

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

February 27, 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

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**Nos.96-2349
96-2350**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

VILLAGE OF McFARLAND,

Plaintiff-Respondent,

v.

DENNIS L. PRESTON,

Defendant-Appellant.

APPEAL from judgments of the circuit court for Dane County: PATRICK J. FIEDLER and JACK F. AULIK, Judges. *Affirmed.*

DYKMAN, P.J.¹ Dennis L. Preston appeals from judgments convicting him of operating a motor vehicle while under the influence of an intoxicant (OMVWI), contrary to § 346.63(1)(a) STATS., and operating a motor vehicle with a prohibited blood alcohol concentration (BAC), contrary to § 346.63(1)(b), STATS. First, Preston contends that the police officer illegally expanded the scope of a traffic stop for nonfunctioning trailer lights to include

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

investigation for OMVWI and BAC. Secondly, Preston contends that the police officer did not have reasonable suspicion to investigate the OMVWI and BAC charges. We conclude that: (1) the Fourth Amendment to the United States Constitution does not prohibit such an expansion of the investigation in this case; and (2) the officer had reason to suspect Preston of both OMVWI and BAC. We therefore affirm.

BACKGROUND

On August 13, 1995, at approximately 1:40 a.m., Officer Michael Klementz and Probationary Officer Bradley Meng of the McFarland Police Department stopped Dennis Preston for nonfunctioning trailer lights. Preston told Meng that the connection must have been made inadequately. The officers allowed Preston to exit his vehicle and attempt to correct the nonfunctioning lights.

While Preston attempted to make a proper electrical connection, Officer Klementz detected an odor of intoxicants on his breath. At that time, Klementz asked Preston if he had been drinking. Preston admitted that he had consumed four or five drinks. Klementz asked Preston to submit to field sobriety testing, and Preston consented. The results of the field sobriety tests were stipulated as evidence. Based upon his observations of Preston during the field sobriety tests and the odor of intoxicants on Preston's breath, Officer Klementz arrested him for OMVWI and BAC.

Preston moved to suppress the evidence of intoxication obtained at the scene for two reasons. First, he argued that the evidence was obtained during an illegal expansion of the traffic stop. Second, he argued that Officer Klementz did not have reasonable suspicion to investigate the OMVWI and BAC charges. The trial court denied his suppression motion and subsequently convicted Preston of both charges. Preston appeals.

DISCUSSION

The temporary detention of individuals during traffic stops constitutes a "seizure" of "persons" under the Fourth Amendment. *Whren v. United States*, 116 S. Ct. 1769, 1772 (1996). Therefore, an automobile stop is subject to the constitutional requirement that it not be "unreasonable" under the circumstances. *Id.* A traffic stop is generally reasonable if the officer has grounds to reasonably suspect that a violation has been or will be committed. See *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984). Moreover, a *Terry*-stop is investigative in nature. See *Terry v. Ohio*, 392 U.S. 1, 22 (1988). The officer can temporarily question the suspect to determine whether the person is committing, is about to commit, or has committed a crime. See § 968.24, STATS.

Preston concedes that Officer Klementz had reasonable suspicion or probable cause to stop him for nonfunctional trailer lights. However, Preston asserts that the scope of an investigation during a traffic stop is limited to the justification for its initiation. In support of his argument, Preston cites *Terry*, which provides that "evidence may not be introduced if it was discovered by means of a seizure and search which were not reasonably related in scope to the justification for their initiation." *Terry*, 392 U.S. at 29. Because Officer Klementz's justification for stopping Preston was to investigate a nonfunctional trailer light, Preston argues that the scope of the investigation was illegally expanded when the officer asked Preston if he had been drinking. Yet, in his brief Preston concedes that a *Terry*-stop can be expanded: "Nothing, in this legal area, is more well-settled than the proposition that a stop cannot be expanded in its scope beyond the specific suspicion which originally justified the officer in making the stop, *absent independent justification for doing so.*" (Emphasis added.)

Therefore, the question becomes, did Officer Klementz have independent justification to ask Preston if he had been drinking? Preston's first argument melds into his second argument, and the only remaining issue is: did Officer Klementz possess the reasonable suspicion necessary to investigate Preston for driving while intoxicated? Preston argues that Officer Klementz did not have reason to suspect that he was guilty of the OMVWI and BAC charges, and therefore, the officer could not ask Preston if he was drinking. We disagree.

The fundamental focus of the Fourth Amendment is reasonableness. *State v. Anderson*, 155 Wis.2d 77, 83, 454 N.W.2d 763, 766

(1990). *Terry* provides that reasonable suspicion is present "where a police officer observes unusual conduct which leads him to reasonably conclude in light of his experience that criminal activity may be afoot." *Terry*, 392 U.S. at 30. Reasonable suspicion has also been defined as "founded suspicion" and "a particularized and objective basis for suspecting the particular person stopped of criminal activity." See *United States v. Cortez*, 449 U.S. 411, 417-18 (1981). "The question of what constitutes reasonableness is a common sense test. What is reasonable under the circumstances? What would a reasonable police officer reasonably suspect in light of his or her training and experience?" *State v. Anderson*, 155 Wis.2d 77, 83-84, 454 N.W.2d 763, 766 (1990).

Officer Klementz stopped Preston at 1:40 a.m. for a violation of nonfunctioning trailer lights. During that brief detention, the officer acquired additional information. He detected intoxicants on Preston's breath. This provided a "particularized and objective basis" for suspecting Preston of OMVWI. Additionally, common sense would dictate that a police officer who smelled intoxicants on a driver's breath would question if that person was driving while intoxicated. In applying that common sense, the officer then asked if Preston had been drinking. Preston admitted to consuming "four or five" drinks. Based upon his training and experience, Officer Klementz reasonably believed that Preston might be under the influence of an intoxicant. Therefore, the officer's continued investigation did not violate the Fourth Amendment, and the trial court did not err in denying Preston's motion to suppress.

By the Court. — Judgments affirmed.

Not recommended for publication in the official reports. See Rule 809.23(1)(b)(4), STATS.