COURT OF APPEALS
DECISION
DATED AND RELEASED

April 9, 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.

No. 96-3152-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KURT GILKES,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Waukesha County: JOSEPH E. WIMMER, Judge. *Affirmed.*

BROWN, J. Kurt Gilkes pled no contest to operating a motor vehicle with a prohibited alcohol concentration. On appeal, he alleges that the complaint was insufficient because it did not substantiate that he had a prohibited alcohol concentration. Gilkes also contends that the arresting officer was not presented with enough facts to form a reasonable suspicion justifying the traffic stop.

We reject Gilkes's attack on the complaint for two reasons. First, we determine that the complaint contained the necessary facts. Second, and alternatively, Gilkes has not demonstrated how he was prejudiced by this alleged defect, and therefore we apply the rule that a court may not set aside a conviction on grounds of a defect in the charging document unless the defect results in prejudice. *See* ***Schleiss v. State***, 71 Wis.2d 733, 739, 239 N.W.2d 68, 73 (1976). We also reject Gilkes's claim that the traffic officer was not presented with enough facts to form a reasonable suspicion to stop Gilkes's vehicle. We affirm.

In January 1995, the State charged Gilkes with operating a motor vehicle while under the influence of an intoxicant and operating a motor vehicle with a prohibited alcohol concentration. After the trial court rejected his motions to dismiss the complaint and to suppress his blood test results because of the allegedly unlawful stop, Gilkes entered a no contest plea to the OMVWPAC charge. Gilkes has appealed alleging that the trial court erred in its conclusions. We will now address these issues directly, withholding our recital of the facts until necessary.

Gilkes first argues that the complaint was defective because it does not contain a "factual showing" that he had a "prohibited alcohol concentration." While the complaint states that a blood test "indicated a .154 per cent of alcohol by weight in the defendant's blood," he argues that complaint does not reveal the critical factor of *when* this blood sample was taken. Gilkes explains that the time when the sample was taken is needed to establish whether an OWI-related defendant was actually intoxicated when he or she was behind the wheel. Gilkes concludes that this time requirement is a significant element in a complaint charging an intoxication-related offense because it answers the question of why

this person is being charged. *See* ***State v. O'Connell***, 179 Wis.2d 598, 604, 508 N.W.2d 23, 25 (Ct. App. 1993).

The standards we apply to test the adequacy of a criminal complaint are well settled. A complaint is sufficient if it alleges facts that could lead a reasonable person to conclude that the person probably committed a crime. *See* ***id.*** The issue of whether a complaint meets a required standard is a matter we review independently of the trial court. *See* ***id.***

We conclude that this complaint was sufficient. Although the complaint does not state when the blood test was given, it contains a narrative of events which would enable a reasonable person to infer that the blood test was given soon enough after Gilkes was stopped such that Gilkes probably had a prohibited alcohol concentration when he was driving. *See* § 885.235(1), STATS. (requiring that a blood alcohol test be given within three hours of the stop).

The complaint explains that Gilkes was stopped around 3:25 a.m. on State Highway 16 in the Town of Oconomowoc. Gilkes performed several field sobriety tests, which he failed, and took a roadside breath test, which yielded a result of 0.15%. Gilkes was then taken to Oconomowoc Memorial Hospital for the blood test.

While the complaint does not describe how long the field testing took or whether the officer stopped somewhere en route from the traffic stop to the hospital, the general course of events outlined supports a conclusion that the hospital blood test took place soon after the stop. As important, the correlation between the roadside test result (0.15%) and the hospital blood test (0.154%) suggests that not much time elapsed between the stop and the test. If a lot of time had passed between these two tests, we would expect a greater disparity in the

results as Gilkes metabolized more alcohol. The complaint was not perfect, but it nonetheless provided enough information so that Gilkes's doubts about the timeline of events could have been resolved at trial.

We independently observe that there is another reason why Gilkes's attack on the complaint fails. It relates to § 971.26, STATS., which provides:

> **971.26 Formal defects**. No indictment, information, complaint or warrant shall be invalid, nor shall the trial, judgment or other proceedings be affected by reason of any defect or imperfection in matters of form which do not prejudice the defendant.

This statute prohibits a court from reversing a conviction because of a "technical defect" in a charging document. *See* ***Craig v. State,*** 55 Wis.2d 489, 493, 198 N.W.2d 609, 611 (1972). Courts have applied the principle embodied in this statute to uphold convictions even when the complaint failed to allege an element of the crime. *See* ***Schleiss***, 71 Wis.2d at 736-37, 239 N.W.2d at 71.

What ***Schleiss*** and the other cases reveal is that a defendant challenging the sufficiency of a complaint must not only show that there was a defect in the document, but the defendant must also show how the defect affected his or her ability to defend the charges. *See* ***id.*** at 739, 239 N.W.2d at 73. In this case, Gilkes has not demonstrated how this allegedly defective complaint prejudiced his ability to prepare a defense. His failure to build that record provides an alternative basis for rejecting his challenge to the complaint.

We next turn to Gilkes's claim that the officer did not have a reasonable suspicion to stop his vehicle. We will begin this analysis with the testimony gathered during the evidentiary hearing on this issue. Only the arresting officer testified.

On the night of Gilkes's arrest, the arresting officer explained that he was stationed in the median monitoring traffic along Highway 16. At around 3:25 a.m., he received a call from dispatch. Someone had called the police on a cellular phone complaining of a possible drunk driver. The caller was in a Blazer and was following the suspected drunk driver who was in a red car. The caller remained in contact with dispatch and could see the arresting officer in the median.

The officer saw a red Chevrolet pass by with a Blazer behind it. The officer then pulled out of the median and began following the red Chevrolet; the officer later identified the driver as Gilkes. As the officer followed Gilkes, he saw that Gilkes was driving outside the fog line by roughly six inches. Gilkes continued to drive in this position for about two-tenths of a mile. The officer also testified that he and Gilkes were traveling at a speed between thirty-five and forty miles per hour. We have done the calculations and observe that the officer thus watched Gilkes drive this way for roughly twenty seconds. The officer then stopped Gilkes.

The trial court found that the caller's tip gave the officer a reason to suspect that there was a possible drunk driver nearby. Moreover, the court found that the officer was able to partially corroborate the tip when he saw Gilkes's car pass with the Blazer behind it. Finally, the court noted that the officer saw Gilkes driving over the fog line and "typically that is not where a vehicle belongs." The trial court therefore determined that the officer had sufficient reason to make the stop.

Gilkes complains that these events did not provide the officer with enough specific and articulable facts to develop a reasonable suspicion to stop his vehicle. He contends that the officer did not talk with the caller and hence could

not have learned (and later corroborated) what information led the caller to suspect that Gilkes was a drunk driver. Moreover, Gilkes contends that crossing over the fog line is "not an offense in Wisconsin."

When reviewing such challenges, we typically apply a bifurcated standard of review. We defer to the trial court's findings of fact but then independently determine whether those facts satisfy the reasonable suspicion standard. *See* ***State v. Guzy,*** 139 Wis.2d 663, 671, 407 N.W.2d 548, 552 (1987). In this case, however, the facts are not disputed and therefore only the legal question remains.

The supreme court recently visited the legal issue of what quantum of facts can support a reasonable suspicion to stop a suspected drunk driver. In ***State v. Waldner,*** 206 Wis.2d 51, 556 N.W.2d 681 (1996), the arresting officer also observed a driver acting unusually, but not breaking any traffic laws. *See* ***id.*** at 52-53, 556 N.W.2d at 683. The officer in ***Waldner*** saw the defendant make an unnecessary stop at an intersection and then pull into a parking space, get out of the car and pour a mixture of "liquid and ice" onto the roadway. *See* ***id.*** at 53, 556 N.W.2d at 683.

The defendant in ***Waldner,*** similar to Gilkes, argued that "lawful acts cannot form the basis for a reasonable suspicion justifying a stop." *See* ***id.*** at 58, 556 N.W.2d at 685. The supreme court, however, rejected this argument, noting that "police officers are not required to rule out the possibility of innocent behavior before initiating a brief stop." ***Id.*** at 59, 556 N.W.2d at 685. Rather, the court emphasized that all the facts had to be considered together to measure if they "coalesce" and add up to a reasonable suspicion. *See* ***id.*** at 61, 556 N.W.2d at 686.

Then turning to the specific facts of that case, the court upheld the stop. It characterized the defendant's unnecessary stop and dumping of his cup as "unusual" and "suspicious," even though they were not "unlawful." *See* ***id.*** at 60-61, 556 N.W.2d at 686.

We think that these characterizations from ***Waldner*** apply to this case. First, the officer was told that there might be a drunk driver nearby. He was then able to confirm some of this report when he saw the caller and Gilkes drive in front of him. Second, when the officer began to follow Gilkes, he saw him engage in the "unusual" conduct of driving beyond the fog line. Third, Gilkes continued to drive this way for an extended period. Thus, Gilkes's failure to correct this "unusual" behavior made it "suspicious." We hold that these three factors combined to form a reasonable suspicion. The stop was lawful.

By the Court.—Judgment affirmed.

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