COURT OF APPEALS
DECISION
DATED AND FILED

September 25, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1058

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

CITY OF MADISON,

PLAINTIFF-RESPONDENT,

V.

JOHN P. KAVANAUGH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: STUART A. SCHWARTZ, Judge. *Affirmed.*

DEININGER, J.[1] John Kavanaugh appeals a judgment convicting him of operating a motor vehicle while under the influence of an intoxicant (OMVWI) and with a prohibited alcohol concentration (PAC), contrary to § 346.63(1)(a) and (b), STATS., as a first offense. Kavanaugh claims the trial court

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

erred in denying his motion to suppress evidence by concluding that, under the totality of the circumstances, the arresting officer had a sufficient basis for his continued detention of Kavanaugh after the initial stop. We conclude that the officer did not illegally extend Kavanaugh's detention. Accordingly, we affirm the judgment of conviction.

BACKGROUND

At approximately 11:00 p.m. on a May evening, a City of Madison police officer was sitting in his squad car in a parking lot near the intersection of East Washington Avenue, Wright Street and Fair Oaks Avenue. The officer heard a crash which sounded like metal crunching and appeared to originate from the direction of the East Washington and Fair Oaks intersection. The officer was unable to see the intersection from where his car was parked, so he moved the car forward in the parking lot in order to have an unobstructed view of the intersection. He observed no vehicles near the intersection except for Kavanaugh's, which was stopped on Fair Oaks about forty feet from the stoplight at the intersection.

The officer testified that he believed Kavanaugh's vehicle was up over the curb and on the sidewalk near a metal fence adjacent to the Gardner Bakery on Fair Oaks. He then observed Kavanaugh back his vehicle a short distance, proceed on Fair Oaks to the intersection, and turn north onto Wright Street. Because the officer suspected the vehicle had struck the fence, he pursued and stopped Kavanaugh's vehicle. On making contact with Kavanaugh, the officer detected an odor of alcohol, bloodshot eyes and speech that was "heavy and slurred." The officer subsequently inspected the vehicle and found no damage consistent with his suspicion that Kavanaugh had collided with the fence. The

officer then requested Kavanaugh to perform field sobriety tests, arrested him for OMVWI and transported him for the administration of an Intoxilyzer test.

The trial court initially granted Kavanaugh's motion to suppress all evidence obtained after the stop on the grounds that the officer did not have reasonable suspicion for the stop. This court granted the City's petition for leave to appeal and reversed the trial court's order suppressing evidence on that basis. Following remand, the trial court denied Kavanaugh's motion to suppress grounded upon the allegedly unreasonable continuation of Kavanaugh's detention.[2] The parties then stipulated to a bench trial based solely on the record of the suppression hearing and the Intoxilyzer test results. The trial court adjudged Kavanaugh guilty of OMVWI and PAC. From this judgment, Kavanaugh appeals.

ANALYSIS

The detention of an individual in an automobile during a police stop, even if only temporary and brief, constitutes a "seizure" under the Fourth Amendment. ***Whren v. United States,*** 517 U.S. ___, 116 S. Ct. 1769, 1772 (1996). Thus, not only the basis for an automobile stop, but also the duration and scope of the stop, must be reasonable under the Fourth Amendment. ***Florida v. Royer***, 460 U.S. 491, 500 (1983). An automobile stop is "generally reasonable if the officers have probable cause to believe that a traffic violation has occurred, or have grounds to reasonably suspect a violation has been or will be committed." ***State v. Gaulrapp,*** 207 Wis.2d 598, 603, 558 N.W.2d 696, 698-99 (Ct. App. 1996) (citations omitted).

[2] The trial court also ruled that the officer had probable cause to arrest Kavanaugh for OMVWI. Kavanaugh has not appealed that determination.

The Fourth Amendment's touchstone of reasonableness is measured in objective terms by examining the totality of the circumstances. ***Id.*** at 605, 558 N.W.2d at 699, citing ***Ohio v. Robinette,*** 519 U.S. ___, 117 S. Ct 417, 421 (1996); *see also* ***State v. Richardson,*** 156 Wis.2d 128, 139-40, 456 N.W.2d 830, 834 (1990) (focus of investigatory stop is on reasonableness, and determination depends on totality of circumstances). We have previously ruled that the arresting officer legally stopped Kavanaugh's vehicle. The only question presently before us is whether the officer extended Kavanaugh's detention past the point reasonably justified by the initial stop. We conclude, as did the trial court, that under the totality of the circumstances known to the arresting officer, it was not unreasonable to continue Kavanaugh's detention to investigate a possible OMVWI, even after the officer's initial suspicions of a collision with the fence were dispelled.

Kavanaugh argues that the officer's investigation should have begun and ended with an inspection of Kavanaugh's vehicle because the officer did not find damage on the vehicle consistent with hitting the fence by Gardner Bakery. Thus, Kavanaugh argues that the officer illegally expanded the scope of the detention after the ambiguity regarding Kavanaugh's suspicious behavior had been resolved. We disagree.

The officer's first contact with Kavanaugh, during which he detected the odor and other evidence of the consumption of alcohol, occurred prior to the officer's inspection of the vehicle for damage:

> I initially contacted him. That's where, when I smelled the alcohol on his breath. I don't know if at that time I got his license and then inspected the vehicle or if I inspected the vehicle and then got his license. But I initially made contact with him after I stopped him, prior to inspecting the vehicle.

From this point forward, based on his initial observations of the vehicle's position and movements and the subsequent indications of alcohol consumption by its driver, the officer could reasonably suspect Kavanaugh was OMVWI. Thus, we conclude that Kavanaugh's continued detention for the purpose of field sobriety testing was not unreasonable, even if the vehicle inspection indicated to the officer that his original suspicion that Kavanaugh had collided with the metal fence was in error.

Kavanaugh also argues that the officer should have stopped Kavanaugh's vehicle, inspected the outside of it, and "waved him on" without ever talking to him. We cannot conclude that the Fourth Amendment requires this type of "silent" investigation following the stop of Kavanaugh's vehicle. Wisconsin's codification of the ***Terry*** stop procedure, § 968.24, STATS., provides that a police officer, acting upon reasonable suspicion, "may demand the name and address of the person and an explanation of the person's conduct." The officer was doing precisely that when he made observations which gave him the basis to continue Kavanaugh's detention.

Kavanaugh cites several cases from other jurisdictions for the proposition that *after* the initial purpose for a stop is accomplished, an officer may not then continue the stop to investigate other, unrelated violations for which no reasonable suspicion exists at the time. One of those cases specifically distinguishes situations in which "the officer, at the time he or she asks questions or requests the driver's license and registration, still has some 'objectively reasonable articulable suspicion' that a traffic violation 'has occurred or is occurring.'" ***United States v. McSwain,*** 29 F.3d 558, 561 (10th Cir. 1994) (quoted source omitted) (citations omitted).

Thus, the cases on which Kavanaugh would have us rely are distinguishable from the present facts: here, the officer formed a reasonable suspicion of OMVWI *prior* to determining that the initial reason for the stop, a possible collision with the fence, was unlikely. A lawful traffic stop does not develop into an unreasonable seizure so long as something "occurred in the course of the stop to give the officers the reasonable suspicion needed to support a further detention." ***Valance v. Wisel,*** 110 F.3d 1269, 1276-77 (7th Cir. 1997) (citations omitted). The officer's reasonable suspicion which justified the stop had not dissipated before he made observations which justified a continued investigation.

For the foregoing reasons, we affirm the trial court's denial of Kavanaugh's suppression motion and the judgment convicting him of OMVWI and PAC.

By the Court.—Judgment affirmed.

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