

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 21, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 97-2258

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SCOTT A. LONG,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Sheboygan County:
GARY LANGHOFF, Judge. *Affirmed.*

SNYDER, P.J. Scott A. Long appeals from an order finding his refusal to submit to an Intoxilyzer test to be unreasonable. He contends that Officer Donald Liebenthal, the arresting officer, did not possess the reasonable suspicion to support a temporary detention, and therefore his arrest is constitutionally infirm. Because we conclude that Liebenthal did possess the requisite “specific, articulable facts” to support an investigative detention, we affirm the trial court.

While on routine patrol, Liebenthal received information from a sheriff's dispatcher that a possible drunk driver was entering the City of Sheboygan Falls on Highway 32 and was in the area of a McDonald's restaurant. The dispatcher also described the vehicle as a Jeep and provided Liebenthal with a partial license plate number of "35026."

When Liebenthal arrived at McDonald's, he observed a parked vehicle which matched the description and the license plate number the dispatcher had given him. Based on that information, he approached the vehicle and asked the driver for identification. After searching his pockets and the interior of the vehicle for his wallet, Long produced his driver's license. During this time, Liebenthal noted that Long had "bloodshot eyes, a red face and a slight odor of intoxicant[s] on his breath." Liebenthal also observed that "his ability to process information seemed to be slow."

After Long provided Liebenthal with his license, Liebenthal asked him to step out of the vehicle and perform field sobriety tests. As a result of his performance on those tests, Long was arrested and transported to the City of Sheboygan Falls Police Department. Long was asked to submit to a chemical test of his breath, but he refused. At the refusal hearing, Long argued that his refusal was reasonable because he was not lawfully placed under arrest. *See* § 343.305(9)(a)5.a, STATS. This is based on his contention that Liebenthal did not possess reasonable suspicion such that Long was legitimately detained.

Consequently, the single issue on appeal is whether Liebenthal possessed the requisite reasonable suspicion to approach Long in the parking lot. Long argues that the information possessed by the officer was "conclusory" and that because Liebenthal did not have any information as to *why* the citizen witness

thought the driver of Long's vehicle was intoxicated, the temporary detention of Long was unconstitutional.¹ Long also takes issue with the point at which the temporary detention began: whether it began when Liebenthal approached the vehicle or when he asked Long to exit the vehicle. The State claims that this is immaterial and concedes that the detention commenced when Liebenthal first approached the vehicle. We agree with the State on this point, and for purposes of our analysis, we assume, without deciding, that the detention began when Liebenthal first approached Long's vehicle.

Because there is no dispute as to the facts, the question of whether those facts rise to the level of reasonable suspicion is a question of law subject to independent appellate review. *See Ornelas v. United States*, 517 U.S. 690, 116 S. Ct. 1657, 1662 (1996). The issue is whether the rule of law as applied to the established facts is or is not violated. *See id.*

The validity of an investigatory stop and temporary detention is governed by *Terry v. Ohio*, 392 U.S. 1 (1968), and is codified in § 968.24, STATS. *See State v. King*, 175 Wis.2d 146, 150, 499 N.W.2d 190, 191 (Ct. App. 1993). *Terry* requires that an officer must reasonably suspect “in light of his or her experience” that some criminal activity has taken place or is taking place before stopping an individual. *See King*, 175 Wis.2d at 150, 499 N.W.2d at 191. A determination of whether a temporary detention is reasonable is based on the totality of the circumstances. *See id.* If an officer has a suspicion, grounded in specific, articulable facts and reasonable inferences drawn from those facts, the

¹ Long contends that the “conclusory” nature of Liebenthal’s information—that he only received information that was “some unknown person’s **conclusion** that [he] was possibly intoxicated”—prohibits it from being considered a “specific, articulable fact.” However, we are unaware of any case law that makes this distinction.

officer may conduct a temporary detention of the individual in order to investigate further. *See id.*

In *State v. Guzy*, 139 Wis.2d 663, 677, 407 N.W.2d 548, 554 (1987), the court adopted the following six-factor analysis to be used when making a determination of reasonableness:

“(1) the particularity of the description of the offender or the vehicle in which he fled; (2) the size of the area in which the offender might be found, as indicated by such facts as the elapsed time since the crime occurred; (3) the number of persons about in that area; (4) the known or probable direction of the offender’s flight; (5) observed activity by the particular person stopped; and (6) knowledge or suspicion that the person or vehicle stopped has been involved in other criminality of the type presently under investigation.” [Quoted source omitted.]

As the *Guzy* court acknowledged, even with the above considerations, an issue may still remain as to when “the scale tip[s] to reasonably justify the stop even though there are insufficient facts to establish probable cause.” *Id.* at 677, 407 N.W.2d at 555. Additional factors to be considered are whether the officer has alternative means available to investigate, whether the officer has an opportunity to conduct further investigation, and whether the situation would allow the officer to quickly identify the individual so that a temporary detention would result in a minimal intrusion. *See King*, 175 Wis.2d at 153, 499 N.W.2d at 193. “The ultimate question is, given the facts and circumstances present, does the important societal interest in solving crime and bringing offenders to justice reasonably justify the specific intrusion on personal security, i.e., the stop?” *Guzy*, 139 Wis.2d at 680, 407 N.W.2d at 556.

We conclude that under the facts and circumstances present in the instant case, Liebenthal possessed reasonable suspicion to support the temporary

detention of Long. Liebenthal had been given information that a citizen witness had observed driving which led the witness to conclude that the driver was possibly drunk. The witness had provided the dispatcher with a description of the vehicle, including a partial license plate number, and the fact that it was in the vicinity of a McDonald's restaurant. When Liebenthal arrived, he observed a vehicle matching the description and with the reported license plate number parked at McDonald's. He was faced with the choice of approaching the vehicle to request identification or waiting until a possibly intoxicated driver started up the car and began driving again, potentially endangering other persons and vehicles on the road.

Liebenthal's initial investigative detention was a minor intrusion that was reasonable under the circumstances. At the time the officer observed the vehicle, he had no way of knowing that the citizen witness who had called in the report was inside the restaurant and could be contacted directly. Liebenthal's initial request was for Long's driver's license. Had Liebenthal not observed Long searching for the license and noted his bloodshot eyes, red face and the odor of intoxicants, the detention likely would have ended once Long identified himself.

We hold that the circumstances support a determination that Liebenthal possessed the requisite reasonable suspicion to support the temporary detention of Long. Once he approached the car and observed Long, the observed indicators of alcohol consumption led to Liebenthal's request that Long perform field sobriety tests. Because Liebenthal's detention of Long was constitutionally sound, we affirm the trial court's finding that his refusal was unreasonable.

By the Court.—Order affirmed.

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

