

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 26, 2006

Cornelia G. Clark
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. 2005AP2241

Cir. Ct. No. 2004CT125

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH A. YANSKE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Iowa County: WILLIAM D. DYKE, Judge. *Reversed.*

¶1 HIGGINBOTHAM, J.¹ Joseph A. Yanske appeals a forfeiture judgment of conviction for operating a motor vehicle with a prohibited blood

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

alcohol concentration, first offense, and from an order denying his motion to suppress evidence. The sole issue is whether there was reasonable suspicion to stop Yanske's motor vehicle. We conclude there was not and reverse the judgment and order.

FACTS

¶2 Yanske was charged with operating a motor vehicle while intoxicated, second offense, and operating a motor vehicle with a prohibited blood alcohol concentration (BAC), second offense.² Yanske moved to suppress the blood tests arguing the deputy sheriff's stop of his car was unlawful. A hearing was held on this motion; the following testimony was taken at the hearing.

¶3 On November 19, 2004, at approximately 3:39 a.m., Yanske was driving his truck southbound on County Trunk Highway II in Iowa County, Wisconsin. Iowa County Deputy Sheriff Alan D. Erickson was on duty and traveling eastbound on County Trunk Highway I when he observed the taillights of Yanske's car. Erickson decided to turn and follow Yanske's truck because, according to Erickson, the fact that anyone was traveling southbound on County Trunk Highway II "at 3:30, almost 4:00 in the morning raised a certain degree of suspicion in my mind" Erickson then observed Yanske's truck slow and stop while on County Trunk Highway II for no more than five seconds; during those five seconds, Erickson also saw the interior dome light of the truck activated.

² The criminal complaint charges Yanske with operating a motor vehicle while intoxicated, second offense, and operating a motor vehicle with a prohibited blood alcohol concentration, second offense. However, Yanske asserts in his brief that on January 7, 2005, the State concluded the charges should both be first offenses. Nothing in the record indicates why or when the charges were amended to first offenses; however, the judgment of conviction is for operating with a prohibited blood alcohol concentration, first offense.

Erickson then saw the truck resume driving and turn onto Anderson Road, then northbound onto County P. During this entire time, Erickson observed no traffic violations. Erickson also indicated that his family owns land on Anderson Road and he was therefore familiar with the area. He testified that he knew only one person who lived on Anderson Road, Charlie Anderson. Erickson testified he personally knew Charlie Anderson's car and this vehicle was not one of them.

¶4 Erickson testified that he was also concerned that it was currently deer hunting season, leading him to suspect that Yanske might be deer poaching. However, Erickson did not observe any bright light emitting from Yanske's car nor did he observe the presence of any weapons.

¶5 Erickson was additionally concerned about a burglary that had occurred approximately two miles away two weeks earlier. Erickson suspected Yanske might be the alleged burglar. However, Erickson had no specific information about that burglary; Erickson did not have a physical description of the suspected burglar or a description of the suspected burglar's vehicle. He also did not know the time of day the burglary occurred nor the items that were taken.

¶6 Erickson testified he witnessed the vehicle turn off Anderson Road and travel northbound on County P. While traveling northbound on County P, Erickson decided to stop the vehicle. Erickson activated his emergency lights; Yanske pulled over and stopped his truck. By his own admission, Erickson did not witness any traffic violation. After performing a series of field sobriety tests, Yanske was arrested.

¶7 The trial court denied Yanske's suppression motion. Yanske was found guilty of the BAC charge by means of a trial on stipulated facts. Yanske appeals.

DISCUSSION

¶8 When we review a motion to suppress evidence, we will uphold a circuit court's findings of fact unless they are clearly erroneous. *State v. Eckert*, 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996). However, the application of constitutional principles to those facts is a question of law we decide de novo. *State v. Patricia A.P.*, 195 Wis. 2d 855, 862, 537 N.W.2d 47 (Ct. App. 1995). In addition, the legality of a traffic stop is a question of law we also review de novo. *State v. Baudhuin*, 141 Wis. 2d 642, 648-49, 416 N.W.2d 60 (1987).

¶9 The Fourth Amendment prohibits unreasonable searches and seizures. U.S. Const. amend. IV. The detention of a motorist by a law enforcement officer constitutes a "seizure" within the context of the Fourth Amendment. *Berkemer v. McCarty*, 468 U.S. 420, 436 (1984). If a detention is illegal and violates the Fourth Amendment, all statements given and items seized during this detention are inadmissible. *Florida v. Royer*, 460 U.S. 491, 501 (1983). An investigative detention is not unreasonable if it is brief in nature and justified by a reasonable suspicion that the motorist has committed or is about to commit a crime. *Berkemer*, 468 U.S. at 439; *see also* WIS. STAT. § 968.24.

¶10 According to *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968), the reasonable suspicion necessary to detain a suspect for investigative questioning must be premised on specific facts, together with rational inferences drawn from those facts, sufficient to lead a reasonable law enforcement officer to believe that criminal activity may be in the works and that action is appropriate. *Id.*, *see also State v. Longcore*, 226 Wis. 2d 1, 8, 594 N.W.2d 412 (Ct. App. 1999), *aff'd*, 2000 WI 23, 233 Wis. 2d 278, 607 N.W.2d 620. "The question of what constitutes reasonable suspicion is a common sense test. Under all 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 (1989). This test is designed to balance the personal intrusion into a suspect’s privacy generated by the stop against the societal interests in solving crime and bringing offenders to justice. *See State v. Guzy*, 139 Wis. 2d 663, 680, 407 N.W.2d 548 (1987).

¶11 We conclude Erickson lacked reasonable suspicion to stop Yanske’s vehicle because, based upon the specific and articulable facts, together with reasonable inferences therefrom, Erickson could not reasonably suspect that an offense had occurred or was about to occur. Erickson justified his stop based on four rather weak premises: (1) potential deer poaching; (2) a burglary that occurred two weeks prior two miles away; (3) Erickson knew only one person who lived on Anderson Road, Charlie Anderson, and the vehicle he followed was not one of Anderson’s vehicles; and (4) Yanske’s vehicle stopped on County Trunk Highway II for approximately five seconds contrary to WIS. STAT. § 346.51(1). Based upon the observed behavior of the vehicle, none of the first three premises is reasonable; as to the fourth premise, insufficient evidence was presented surrounding a potential § 346.54(1) violation. We discuss each premise in turn.

Deer Poaching

¶12 Erickson testified he came upon Yanske’s vehicle while it was stopped in its lane of travel on a rural road. He observed the vehicle for approximately five seconds and saw that the truck’s dome light was on. According to Erickson, he became suspicious because it was deer hunting season. Erickson was a deputy conservation warden and was personally aware that deer

frequented this area. As Erickson approached the vehicle it took off and continued on County Trunk Highway II. Erickson did not activate any lights or siren, but instead continued to follow the vehicle. He eventually stopped Yanske's vehicle.

¶13 After stopping Yanske's vehicle Erickson asked Yanske if he had any weapons, to which Yanske answered no. Erickson testified he did not observe Yanske shining any lights from the car when he stopped the truck on County Trunk Highway II. He also testified that night deer hunting typically involved shining a light from a vehicle. Erickson emphasized that he suspected the possibility that Yanske was deer hunting from his vehicle because of where the truck was stopped, the time of night and because it was deer hunting season.

¶14 Erickson's generalized suspicion that Yanske may be deer hunting does not constitute reasonable suspicion justifying stopping Yanske's vehicle. The test of reasonable suspicion is an objective one and must be a suspicion "grounded in specific, articulable facts and reasonable inferences from those facts" *State v. Waldner*, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996) (citation omitted). The facts cited by Erickson giving rise to his suspicions that Yanske was deer hunting do not support a reasonable conclusion that criminal activity was afoot. The basic facts are: the truck was traveling on a rural road around 3:30 in the morning when it stops in its lane adjacent to a field Erickson knew was frequented by deer; the dome light of the truck was on; five seconds after Erickson observed the truck, the truck sped up and continued traveling down the road. We conclude these facts are insufficient to lead a reasonable law enforcement officer to conclude that criminal activity may be occurring.

The Burglary

¶15 The only testimony by Erickson offered by the State on the burglary was the following:

Q: Has there been any criminal activity at that area?

A: Yes. There had been a burglary several weeks prior to that on Wilson Road, which is approximately two miles away from that area.

This was the extent of the State’s proof that Erickson had reasonable suspicion to stop Yanske’s vehicle because he suspected Yanske might be the person who committed the burglary “several weeks prior” at a place approximately two miles from where Yanske was stopped on County Trunk Highway II.

¶16 On cross-examination Erickson testified that at the time he stopped Yanske’s vehicle, Erickson had no description of the burglary suspect; he had no reason to suspect that Yanske’s vehicle was the vehicle used in the burglary; he was not aware of the description of any of the items stolen during the burglary; and he had no direct information connecting Yanske to the burglary in any way. In short, Erickson lacked any basis for suspecting Yanske was somehow connected to the burglary in question. We conclude any suspicions Erickson had regarding Yanske’s participation in the burglary were not based on any articulable facts raising a reasonable inference that Yanske could possibly have been the burglar.

Driving on Anderson Road

¶17 Erickson’s familiarity with Anderson Road and its lone resident is also insufficient to support reasonable suspicion. Anderson Road is presumably a

public roadway, intended to be traveled upon by more than just Charlie Anderson. Additionally, Anderson Road eventually leads to other roads (at least, as noted by Yanske's turn onto it, County P), which leads to other roads, where many other persons might live. Charlie Anderson's status as the only resident on Anderson Road does not disqualify other non-Anderson Road residents from traveling on this same road.

Violation of WISCONSIN STAT. § 346.51(1)

¶18 The sum of Erickson's testimony, indeed the only evidence the State presented in support of its argument that Erickson stopped Yanske's vehicle because of a traffic violation, was that he observed Yanske's vehicle stopped in the middle of his lane of traffic on County Trunk Highway II. The State argued to the court that by stopping his vehicle in the middle of his lane on County Trunk Highway II, Yanske violated WIS. STAT. § 346.51(1). Section 346.51(1) addresses stopping, standing or parking outside of business or residence districts and states

(1) No person shall park, stop or leave standing any vehicle, whether attended or unattended, upon the roadway of any highway outside a business or residence district when it is practical to park, stop or leave such vehicle standing off the roadway, but even the parking, stopping or standing of a vehicle off the roadway of such highway is unlawful unless the following requirements are met:

(a) An unobstructed width of at least 15 feet upon the roadway of such highway must be left opposite such standing vehicle for the free passage of other vehicles. This section shall not apply to a school bus when the school bus is loading or unloading pupils or other authorized passengers where red flashing signal lights are used as required by s. 346.48 (2).

(b) Such standing vehicle must be capable of being seen by operators of other vehicles from a distance of 500 feet in each direction along such highway.

A “[b]usiness district’ means a territory contiguous to a highway when fifty percent or more of the frontage thereon for a distance of 300 feet or more is occupied by buildings in use for business.” WIS. STAT. § 340.01(6). A “residence district” is a “territory contiguous to a highway not comprising a business district where the frontage on such highway for a distance of 300 feet or more is mainly occupied by dwellings or by dwellings and buildings in use for business.” WIS. STAT. § 340.01(50).

¶19 The plain language of WIS. STAT. § 346.51(1) does not, per se, prohibit the act of stopping on a roadway. For a violation of § 346.51(1) to occur, it must be outside a business or residence district and it must be practical for a vehicle to park or stop off the roadway.

¶20 The State established only that Yanske stopped his vehicle for five seconds while on a roadway. The record is completely devoid of any testimony about whether the area where Yanske stopped his vehicle was a business or residence area or about the conditions off the roadway or the practicality of stopping the vehicle off the roadway. In essence, the record contains no facts from which it can even remotely be inferred Yanske committed a violation of WIS. STAT. § 346.51(1). In short, the record does not support the State’s contention that Erickson had reasonable suspicion to stop Yanske’s vehicle because Yanske committed a traffic violation.

¶21 In sum, Erickson did not have reasonable suspicion to stop Yanske’s vehicle.³ There was no reasonable evidence of either deer poaching or burglarious

³ The trial court also determined that Erickson had reasonable suspicion to stop Yanske’s vehicle because Erickson was concerned about Yanske’s health. This finding is clearly
(continued)

activity and no evidence of a WIS. STAT. § 346.51(1) violation. At bottom, the only reasonable inference from the evidence serving as the basis for stopping Yanske's vehicle was that Yanske was driving on a rural road at 3:30 in the morning. There must be more before a reasonable law enforcement officer may stop a vehicle. We therefore reverse the trial court's order denying the suppression motion and the judgment of conviction.

By the Court.—Judgment and order reversed.

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

erroneous. The only evidence in the record that Erickson may have been concerned about Yanske's health is the following question by the State and Erickson's answer:

Q: Did you have any concern as to the health of the driver when he was stopped in the middle of the road?

A: I was concerned about why he was stopped in the middle of the road.

No reasonable inference can be made by Erickson's answer that he was concerned about Yanske's health or that it served as a reason for stopping Yanske.

