

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 8, 2014

Diane M. Fremgen
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. 2014AP965-CR

Cir. Ct. No. 2013CM1330

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

ROBERT A. HARRIS,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Washington County:
ANDREW T. GONRING, Judge. *Reversed and cause remanded.*

¶1 REILLY, J.¹ The State appeals from the circuit court's order suppressing evidence of intoxication gathered subsequent to the stop of Robert

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Harris's vehicle. We reverse as reasonable suspicion existed that Harris was operating his motor vehicle while intoxicated and the length of Harris's detention was not unreasonable.

¶2 Harris was traveling northbound on U.S. Highway 45 when a police officer observed his vehicle swerve within its lane. The officer observed Harris accelerate and close within one-car length of the vehicle ahead of his while traveling at a speed of sixty-five to seventy miles per hour. The officer followed Harris's vehicle, which continued to swerve within its lane, then cross over the "dashed line" dividing northbound lanes on the highway, then "do some [more] swerving back and forth within its lane" before it "cross[ed] either onto or slightly over the fog line on the left side of the lane that it was in." The officer activated his squad car's emergency lights and "blipped" its siren, and Harris pulled his vehicle over to the median side of the highway.

¶3 The officer approached Harris's vehicle and observed that Harris's eyes appeared "glassy ... consistent with my training and experience with someone who had been consuming alcohol." The officer did not smell any alcohol on Harris's breath but observed an "overwhelming cigarette smell." Harris exhibited a "lack of dexterity" in retrieving his driver's license and touched his fingers out of order when performing a finger dexterity test.

¶4 The officer returned to his squad car to write warnings for unsafe lane deviation and following too closely and requested a back-up officer to respond to the scene to assist in administering field sobriety tests. The officer wanted back-up for safety reasons. The back-up officer arrived ten minutes later, at which time Harris was asked to exit his vehicle and perform field sobriety tests.

¶5 Harris was charged with operating his motor vehicle while intoxicated and operating with a prohibited alcohol concentration, as third offenses. He moved to suppress the results of the field sobriety blood tests and physical evidence removed from his vehicle on the basis that the police officer did not have reasonable suspicion to investigate him for drunk driving before conducting field sobriety tests. The court found that while the officer saw “questionable driving” and glassy eyes, “[u]p against that we have no atrociously bad driving, and we have no slurred speech or other indication of intoxication, not even the smell of alcohol.” The court gave “no weight whatsoever” to the officer’s observations on the finger dexterity test, which the court said it did not understand, had never seen performed, did not think it could perform, and the officer had no formal training to conduct. The circuit court granted Harris’s motion. The State appeals. *See* WIS. STAT. § 974.05(1)(d)2.

¶6 When reviewing a motion to suppress evidence, we uphold a circuit court’s findings of fact unless they are clearly erroneous but independently apply constitutional principles to those facts. *State v. Hess*, 2010 WI 82, ¶19, 327 Wis. 2d 524, 785 N.W.2d 568. We conclude that the officer had sufficient evidence when he initiated the stop for a reasonable person to believe that Harris was operating while intoxicated and to investigate Harris for that purpose. We further conclude that the ten-minute wait between the stop and the performance of field sobriety tests was reasonably justified by officer safety and was not a “new” investigation into whether Harris was operating while intoxicated.

¶7 A police officer may lawfully stop a vehicle to investigate so long as the officer has “specific and articulable facts which, taken together with rational inferences from those facts, objectively warrant a reasonable person with the knowledge and experience of the officer to believe that” the driver has committed

an offense. *State v. Rutzinski*, 2001 WI 22, ¶14, 241 Wis. 2d 729, 623 N.W.2d 516. The legal determination of whether the officer has such reasonable suspicion is not dependent upon the subjective belief of the officer, but must be evaluated objectively. *State v. Anagnos*, 2012 WI 64, ¶60, 341 Wis. 2d 576, 815 N.W.2d 675.

¶8 Although the officer in this case testified at the suppression hearing that he stopped Harris’s vehicle due to infractions of deviating from his traffic lane and following too closely, there was also reasonable suspicion for an officer in his position to stop Harris’s vehicle to investigate the possibility that Harris was operating while intoxicated. Harris had engaged in “a series of unusual and impulsive driving choices, suggestive of impairment.” *See id.*, ¶56. Harris repeatedly swerved within his traffic lane, accelerated rapidly and dangerously close to another vehicle, and deviated twice from his lane in violation of the law. Harris’s vehicle was lawfully stopped so as to investigate the reasons for the erratic driving, including possible intoxication. *See Rutzinski*, 241 Wis. 2d 729, ¶34.

¶9 As reasonable suspicion for the stop existed, the remaining question is whether the ten-minute wait for the back-up officer to arrive to perform the field sobriety tests was “a reasonable period of time.” *See* WIS. STAT. § 968.24. For an investigatory stop to pass constitutional muster, “the detention must be temporary and last no longer than is necessary to effect the purpose of the stop.” *State v. Wilkens*, 159 Wis. 2d 618, 625, 465 N.W.2d 206 (Ct. App. 1990). Courts should not second-guess an officer and must consider the totality of the circumstances in assessing whether the duration of a stop is reasonable. *Id.* at 626. We find that the delay between when Harris was stopped and when he was asked to exit his vehicle was reasonable based on the circumstances. The officer had a rational concern for

safety due to the possibility of having an intoxicated individual perform field sobriety tests in the median of a busy highway such that the ten-minute delay to allow a back-up police officer to arrive was reasonable.

¶10 Viewed objectively, Harris’s erratic driving and “glassy” eyes provided reasonable suspicion that his driving was impaired so as to warrant further investigation, including field sobriety tests. The ten-minute period to await the back-up officer was a reasonable period of time under the totality of the circumstances. Accordingly, the order to suppress is reversed.

By the Court.—Order reversed and cause remanded.

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

