evidence that Faken ever confirmed that the muffler was excessively loud. Further, Wright did not testify about the approximate distance at which he heard Faken's vehicle or how long the car was audible upon approach and passing. Wright had not tested to see whether Faken's vehicle could be heard with the window up.

All of these factors support our determination that Wright's meager and conclusionary testimony did not demonstrate articulable facts to support his opinion that the vehicle was emitting noise disruptive enough to be classified as "excessive or unusual" pursuant to § 347.39(1), STATS. *See* ***Baudhuin***, 141 Wis.2d at 650, 416 N.W.2d at 63. Wright's bare statement, without more, that Faken's car was "quite loud" is insufficient.

By the Court.—Judgment reversed.

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