COURT OF APPEALS
DECISION
DATED AND RELEASED

July 23, 1997

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.

NOTICE

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No. 96-2150-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DANN P. KNIPPEL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: JOSEPH E. WIMMER, Judge. *Reversed and cause remanded.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

NETTESHEIM, J. Dann P. Knippel appeals from a judgment of conviction for possession with intent to deliver tetrahydrocannibinol (THC) contrary to § 161.41(1m)(h)1, STATS., 1993-94. Knippel argues that the trial court erred in denying his motion to suppress the evidence underlying his conviction. Knippel contends on appeal that (1) he was illegally seized and

detained during the temporary stop of his vehicle, and (2) the evidence was amassed during a warrantless search of his vehicle to which he did not consent. As to Knippel's first argument, we conclude that Knippel's detention was supported by a reasonable suspicion based on articulable facts. However, we reverse the trial court's ruling on the second issue. We are not satisfied that Knippel consented to the search of his vehicle.[1] Accordingly, we reverse the conviction.

FACTS

The facts are undisputed. On July 27, 1995, at approximately 1:16 a.m., Knippel was stopped by Trooper Kelly Lynch of the Wisconsin State Patrol for a speeding violation. When Lynch approached the vehicle she noticed a strong odor of intoxicants. Lynch inquired if Knippel had been drinking and Knippel responded that he had. At Lynch's request, Knippel agreed to perform field sobriety tests. Knippel passed the tests and was told he could leave. Lynch then asked Knippel if he had any alcohol, drugs or weapons in his vehicle. Knippel stated that he did not. Lynch took possession of Knippel's operator's license and instructed him to have a seat in his vehicle while she issued a warning citation for the speeding violation.

When Lynch returned to Knippel's vehicle, she again noted the strong odor of intoxicants. She returned Knippel's driver's license to him, issued the warning citation, and again informed Knippel that he was free to leave. At this point, Lynch was joined by a Waukesha county deputy sheriff who had arrived on the scene. Lynch then asked Knippel where he was going and inquired about

[1] Because we conclude that Knippel's conduct was not sufficient to demonstrate consent, we do not address Knippel's further argument that the search exceeded the scope of his consent. *See* ***Sweet v. Berge***, 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983) (if a decision on one point disposes of appeal, we will not decide other issues raised).

Knippel's ignition which appeared to be broken. Knippel answered Lynch's questions satisfactorily. Lynch asked Knippel again if he had any alcohol, drugs or weapons in the car. Knippel again responded that he did not.

Lynch then asked Knippel if he would allow her and the other officer who had arrived on the scene to look inside his vehicle. Knippel responded that he had been harassed enough. Lynch then explained to Knippel the reasons for the stop and the field sobriety tests. Lynch testified that Knippel told her that he understood. Lynch asked Knippel again if he would be willing to step out of the vehicle and allow the officers to look inside. Lynch testified: "Without saying anything [Knippel] got out of the vehicle, walked to the rear of his car and placed his hands on the trunk." Lynch conducted a search of Knippel's vehicle during which she found the evidence leading to Knippel's conviction.

Knippel filed a motion to suppress the evidence, arguing that he did not consent to Lynch's warrantless search of his vehicle. Lynch presented the only testimony at the suppression hearing. After arguments, the trial court denied Knippel's motion to suppress based on the following reasoning:

> [T]he trooper indicated … that [Knippel] was asked … if he would be willing to step out of the vehicle and allow her to search the car.… [Knippel] then got out of the vehicle without saying anything and placed his hands apparently on the vehicle.… It would appear to me that if a defendant then proceeds to get out of the vehicle, that he is following the requests of the person who asks the question and it would appear to me that he is impliedly indicating that he does consent to have the vehicle searched. Otherwise, he wouldn't have gotten out of the car to begin with.… I am

> going to find that there was an implied consent given by the defendant by his actions to have the vehicle searched.[2]

Knippel entered a plea of no contest and a judgment of conviction was entered. He appeals.

DISCUSSION

A motion to suppress evidence raises a constitutional question involving a mixed question of fact and law. To the extent that the trial court's decision involves findings of evidentiary or historical facts, those findings will not be overturned unless they are clearly erroneous. *See* ***State v. Krier***, 165 Wis.2d 673, 676, 478 N.W.2d 63, 65 (Ct. App. 1991). The application of constitutional principles to the facts found by the trial court, however, presents a matter for independent appellate review. *See* ***id***.

The Legality of the Stop

Knippel first contends that the trial court erred in denying his motion to suppress the evidence because Lynch continued to detain him following the completion of field sobriety tests. Knippel does not dispute Lynch's original stop of his vehicle for the speeding violation. Nor does he object to Lynch's administration of field sobriety tests. Rather, Knippel argues that when Lynch continued questioning him after informing him that he was free to leave, she effectively detained him without reasonable suspicion that "separate illegal activity" was afoot. We disagree.

[2] We note that the trial court characterizes Knippel's conduct as "implied consent." Because Wisconsin has not recognized "implied consent" in a similar situation, we frame the issue as whether Knippel's conduct manifested consent for purposes of a warrantless search of his vehicle.

In assessing whether there exists reasonable suspicion for a particular stop, we must consider all of the specific and articulable facts, taken together with the rational inferences from those facts. *See* ***State v. Dunn***, 158 Wis.2d 138, 146, 462 N.W.2d 538, 541 (Ct. App. 1990). 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. *See* ***State v. Jackson***, 147 Wis.2d 824, 831, 434 N.W.2d 386, 389 (1989).

Knippel argues that "Officer Lynch continued to interrogate [him] even after her reasonable suspicion to stop him was alleviated." However, Lynch testified that after the field sobriety tests, she returned to Knippel's vehicle and "noted that the odor of intoxicant was still very strong from that vehicle, did not match what the field sobriety tests were indicating as far as his being under the influence." It is apparent from Lynch's testimony that her reasonable suspicion had not been alleviated and that she remained suspicious because Knippel's satisfactory performance during the field sobriety testing was inconsistent with the strong odor of intoxicants emanating from his vehicle.

We conclude that Lynch's further questioning of Knippel was an appropriate attempt to resolve any reasonable suspicion regarding the odor of intoxicants emanating from Knippel's vehicle. As noted by the ***Jackson*** court:

> "The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, ***Terry*** recognizes that it may be the essence of good police work to adopt an intermediate response. A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time."

Jackson, 147 Wis.2d at 830, 434 N.W.2d at 389 (quoting ***Adams v. Williams***, 407 U.S. 143, 145-46 (1972)). Here, Lynch was attempting to ascertain whether Knippel was indeed capable of driving. We conclude that Lynch's actions were reasonable in light of the facts available to her at that time.

Consent to Search

Knippel next argues that the trial court erred in denying his motion to suppress the evidence because he did not consent to the search of his vehicle. The State argues that "[o]bviously, [Knippel] exited the vehicle in response to the trooper's request to search. Therefore, he gave his consent, even if it was by deed rather than word."

"Consent is one of the recognized exceptions to the Fourth Amendment warrant requirement." ***State v. Johnson***, 177 Wis.2d 224, 233, 501 N.W.2d 876, 879 (Ct. App. 1993). When the State seeks to uphold the validity of a warrantless search based on the consent exception, it must prove by clear and positive evidence that the search was the result of a free, intelligent, unequivocal and specific consent without any duress or coercion, actual or implied. *See* ***id***. Here, the facts relevant to the issue of consent are undisputed. The application of the undisputed facts to the constitutional requirement of consent is a question of law which we review de novo. *See* ***id***.

Lynch had twice told Knippel that he was free to go. Nonetheless, she also twice requested that Knippel step out of his car so that she could look inside. The first time Knippel responded that he had been harassed enough. The second time Knippel exited the vehicle without speaking and placed his hands on the vehicle. The issue in this case is whether Knippel's conduct manifested consent for purposes of a warrantless search. We conclude that it did not.

At the suppression hearing, Lynch testified on cross-examination:

> Q: Mr. Knippel did not give you permission to look inside his car, did he?
>
> A: He did not deny me permission to get in his car.
>
> Q: Mr. Knipple did not give you permission to look inside his car, did he?
>
> A: I guess when he got out of the vehicle and allowed me access into the vehicle, it was not denying me access to the vehicle.

However, failure to deny access does not constitute consent. To the contrary, the ***Johnson*** court concluded that, "A person need not protest … to gain the Fourth Amendment's protection. Consent 'cannot be found by a showing of mere acquiescence ….'" ***Id***. at 234, 501 N.W.2d at 880 (quoting ***United States v. Shaibu***, 920 F.2d 1423, 1426 (9th Cir. 1990)).

In ***Johnson***, the defendant was stopped and questioned in an apartment building pursuant to a "Directed Patrol Mission" aimed at controlling drug traffic. The police requested identification from Johnson. Johnson told them his name and informed them that he had identification in his girlfriend's apartment which was in the building. *See* ***Johnson***, 177 Wis.2d at 227, 501 N.W.2d at 877. The officer knocked on the apartment door. When no one answered, Johnson held up a key which the officer grabbed. Johnson said "let me do it," and the officer returned the key to him. *See* ***id***. at 227-28, 501 N.W.2d at 877. Johnson opened the door and entered the apartment, indicating that he would retrieve his identification. The officer entered behind Johnson without permission and without invitation. The officer recovered a weapon and cocaine. *See* ***id***. at 228, 501 N.W.2d at 877.

Johnson moved to suppress the evidence based on lack of consent. The State argued that Johnson had not objected to the search. This court concluded that evidence of acquiescence and lack of protestation is not enough to overcome one's Fourth Amendment protections. *See* ***id***. at 234, 501 N.W.2d at 880. In light of ***Johnson***, we conclude that based on the facts of record, the State has failed to prove that Knippel's conduct manifested an "unequivocal and specific consent" to the search of his vehicle. *See* ***id***. at 233, 501 N.W.2d at 879.

In so concluding, we do not hold that conduct may never be sufficient to manifest consent. For instance, it has been held that a nod of the head accompanied by a statement such as "go ahead" can constitute consent to search. *See* ***United States v. Rodriguez***, 888 F.2d 519, 523 (7th Cir. 1989). But here, after twice being told that he was free to leave, Lynch continued to pursue her suspicions. Twice she asked Knippel to step out of the vehicle. The first time Knippel complained that he was being harassed. That complaint was understandable in light of Lynch's previous statements that Knippel was free to leave. After the second request, Knippel's response was by conduct, not verbal consent. Under the totality of the circumstances, we cannot say with confidence that Knippel's conduct demonstrated the giving of consent by clear and positive evidence. *See* ***Johnson,*** 177 Wis.2d at 233, 501 N.W.2d at 879. As such, we conclude that this is a case in which the State seeks to establish Knippel's consent by his failure to yet again protest. That is not enough under these facts.

We reverse the judgment of conviction and we remand for further proceedings.

By the Court.—Judgment reversed and cause remanded.

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