

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 24, 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. 2010AP1825-CR

Cir. Ct. No. 2009CM420

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

JOSEPH E. JENAMANN,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Grant County:
CRAIG R. DAY, Judge. *Affirmed.*

¶1 SHERMAN, J.¹ The State of Wisconsin appeals a circuit court order suppressing evidence supporting a charge of possession of drug

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

paraphernalia against Joseph Jenamann. We conclude that the evidence was properly suppressed and, therefore, affirm.

BACKGROUND

¶2 The State charged Jenamann with possession of drug paraphernalia under WIS. STAT. § 961.573(1) after a search of his vehicle during a traffic stop revealed drug paraphernalia. Jenamann moved to suppress evidence supporting the charge on the basis that the evidence was not obtained in the course of a lawful search and seizure under the Fourth Amendment to the United States Constitution.

¶3 At the suppression hearing, State Trooper Casey Updike testified that he stopped Jenamann at approximately 9:00 p.m. on County Highway H in Jamestown Township in Grant County after observing that Jenamann's exhaust was "extremely loud." During Updike's initial conversation with Jenamann, he observed that Jenamann appeared "extremely nervous, more nervous than a usual traffic stop," his hands and arms "were visually shaking" and "his eyes were ... very bloodshot and glassy."

¶4 Updike testified that Jenamann denied that he had been drinking or smoking marijuana. Updike then had Jenamann perform field sobriety tests. Updike observed no clues when Jenamann performed the horizontal gaze nystagmus test, one clue out of a possible eight when Jenamann performed the walk-and-turn test, and no clues when Jenamann performed the one-leg stand. When Jenamann recited the alphabet, he did so in full on his second attempt. Following the field sobriety tests, Jenamann submitted to a preliminary breath test (PBT), the result of which was zero.

¶5 After Jenamann passed the preliminary breath test, Updike “began talking to [Jenamann] more about him smoking marijuana.” Updike did so because he assumed that Jenamann’s bloodshot and glassy eyes were from smoking marijuana since had did not have “a detectable amount of alcohol” in his system. When asked, Jenamann advised Updike that he was not aware of any marijuana in the vehicle. He also advised Updike that his eyes appeared bloodshot because he was tired. After Updike advised Jenamann that he did not see bloodshot and glassy eyes like Jenamann was exhibiting from being tired, Jenamann admitted that he had smoked marijuana thirty to forty-five minutes prior to the stop. According to Updike, his conversation with Jenamann lasted approximately two minutes between the PBT and Jenamann’s admission that he had smoked marijuana.

¶6 After Jenamann’s admission that he had smoked marijuana, Updike conducted a search of Jenamann’s vehicle. During the course of the search, Updike discovered a device used to smoke marijuana.

¶7 At the end of the suppression hearing, Jenamann argued that Updike had detained him in violation of the Fourth Amendment following the PBT, rendering his admission of smoking marijuana and any other evidence obtained following the PBT invalid. The circuit court granted Jenamann’s motion to suppress. The State appeals.

DISCUSSION

¶8 The temporary detention of an individual during a police stop of a vehicle is a form of seizure triggering Fourth Amendment protections from unreasonable search and seizure. *State v. Malone*, 2004 WI 108, ¶24, 274 Wis. 2d 540, 683 N.W.2d 1. To satisfy the Fourth Amendment, a traffic stop must be

justified at its inception, and it must be reasonably related in scope to the circumstances that justified the stop. *Id.* However, if, during a valid traffic stop, police become aware of suspicious factors or additional information that would give rise to a reasonable suspicion that further criminal activity is afoot, the investigation may extend beyond the scope of the initial stop without violating the individual's Fourth Amendment rights. *Id.*

¶9 There is no dispute in this case about the validity of the initial stop. Rather, the dispute in this case centers on whether the scope of Jenamann's subsequent detention was permissible. The State argues that Updike's observations of Jenamann gave Updike the reasonable suspicion necessary to justify giving Jenamann field sobriety tests and a PBT, and to detain Jenamann following the PBT to inquire into Jenamann's suspected usage of drugs. We disagree.

¶10 The question of what constitutes reasonable suspicion is a common sense test that asks what a reasonable police officer would reasonably suspect in light of his or her training and experience under all of the facts and circumstances present. *State v. Jackson*, 147 Wis. 2d 824, 834, 434 N.W.2d 386 (1989). In evaluating reasonable suspicion, we must examine whether all the facts, when taken together, could constitute a reasonable suspicion. *State v. Allen*, 226 Wis. 2d 66, 75, 593 N.W.2d 504 (Ct. App. 1999).

¶11 In support of its contention that Updike could have reasonably suspected Jenamann of illegal drug activity, the State points to the following facts, arguing they formed the basis for a reasonable suspicion: Jenamann's eyes were bloodshot and glassy; Jenamann appeared shaky; and Jenamann appeared overly nervous. Even assuming for the sake of argument that Updike had probable cause

to believe that Jenamann was operating his motor vehicle under the influence of an intoxicant, justifying the administration of the PBT, we conclude that under these circumstances, Updike could not have reasonably suspected that Jenamann was engaged in illegal drug activity justifying further detention of Jenamann, no matter how short a period of time, for a further drug investigation.

¶12 The only suspicious factors suggesting drug activity were bloodshot, glassy eyes, shakiness, and a nervous suspect. Traffic stops involving more suspicious facts than exhibited here have been found insufficient to establish reasonable suspicion of illegal drug activity. *See, e.g., State v. Gammons*, 2001 WI App 36, ¶21, 241 Wis. 2d 296, 625 N.W.2d 623 (suspect vehicle was stopped in “drug-related” area; stop occurred at 10:00 p.m.; suspect vehicle was from Illinois; an investigating officer had personal knowledge of prior drug activity on the suspect’s part; and the suspect appeared nervous and uneasy); *State v. Betow*, 226 Wis. 2d 90, 95-97, 593 N.W.2d 499 (Ct. App. 1999) (suspect’s wallet had a picture of a mushroom on it; the stop occurred late at night; the suspect appeared nervous; the suspect was returning to Appleton from Madison; the investigating officer thought the suspect’s story about what he had been doing in Madison sounded implausible).

¶13 Accordingly, we conclude that once Jenamann passed the PBT and Updike had determined that Jenamann was not operating his motor vehicle under the influence of an intoxicant, Updike had no basis to further detain him. At that point, the Fourth Amendment required Updike to terminate the stop and allow Jenamann to continue on his business. When Updike did not do so, the stop was transformed into an unlawful detention, and any drug evidence obtained by police after that point was obtained in violation of Jenamann’s Fourth Amendment rights and was properly suppressed.

By the Court.—Order affirmed.

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

