

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 24, 2004

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. 03-2936-CR
STATE OF WISCONSIN**

Cir. Ct. No. 02CT000118

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID G. RODENKIRCH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and order of the circuit court for Juneau County: ROBERT W. RADCLIFFE, Judge. *Reversed.*

¶1 HIGGINBOTHAM, J.¹ David G. Rodenkirch appeals a judgment of conviction for operating a motor vehicle while intoxicated, third offense, and operating a motor vehicle with a prohibited blood alcohol concentration (PAC),

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

third offense, and from an order denying his suppression motion. Rodenkirch argues that his motion to suppress the results of the chemical test should have been granted because the arresting officer had no reasonable suspicion to prolong his detention beyond the initial stop. Rodenkirch further argues that the arresting officer did not have probable cause to arrest him. We agree that the arresting officer had no reasonable suspicion to prolong Rodenkirch's detention and therefore reverse the judgment of conviction and suppression order.

FACTS

¶2 The essential facts are undisputed. On June 26, 2002, Wisconsin State Trooper John W. Schick, while traveling westbound on U.S. Highway 12, observed two vehicles traveling eastbound. Both vehicles were traveling approximately at the 55-mile-per-hour speed limit. At approximately 3:20 a.m., Schick stopped the second eastbound vehicle, driven by Rodenkirch, for following too closely;² the distance between the two vehicles was approximately five feet.

¶3 Upon approaching the truck, Schick noted Rodenkirch was the sole occupant of the truck. When asked if he was aware he was following the car ahead of him too closely, Rodenkirch responded that the car ahead of him was traveling too slowly. Schick smelled alcohol emanating from Rodenkirch's vehicle and, when asked, Rodenkirch admitted consuming two or three beers.

¶4 Schick testified that prior to stopping Rodenkirch's vehicle, the truck did not cross the centerline, did not cross the fog line and did not weave in its own lane. Schick testified that Rodenkirch did not fumble for his driver's license, did

² Rodenkirch does not contest the reasonableness of the stop.

not exhibit red, glassy or bloodshot eyes and his speech was not slurred. Schick testified that Rodenkirch was cooperative.

¶5 Because it was raining very hard, Schick asked Rodenkirch to drive his truck approximately one-half mile to a gas station to perform field sobriety tests under a canopy. Rodenkirch agreed. Accordingly, Schick and Rodenkirch, each traveling in his own vehicle, met at the gas station to perform field sobriety tests. Schick testified that from the place of the initial stop to the canopy of the gas station, he did not observe the Rodenkirch vehicle travel either over the centerline or fog line or weave in its own lane of traffic.

¶6 Once at the gas station, Schick asked Rodenkirch to exit his truck and perform the field sobriety tests. Rodenkirch had no difficulty getting out of his truck, did not hold onto the truck for balance and had no problems walking.

¶7 The first field sobriety test was the horizontal gaze nystagmus test. During the administration of this test, Schick found Rodenkirch lacked smooth pursuit in each eye and found nystagmus at maximum deviation in each eye- indications of intoxication.

¶8 The second field sobriety test was the walk-and-turn test. Schick testified that Rodenkirch began the walk-and-turn test before instructed, took eight steps rather than the instructed nine, turned improperly and stepped off the line twice. The final test was the one-leg stand. During this test, Rodenkirch put his foot down four times. Rodenkirch was ultimately arrested and transported to a local hospital where blood was drawn. The blood test revealed a blood alcohol concentration of .226 percent. Rodenkirch was eventually charged with OWI, third offense and PAC, third offense.

¶9 On August 2, 2002, Rodenkirch filed a motion to suppress the results of the blood test. The trial court denied the motion. A jury trial was held on September 16, 2003. Rodenkirch was convicted of OWI, third offense and PAC, third offense. Rodenkirch appeals.

DISCUSSION

¶10 When reviewing a trial court's ruling on a suppression motion, we will uphold its factual findings unless they are clearly erroneous. *State v. Roberts*, 196 Wis. 2d 445, 452, 538 N.W.2d 825 (Ct. App. 1995). However, whether a stop meets constitutional and statutory standards is a question of law, which we review *de novo*. *State v. Krier*, 165 Wis. 2d 673, 676, 478 N.W.2d 63 (Ct. App. 1991).

¶11 The law of investigative stops allows police officers to stop a person when they have less than probable cause. *State v. Waldner*, 206 Wis. 2d 51, 59, 556 N.W.2d 681 (1996). To justify an investigatory seizure, the police must have a reasonable suspicion, grounded in specific articulable facts and reasonable inferences from those facts, that an individual is violating or has violated the law. *State v. Colstad*, 2003 WI App 25, ¶ 8, 260 Wis. 2d 406, 659 N.W.2d 394. "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. Young*, 212 Wis.2d 417, 424, 569 N.W.2d 84 (Ct.App. 1997).

¶12 Rodenkirch first argues that

the arresting officer did not have a reasonable suspicion to prolong the detention of Mr. Rodenkirch for field sobriety tests because after the initial basis for the stop he had seen no weaving, crossing the centerline or crossing the fog line, was only aware that Mr. Rodenkirch has consumed two or three beers, did not see red, bloodshot or glassy eyes,

observed no slurred speech, had not determined any level of intoxication and required Mr. Rodenkirch to drive his own motor vehicle another half a mile after the stop but before the field sobriety tests.

We agree.

¶13 When Schick initially stopped Rodenkirch, he stopped him for following too close to another vehicle; the distance between the two vehicles was approximately five feet. Schick did not observe Rodenkirch's truck cross the centerline, cross the fog line or weave in his own lane. While Schick smelled alcohol in Rodenkirch's vehicle and Rodenkirch admitted consuming two or three beers, Rodenkirch did not fumble for his driver's license, did not exhibit red, glassy or bloodshot eyes, his speech was not slurred and he was cooperative. These facts, standing alone, do not support a reasonable suspicion that Rodenkirch was operating a motor vehicle under the influence of alcohol.

¶14 Our conclusion is further supported by Schick's own inexplicable actions after Rodenkirch's initial detention, prior to the administration of the field sobriety tests. After pulling Rodenkirch over and purportedly arriving at the conclusion that Rodenkirch might be intoxicated, Schick then asked Rodenkirch, because it was raining very hard, to get back in his car and drive approximately one-half mile to a gas station. We are hard-pressed to believe that a law enforcement officer who reasonably believed that a person was so intoxicated as to legally justify field sobriety tests would then ask this allegedly intoxicated person to get back in his vehicle and drive to a different location in the pouring rain. If Schick reasonably believed that Rodenkirch was intoxicated, he never should have asked Rodenkirch to get back behind the wheel.

¶15 Because we agree that Schick lacked reasonable suspicion to further detain Rodenkirch and administer field sobriety tests, and therefore reverse the judgment and order on those grounds, we need not address Rodenkirch's remaining argument.

By the Court.—Judgment and order reversed.

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

