

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 19, 1999

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. 99-0814-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

COUNTY OF MARQUETTE,

PLAINTIFF-RESPONDENT,

V.

MARTIN E. JACOBS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Marquette County:
RICHARD O. WRIGHT, Judge. *Affirmed.*

ROGGENSACK, J.¹ Martin E. Jacobs appeals from a judgment of conviction for operating a motor vehicle while under the influence of intoxicants (OMVWI), contrary to § 346.63(1)(a), STATS. Jacobs claims that the results of field sobriety tests given at a sheriff's department should have been suppressed

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

because taking him to the department was an arrest without probable cause. We conclude that Jacobs's transport to the sheriff's department fell short of an arrest, and that the investigating officer had reasonable suspicion to detain him temporarily while he conducted a reasonable investigation to determine whether Jacobs had been driving under the influence. We also conclude that even if Jacobs were under arrest, the officer had probable cause to arrest Jacobs at the scene. Accordingly, we affirm.

BACKGROUND

Deputy Scott Johnston stopped Martin Jacobs after Jacobs's vehicle swerved across the centerline into oncoming traffic. After the stop, Johnston observed a strong odor of intoxicants from Jacobs. Johnston also noticed that Jacobs had blood shot, glassy eyes, and that his speech was slurred. Further, when asked if he had been drinking that evening, Jacobs admitted that he had.

Johnston asked Jacobs to perform field sobriety tests and he agreed to do so. However, due to the heavy rain, they could not be conveniently conducted at the site of the traffic stop. Therefore, Johnston asked Jacobs to accompany him to the sheriff's department, approximately one mile from the scene, to perform the tests indoors. Jacobs was transported to the sheriff's department in the squad car. He was not handcuffed nor told that he was under arrest. At the sheriff's department, Jacobs failed the field sobriety tests and was arrested for OMVWI.

Jacobs filed a motion to suppress the results of the field sobriety tests on the ground that the transport to the sheriff's offices constituted an arrest that was accomplished without probable cause. The circuit court denied his

motion, and after a trial to the court, Jacobs was found guilty of OMVWI. Jacobs appeals.

DISCUSSION

Standard of Review.

When a suppression motion is reviewed, the circuit court's findings of fact will be sustained unless they are clearly erroneous. *See State v. Roberts*, 196 Wis.2d 445, 452, 538 N.W.2d 825, 828 (Ct. App. 1995). However, whether those facts establish reasonable suspicion to stop or probable cause to arrest are questions of law which we review *de novo*. *See State v. Richardson*, 156 Wis.2d 128, 137-38, 456 N.W.2d 830, 833 (1990); *see also State v. Babbitt*, 188 Wis.2d 349, 356, 525 N.W.2d 102, 104 (Ct. App. 1994).

Reasonable Suspicion to Detain.

The Fourth Amendment prohibits the unreasonable seizure of a person without a warrant supported by probable cause. *See* U.S. CONST. amend. IV. The detention of a motorist by police for a routine traffic stop constitutes a "seizure" of a person within the meaning of the Constitution. *See Berkemer v. McCarty*, 468 U.S. 420, 436-37 (1984). However, a detention is not "unreasonable" if it is brief in nature, and is justified by a reasonable suspicion that the motorist has committed or is about to commit a crime. *See id.* at 439.²

² The same standards for determining reasonable suspicion which have been established for rights arising from the United States Constitution apply to rights derived from the Wisconsin Constitution. *See State v. Harris*, 206 Wis.2d 243, 259, 557 N.W.2d 245, 252 (1996) (affirming the adoption of federal standards for reasonable suspicion).

Under *Terry v. Ohio*, 392 U.S. 1 (1968), the reasonable suspicion necessary to detain a suspect for investigative questioning must rest on specific and articulable facts, along with rational inferences drawn from those facts, sufficient to lead a reasonable person to believe that criminal activity may be afoot, and that action would be appropriate. *See id.* at 21. “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?” *State v. Jackson*, 147 Wis.2d 824, 834, 434 N.W.2d 386, 390 (1989).

An officer who has reasonable suspicion that a person has been driving while under the influence is entitled to have the suspect perform tests which would either confirm or dispel the officer’s suspicions. *See Terry*, 392 U.S. at 22. An arrest occurs when “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.” *State v. Swanson*, 164 Wis.2d 437, 446-47, 475 N.W.2d 148, 152 (1991). This is an objective test, focusing on what the officer’s actions and words would reasonably have communicated to the defendant, rather than the subjective belief of either the officer or the defendant. *See id.* Therefore, in order for a suspect to be detained short of arrest during an investigatory traffic stop, the stop must be brief and public in nature. *See Berkemer*, 468 U.S. at 438. In addition, Wisconsin requires that investigative questioning “be conducted in the vicinity where the person was stopped.” Section 968.24, STATS.

Here, Johnston had observed Jacobs’s vehicle crossing the centerline into oncoming traffic. He also observed that Jacobs smelled of intoxicants, his eyes were glassy and blood shot, and his speech was slurred. Finally, Jacobs

admitted that he had been drinking. We conclude that Johnston had reasonable suspicion for the initial detention of Jacobs while he conducted a reasonable investigation about Jacob's sobriety.

Furthermore, Jacobs's continued detention while he was transported to the sheriff's department to perform field sobriety tests did not constitute an arrest. Jacobs's was not handcuffed and he was not told that he was under arrest. He was asked to perform the tests at the sheriff's department only because of the heavy rain. While sobriety tests are typically conducted on the roadside, we conclude it was entirely reasonable, in light of the inclement weather, to perform the tests indoors. We also conclude that a facility located approximately one mile from the traffic stop is "within the vicinity" as required by § 968.24, STATS. A reasonable person in Jacobs's position would have understood that the officer was still in process of gathering information, and that if Jacobs were able to demonstrate that he was not intoxicated by successfully performing the field sobriety tests, he would have been released.

However, this does not mean that Jacobs should have felt free to leave while the sobriety tests were being performed. *See Terry*, 392 U.S. at 22. Therefore, we conclude that Johnston had reasonable suspicion to detain Jacobs until he could reasonably determine whether Jacobs had been driving while under the influence of an intoxicant, and that his investigation was reasonable, given the facts and circumstances of this case.

Probable Cause to Arrest.

Jacobs argues that his detention by Johnston constituted an arrest without probable cause. He claims that a reasonable person in his position would have considered himself to be in police custody because he was transported from a

public street to the sheriff's department in the back seat of a squad car. Additionally, when asked whether he had to go to the sheriff's department, Johnston responded to Jacobs that he was "being detained." Jacobs also asserts that Johnston lacked probable cause to arrest him without the results of the field sobriety tests.

Every warrantless arrest must be supported by probable cause. *See Molina v. State*, 53 Wis.2d 662, 670, 193 N.W.2d 874, 878 (1972); U.S. CONST. amend. IV; WIS. CONST. art. I, § 11. A police officer has probable cause to arrest when the totality of the circumstances within that officer's knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant probably committed a crime. *See State v. Koch*, 175 Wis.2d 684, 701, 499 N.W.2d 152, 161 (1993). This is a practical test, based on considerations of everyday life on which reasonable and prudent persons, "not legal technicians," act. *See State v. Drogsvold*, 104 Wis.2d 247, 254, 311 N.W.2d 243, 247 (Ct. App. 1981) (citation omitted). The objective facts before the police officer need only lead to the conclusion that guilt is more than a possibility. *See Richardson*, 156 Wis.2d at 148, 456 N.W.2d at 838.

Although we have concluded that Jacobs's transport to the sheriff's department was not an arrest, the State contends even if it were, there was sufficient evidence for a reasonable police officer to conclude that there was more than a possibility that Jacobs had been driving while under the influence. We note that Jacobs smelled of intoxicants; he had glassy, blood shot eyes; he slurred his speech; and he had been driving erratically. Therefore, we conclude that Johnston had probable cause to arrest Jacobs at the scene. *See, e.g., State v. Willie*, 185 Wis.2d 673, 518 N.W.2d 325 (Ct. App. 1994) (an officer had probable cause to arrest a suspect who had hit the rear end of a car parked along the highway,

smelled of intoxicants, and stated in his hospital room that he had “to quit doing this”); *see also Babbitt*, 188 Wis.2d at 357-58, 525 N.W.2d at 104-05 (an officer had probable cause to arrest when a suspect drove erratically, smelled of intoxicants, walked slowly and deliberately and was uncooperative).

CONCLUSION

We conclude that Jacobs’s transport to the sheriff’s department fell short of an arrest, and that Johnston had reasonable suspicion to detain Jacobs temporarily while he conducted a reasonable investigation to determine whether Jacobs had been driving under the influence. We also conclude that even if Jacobs were under arrest, Johnston had probable cause to arrest Jacobs at the scene. Accordingly, we affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

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

