

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 21, 2000

Cornelia G. Clark
Acting 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 WIS. STAT. § 808.10 and RULE 809.62.

No. 99-2995-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

CITY OF APPLETON,

PLAINTIFF-RESPONDENT,

V.

CHRISTINE M. KLOEHN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: HAROLD V. FROEHLICH, Judge. *Affirmed.*

¶1 CANE C.J. Christine Kloehn appeals from a judgment convicting her of operating a motor vehicle while under the influence of an intoxicant (OWI), first offense, contrary to WIS. STAT. § 346.63(1)(a).¹ She argues that the trial

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted. Furthermore, this is an expedited appeal under WIS. STAT. RULE 809.17.

court erred by concluding that the arresting officer had a reasonable suspicion to detain her. Additionally, she contends that notions of fundamental fairness were violated when she was prosecuted for both OWI and operating a motor vehicle with a prohibited alcohol concentration because WIS. STAT. § 885.235 renders the two charges identical. This court rejects her arguments and affirms the judgment.

¶2 At a bench trial, the parties stipulated to the underlying facts. At approximately 2:15 a.m., officer Lawrence Potter first observed Kloehn's vehicle going in an easterly direction while drifting back and forth within her traffic lane. Potter continued to follow Kloehn for six or seven blocks, and during this time he again observed her car repeatedly drifting back and forth in her own lane of traffic. He estimated that this drifting occurred approximately six or seven times in that stretch. As Potter continued to follow her, Kloehn's car suddenly changed lanes and quickly pulled into a grocery store parking lot. Potter immediately turned his squad car around and parked in a position to monitor her vehicle. Within moments, Kloehn's car exited the parking lot and headed in a westerly direction. Potter again followed her until she suddenly turned into her driveway. Potter then got out of his squad car and approached Kloehn's vehicle to ask her questions about her suspicious driving activity. At that time, he could smell the odor of alcohol coming from her vehicle, her speech was slurred, her eyes were bloodshot, and she had difficulty holding items in her hands. Potter then arrested her for OWI, and she subsequently failed a required blood test.

¶3 Based on these facts, the trial court found Kloehn guilty of operating a motor vehicle while intoxicated and with a prohibited alcohol concentration. It then dismissed the operating a motor vehicle with a prohibited alcohol concentration and entered a judgment convicting her of OWI.

¶4 First, Kloehn contends that her activities were insufficient for the officer to form the reasonable suspicion necessary to stop her for the purposes of an investigative inquiry. The reasonableness of a stop depends upon the facts and circumstances of the situation. *See State v. Guzy*, 139 Wis. 2d 663, 677, 407 N.W.2d 548 (1987). Where the facts are undisputed, as here, whether the stop was valid is a question of law this court reviews without deference to the circuit court's decision. *See State v. Jackson*, 147 Wis. 2d 824, 829, 434 N.W.2d 386 (1989).

¶5 In determining what cause is sufficient to authorize police to stop a person, "the totality of the circumstances—the whole picture—must be taken into account. Based upon that whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity." *United States v. Cortez*, 449 U.S. 411, 417-18 (1981). Only with a view toward the totality of the circumstances is this court able to determine the reasonableness of an officer's actions.

¶6 Although the test is objective, a "police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrants that intrusion." *Terry v. Ohio*, 392 U.S. 1, 21 (1968). The question 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? This common sense approach strikes a balance between individual privacy and the societal interest in allowing the police a reasonable scope of action in discharging their responsibility. *See State v. Waldner*, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996).

¶7 This court has no difficulty agreeing with the trial court's conclusion that these facts were sufficient for the officer to make an investigatory stop. In the early morning hours, Potter observed for several blocks Kloehn's car drifting back and forth in her lane of traffic. He saw her suddenly pull into a grocery parking lot

and then suspiciously leave the parking lot going in the opposite direction that she had been driving until quickly pulling into a residential driveway. The time of the morning, coupled with her erratic and suspicious driving activity, provides sufficient circumstances for a reasonable police officer to believe that unlawful activity such as operating a motor vehicle while intoxicated had occurred.

¶8 Next, Kloehn argues that being prosecuted for both operating a motor vehicle while intoxicated and with a prohibited alcohol concentration violates fundamental fairness. She concedes that there is only one conviction in this case, OWI, but reasons that it is fundamentally unfair to defend herself against two identical charges. This court fails to see how she was prejudiced when she was convicted only of OWI. Although Kloehn frames her argument in terms of fairness or prejudice, the State correctly reasons that what she is really contending is that the State be forced to make a pretrial election between the two charges.

¶9 Without deciding whether the two charges are identical as Kloehn contends, the fairness of this process was addressed in *State v. Bohacheff*, 114 Wis. 2d 402, 417, 338 N.W.2d 466 (1983), where our supreme court concluded:

The legislature was concerned with punishing a single wrong—causing great bodily harm to another by drinking and driving—and tried to make it easier to do so by providing the two bases for liability. Although the legislature apparently viewed the two bases for liability as sufficiently distinct in concept to allow the prosecutor to proceed with two counts and to require the jury to bring back two verdicts, we conclude that the legislature did not intend to require two convictions, even if there were two guilty verdicts, or to impose multiple punishments. *This result is fair to offenders and society.* (Emphasis added.)

¶10 In *Bohacheff*, the court also rejected any suggestion that the State should be required to make a pretrial election between the two charges. It held:

It is apparent from the statute that in allowing the prosecutor to proceed upon a violation of both paragraphs (a) or (b) for acts arising out of the same incident and in providing for two verdicts, the legislature intended not to authorize two convictions but to ensure that the prosecutor would not be forced to elect the charge or the mode of proof before trial and risk a variance between the evidence and the charge.

Id. at 416.

¶11 In conclusion, this court is satisfied that under these facts, the arresting officer was authorized to make an investigatory stop and that there is no unfairness in requiring Kloehn to defend against both charges of operating a motor vehicle while intoxicated and with a prohibited alcohol concentration. The judgment convicting her of OWI is therefore affirmed.

By the Court.—Judgment affirmed.

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

