

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 7, 2016

Diane M. Fremgen
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. 2016AP431-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2015CT787

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

CYNTHIA J. POPP,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: STEPHEN E. EHLKE, Judge. *Reversed and cause remanded for further proceedings.*

¶1 KLOPPENBURG, P.J.¹ The State of Wisconsin appeals the order granting Cynthia Popp's motion to suppress evidence arising out of a traffic stop.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

The circuit court held that there was no reasonable suspicion to support field sobriety testing and, therefore, granted Popp's motion to suppress the field sobriety test results and subsequent evidence of intoxication.

¶2 The State argues that, under all the facts and circumstances, the arresting officer did have the requisite reasonable suspicion that Popp was operating under the influence of an intoxicant or operating with a prohibited alcohol concentration and, therefore, the officer properly extended Popp's detention for field sobriety testing. For the reasons set forth below, I conclude that the totality of the facts and circumstances here gave rise to reasonable suspicion that Popp was operating with a prohibited alcohol concentration, and therefore, I reverse the circuit court's order and remand for further proceedings.

BACKGROUND

¶3 The State charged Popp with fourth-offense operating a motor vehicle while intoxicated and fourth-offense operating with prohibited alcohol concentration. Popp filed a suppression motion challenging the lawfulness of the extended traffic stop, specifically the arresting officer's request for Popp to perform field sobriety tests. Officer John Ballard provided the only testimony at the motion hearing. The officer testified as to the following facts, which the circuit court found credible.

¶4 At the time of the incident, the officer was employed by the Wisconsin State Capitol Police Department and had two and one-half years of experience in that capacity, for a total of five years of experience in law enforcement.

¶5 At approximately 8:25 p.m. on June 11, 2015, the officer was on routine patrol near the intersection of Fish Hatchery Road and Park Street in Madison. As he approached that intersection, the officer observed a blue van stopped in front of him at the traffic light. He noticed that the van was “straddling over the white ... dash painted line.” The traffic light turned green and the officer followed the van as it turned from Fish Hatchery onto Park Street. As the van made the turn, it “swerve[d] over the line,” and as it proceeded on Park Street it was also “swerving within the lane, almost going up and hitting the curb at one point and then swerving back over the line again.”

¶6 Based upon his observations of the van’s “poor driving behavior,” the officer initiated a traffic stop by activating his emergency lights. The van did not stop and, after about seven to ten seconds, the officer activated his emergency siren. Two or three seconds later, the van stopped in a left-turn lane on Park Street. The officer testified that the van’s stop location was not normal, and that generally vehicles will proceed so that they are out of traffic and do not cause a traffic hazard.

¶7 The officer made contact with the driver of the van, Cynthia Popp, and observed that Popp was “very upset,” that she “had been crying,” and that she “seemed kind of out of it.” Popp explained to the officer that she was driving to the hospital to see her husband, and that there was a life-or-death type of situation. Popp admitted to having had one glass of wine within one to three hours prior to the traffic stop.

¶8 The officer returned to his patrol vehicle to request a second officer and to run Popp’s driver’s license information, which returned as indicating that Popp was subject to a .02 prohibited alcohol concentration (PAC) standard. A

sergeant arrived to assist the officer. The officer told the sergeant that he did not smell an odor of intoxicants on Popp and was not sure what could have caused Popp's poor driving behavior, whether it "could have been alcohol or if it was possibly some sort of prescription medication or if she truly was just that upset." The officer decided to administer field sobriety tests.

¶9 The circuit court found the officer's testimony "very credible," but concluded that "this was simply a hunch" and that it was "improper to extend the length of time [f]or the stop here." Accordingly, the circuit court granted Popp's motion to suppress the field sobriety test results and subsequent evidence of intoxication.

DISCUSSION

¶10 The parties agree that there was reasonable suspicion to support the initial traffic stop. However, the parties dispute whether there was reasonable suspicion to continue the traffic stop for the administration of field sobriety tests. The State argues that all the facts and circumstances gave rise to reasonable suspicion that Popp was operating a motor vehicle while intoxicated or operating with prohibited alcohol concentration so as to justify continued detention for field sobriety testing. As I explain below, I conclude that the continued traffic stop to administer field sobriety tests was lawful and, therefore, the circuit court erroneously granted Popp's suppression motion.

Standard of Review

¶11 This court analyzes the grant or denial of a suppression motion under a two-part standard of review: we uphold the circuit court's findings of fact unless they are clearly erroneous, and we independently review whether those facts

warrant suppression. *State v. Scull*, 2015 WI 22, ¶16, 361 Wis. 2d 288, 862 N.W.2d 562. “Whether there is probable cause or reasonable suspicion to stop a vehicle is a question of constitutional fact.” *State v. Popke*, 2009 WI 37, ¶10, 317 Wis. 2d 118, 765 N.W.2d 569. The ultimate question of “whether the facts as found by the [circuit] court meet the constitutional standard” is reviewed de novo. *State v. Hindsley*, 2000 WI App 130, ¶22, 237 Wis. 2d 358, 614 N.W.2d 48.

Reasonable Suspicion for Continued Detention

¶12 The Fourth Amendment of the United States Constitution and Article I, Section 11 of the Wisconsin Constitution offer protection against unreasonable searches and seizures.² “The temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a seizure of persons within the meaning of the Fourth Amendment.” *Popke*, 317 Wis. 2d 118, ¶11 (quoted source omitted). Therefore, the “stop must not be unreasonable under the circumstances.” *Id.* A traffic stop is reasonable if supported by reasonable suspicion that a traffic violation has been or will be committed. *State v. Houghton*, 2015 WI 79, ¶30, 364 Wis. 2d 234, 868 N.W.2d 143.

¶13 “[O]nce stopped, the driver may be asked questions reasonably related to the nature of the stop” *State v. Betow*, 226 Wis. 2d 90, 93, 593 N.W.2d 499 (Ct. App. 1999). “If, during a valid traffic stop, the officer becomes

² The Fourth Amendment of the United States Constitution states, “The right of the people to be secure in their persons ... against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause” Article I, Section 11 of the Wisconsin Constitution provides, “The right of the people to be secure in their persons ... against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause”

aware of additional suspicious factors which are sufficient to give rise to an articulable suspicion that the person has committed or is committing an offense or offenses separate and distinct from the acts that prompted the officer's intervention in the first place, the stop may be extended and a new investigation begun. The validity of the extension is tested in the same manner, and under the same criteria, as the initial stop." *Id.* at 94-95.

¶14 "The question of what constitutes reasonableness is a common sense test. What would a reasonable police officer reasonably suspect in light of his or her training and experience." *State v. Waldner*, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996) (citation omitted). "The reasonableness of a stop is determined based on the totality of the facts and circumstances." *State v. Post*, 2007 WI 60, ¶13, 301 Wis. 2d 1, 733 N.W.2d 634.

¶15 Here, the officer learned during the stop, before requesting the field sobriety tests, that Popp had three prior operating while intoxicated convictions and was therefore subject to a .02 PAC standard. *See generally* WIS. STAT. § 340.01(46m)(c) (reducing PAC standard to .02 if person has three or more prior convictions, suspensions or revocations). This is a particularly important fact, because it is common knowledge that it takes "only a very small amount" of alcohol to exceed a .02 PAC. *See State v. Goss*, 2011 WI 104, ¶¶17, 18, 26, 338 Wis. 2d 72, 806 N.W.2d 918 (noting officer's knowledge that a very small amount of alcohol, as little as one or one and one-half drinks, would cause a person to exceed the .02 PAC standard).

¶16 Although the officer did not smell an odor of intoxicants from Popp, Popp did admit to the officer that she had consumed a glass of wine within one to three hours of the traffic stop. Given that Popp was subject to the lower PAC

standard, and given Popp's erratic driving behavior prior to the stop, a reasonable police officer would reasonably suspect that Popp was operating with prohibited alcohol concentration so as to justify continuing the stop and administering field sobriety tests.

¶17 Popp argues that there was no reasonable suspicion because the officer "admitted that he did not suspect [that Popp was] impair[ed]" and therefore, the officer was "acting on a 'hunch.'" I am not persuaded for two reasons.

¶18 First, the officer's "admission" referenced by Popp is really no admission at all. It appears that Popp is referring to the officer's testimony that he told dispatch, "She doesn't seem [impaired driving], but she was all over the road." While Popp did offer a possible innocent explanation as to her driving behavior, the officer was not required to accept that explanation as true. *See State v. Hogan*, 2015 WI 76, ¶36, 364 Wis. 2d 167, 868 N.W.2d 124 ("Although officers sometimes will be confronted with behavior that has a possible innocent explanation, a combination of behaviors—all of which may provide the possibility of innocent explanation—can give rise to reasonable suspicion."). Here, the officer remained suspicious as to why Popp's driving was so erratic and had not completely ruled out the possibility that Popp was operating with a prohibited alcohol concentration.

¶19 Second, the officer's "admission" is not determinative. As noted above, the standard for determining whether there is reasonable suspicion to support a continued stop is objective—what a *reasonable police officer* would suspect under the totality of the facts and circumstances. Thus, contrary to Popp's assertion, the officer acted on more than a "hunch." As I concluded above, a

reasonable police officer would suspect that Popp may be operating with a blood alcohol concentration level greater than .02 where, as here, her driving was erratic and she admitted that she had consumed a glass of wine within the last one to three hours.

CONCLUSION

¶20 For the reasons set forth above, I conclude that there was reasonable suspicion that Popp was operating with a prohibited alcohol concentration. Therefore, I reverse the circuit court's order granting Popp's motion to suppress evidence of the field sobriety tests and subsequent evidence of intoxication, and remand for further proceedings.

By the Court.—Order reversed and cause remanded for further proceedings.

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

