

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 12, 2010

A. John Voelker
Acting Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2009AP2268

STATE OF WISCONSIN

Cir. Ct. Nos. 2009TR81, 2009TR82

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES CASAS KLAUSEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
PATRICK J. FIEDLER, Judge. *Affirmed.*

¶1 LUNDSTEN, J.¹ James Casas Klausen appeals a judgment of the circuit court finding him guilty of operating a motor vehicle while under the

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

influence of an intoxicant. He argues that the arresting officer lacked reasonable suspicion for his traffic stop and the expansion of that stop to investigate whether Klausen was intoxicated. I agree with the circuit court that the stop and expanded investigation were proper.

Background

¶2 At approximately 2:15 a.m. on December 24, 2008, a police officer observed a vehicle with Wisconsin plates and conducted a routine check of the vehicle's registration. The officer learned that the vehicle was registered to James Klausen and that Klausen had a Wisconsin address. The officer then ran a report on Klausen's driving history that showed Klausen was involved in some sort of previous crash in Wisconsin and revealed that Klausen did not have a valid driver's license issued in Wisconsin. The report did not state whether Klausen's license was revoked or suspended, and did not indicate whether Klausen was validly licensed in some other state.

¶3 The officer stopped the vehicle, identified Klausen as the driver, and learned that Klausen had a valid Iowa license. During this exchange, the officer noticed signs of intoxication, which led to questions and responses by Klausen, a field sobriety test, an arrest, and drunk driving charges.

¶4 After Klausen unsuccessfully moved to suppress the evidence from the stop, he submitted to a stipulated trial based on the police reports and the suppression hearing transcript. The circuit court found Klausen guilty, and entered judgment on the charge of operating while under the influence of an intoxicant.

Discussion

¶5 Both of Klausen’s points on appeal concern reasonable suspicion:

In order to justify an investigatory seizure, “[t]he police must have a reasonable suspicion, grounded in specific articulable facts and reasonable inferences from those facts, that an individual is [or was] violating the law.” “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.” Before initiating a brief stop, an officer is not required to rule out the possibility of innocent behavior. “A trial court’s determination of whether undisputed facts establish reasonable suspicion justifying police to perform an investigative stop presents a question of constitutional fact, subject to *de novo* review.”

State v. Colstad, 2003 WI App 25, ¶8, 260 Wis. 2d 406, 659 N.W.2d 394 (citations omitted).

A. Reasonable Suspicion Supporting The Initial Stop

¶6 WISCONSIN STAT. § 343.05(3)(a) requires that a Wisconsin resident operating a vehicle possess a valid Wisconsin driver’s license. There are several exceptions, including one for nonresident persons who possess a valid operator’s license “in the person’s home jurisdiction.” WIS. STAT. § 343.05(4)(b)1. Subject to some exemptions, the administrative code requires a Wisconsin resident to apply for a Wisconsin license within sixty days of establishing residency. WIS. ADMIN. CODE § TRANS 102.14(4). Thus, the combined statutory/administrative code scheme contemplates that a person with a valid out-of-state driver’s license who becomes a Wisconsin resident has sixty days, after becoming a Wisconsin resident, to apply for a Wisconsin license.

¶7 I begin by explaining why the officer had reasonable suspicion to believe that Klausen was a Wisconsin resident in violation of the requirement that he apply for a Wisconsin driver's license within sixty days of becoming a Wisconsin resident.

¶8 Before the stop, the officer learned the following:

- The vehicle was registered in Wisconsin to Klausen.
- Klausen had a Wisconsin address.
- Klausen's driving history showed that he had been involved in an automobile accident in Wisconsin.
- Klausen did not have a valid Wisconsin license.

A reasonable inference from these facts is that Klausen was a Wisconsin resident and had been for a significant period of time. Thus, it was also reasonable to suspect that Klausen had been a resident longer than sixty days and had failed to apply for a license.

¶9 Klausen correctly points out that there are several innocent explanations. For example, he notes that a nonresident licensed in his or her home jurisdiction need not obtain a Wisconsin driver's license and that he might have been a nonresident. I agree, and add that it might have been that Klausen was a Wisconsin resident who had not yet been a resident for sixty days. However, as noted above, "an officer is not required to rule out the possibility of innocent behavior." *Colstad*, 260 Wis. 2d 406, ¶8. Indeed, reasonable suspicion can exist even when innocent explanations, collectively, are more likely than a non-innocent explanation. We know that this is the rule because even the more demanding "probable cause" standard does not require facts indicating that guilt is more likely than not. *See State v. Mitchell*, 167 Wis. 2d 672, 681-82, 482 N.W.2d 364 (1992).

¶10 Klausen contends that *Delaware v. Prouse*, 440 U.S. 648 (1979), supports his view. I disagree. *Prouse* is one of the seminal cases requiring that an investigatory stop be supported by reasonable suspicion. The *Prouse* Court held that,

except in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment.

Id. at 663 (emphasis added). Applied here, *Prouse* requires that the officer have a basis to seize Klausen for a “violation of law.” That is the issue I address. *Prouse* sheds no light on the question whether there was reasonable suspicion supporting stopping Klausen for a violation of the law.

¶11 Klausen also relies on *State v. Newer*, 2007 WI App 236, 306 Wis. 2d 193, 742 N.W.2d 923, a case which concludes that “an officer’s knowledge that a vehicle’s owner’s license is revoked will support reasonable suspicion for a traffic stop so long as the officer remains unaware of any facts that would suggest that the owner is not driving.” *Id.*, ¶2. Klausen’s reliance on *Newer* is limited to the argument that here, unlike in *Newer*, the officer “had no evidence that Mr. Klausen had done anything illegal.” This is not an argument, but rather a conclusory assertion. It does not address why it was not reasonable for the officer to have suspected a violation of the sixty-day rule. Moreover, to the extent that *Newer* has any application here, it supports the stop. As Klausen admits, here, as in *Newer*, it was reasonable for the officer to assume that the driver of the vehicle was the registered owner of the vehicle and, therefore, to believe, before the stop, that Klausen was the driver.

¶12 In sum, I conclude that the circuit court correctly concluded that the police officer possessed articulable facts supporting a reasonable suspicion that Klausen was violating the law.

B. Reasonable Suspicion To Expand The Initial Stop

¶13 Klausen also argues that the officer lacked reasonable suspicion to expand the initial stop into an investigation of whether Klausen was driving under the influence of alcohol. In particular, Klausen asserts that the stop was improperly expanded when the officer asked Klausen if he had been drinking.

¶14 Klausen cites to a footnote in *State v. Swanson*, 164 Wis. 2d 437, 475 N.W.2d 148 (1991), *abrogated by State v. Sykes*, 2005 WI 48, ¶27, 279 Wis. 2d 742, 695 N.W.2d 277, to support his assertion that “the mere odor of intoxicants” is not enough to give rise to reasonable suspicion of driving under the influence. *See Swanson*, 164 Wis. 2d at 453-54 n.6 (merely stating that the facts in that case—“[u]nexplained erratic driving, the odor of alcohol, and the coincidental [bar-closing] time of the incident”—formed a basis for reasonable suspicion). Klausen’s assertion goes nowhere, however, because, in addition to the odor of alcohol, the officer observed Klausen’s bloodshot and watery eyes.

¶15 Klausen appears to suggest that, in addition to these facts, the officer needed to observe suspicious driving behavior. However, he points to no case law supporting this proposition. *See, e.g., State v. Powers*, 2004 WI App 143, ¶12 n.2, 275 Wis. 2d 456, 685 N.W.2d 869 (“Because an OWI conviction does not require proof of erratic driving, proof of erratic driving is obviously not required for purposes of a reasonable suspicion.”).

¶16 Accordingly, the circuit court correctly concluded that the officer had reasonable suspicion to expand the initial stop to investigate whether Klausen was intoxicated.

Conclusion

¶17 The circuit court correctly concluded that both the stop and the expansion of that stop were supported by reasonable suspicion.

By the Court.—Judgment affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)4.

