

**COURT OF APPEALS
DECISION
DATED AND FILED**

DECEMBER 23, 1997

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. 97-2313-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT T. SANKOVICH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County:
JOHN R. RACE, Judge. *Affirmed.*

ANDERSON, J. Robert T. Sankovich appeals from a judgment of conviction for operating under the influence of an intoxicant (OWI), second offense, in violation of § 346.63(1)(a), STATS. On appeal, Sankovich challenges the constitutionality of § 347.39(1), STATS., as adopted by the City of Delavan, on vagueness grounds. This section relates to mufflers on vehicles and was the basis of the officer's traffic stop. We conclude that the officer had probable cause to make an investigatory stop of Sankovich's vehicle on the basis

of Sankovich's loud muffler. Because a determination on the constitutionality of the ordinance would not negate the validity of the OWI arrest, we affirm the judgment.

On April 30, 1995, at approximately 12:18 a.m., Officer James Bilskey of the City of Delavan Police Department was on patrol when he was notified by another officer of a vehicle with a loud exhaust system. Bilskey located the vehicle and listened to the exhaust system. Bilskey testified that the noise was "excessively loud"; it was a "[l]oud rumbling noise" that "[s]ounded like a car without a muffler." While driving with his window rolled down, Bilskey could hear the exhaust system from two car lengths behind his patrol car. After the vehicle passed his patrol car, Bilskey made a traffic stop. Sankovich was issued a five-day warning for the defective exhaust.

During the stop, Bilskey noticed an odor of intoxicants and that Sankovich's eyes were glassy and his speech was slurred. Sankovich was arrested for OWI. Sankovich submitted to an intoxilyzer test which showed a reading of 0.19% blood alcohol concentration. Sankovich was charged with a second offense OWI and with operating a motor vehicle with a prohibited alcohol concentration (PAC).

Subsequently, Sankovich filed numerous motions, only one of which is relevant to this appeal: a motion to suppress because the stop was based on an unconstitutional ordinance as applied. After briefing on the issue, the court concluded that the officer acted properly under the ordinance and that Sankovich failed in his burden to show beyond a reasonable doubt that the ordinance is unconstitutional. Consequently, Sankovich pleaded no contest to OWI and the State dismissed the PAC charge. The court imposed twenty days in the county

jail, costs of \$757, community service and revocation of his driving privileges. Sankovich appeals.

On appeal, Sankovich argues that traffic stop was unlawful because the muffler ordinance on which the stop was based is unconstitutionally vague and, therefore, invalid. In reviewing a trial court's denial of a motion to suppress evidence, we must uphold the court's findings of fact unless they are against the great weight and clear preponderance of the evidence. *See State v. Whitrock*, 161 Wis.2d 960, 973, 468 N.W.2d 696, 701 (1991). Whether a search or seizure meets constitutional standards, however, is a question of law which we review de novo. *See State v. Richardson*, 156 Wis.2d 128, 137-38, 456 N.W.2d 830, 833 (1990).

An officer has authority to stop a vehicle when the officer has reasonable grounds to believe that a violation of a traffic regulation has occurred. *See State v. Baudhuin*, 141 Wis.2d 642, 648, 416 N.W.2d 60, 62 (1987). The reasonableness of an investigative stop depends on the facts and circumstances that are present at the time of the stop. *See State v. Guzy*, 139 Wis.2d 663, 679, 407 N.W.2d 548, 555 (1987). In assessing whether there exists reasonable suspicion for a particular stop, we must consider all the specific and articulable facts, taken together with the rational inferences from those facts. *See State v. Waldner*, 206 Wis.2d 51, 55-56, 556 N.W.2d 681, 684 (1996). What constitutes reasonable suspicion is a common sense test: what would a reasonable police officer reasonably suspect in light of his or her training and experience. *See id.* at 56, 556 N.W.2d at 684. This approach "strikes a balance between individual privacy and the societal interest in allowing the police a reasonable scope of action in discharging their responsibility." *Id.*

In support of his contention that the invalidity of the muffler ordinance makes the stop unlawful, Sankovich argues that *Michigan v. DeFillippo*, 443 U.S. 31 (1979), is inapplicable. In *DeFillippo*, the police officer found the defendant in an alley with a woman who was in the process of undressing. *See DeFillippo*, 443 U.S. at 33. The officer asked the defendant for identification but he failed to identify himself. *See id.* Consequently, the defendant was taken into custody for violating a city ordinance by refusing to identify himself and not producing evidence of his identity. A subsequent search of the defendant led to discovery of marijuana and phencyclidine and he was then charged with possession of a controlled substance. *See id.* at 34. The defendant moved to suppress the evidence. The Michigan Court of Appeals held that the ordinance was unconstitutionally vague and that, since the defendant had been arrested pursuant to that ordinance, both the arrest and the search were invalid. *See id.* The Supreme Court reversed. It concluded that a subsequent determination that an ordinance forming the basis for an arrest was unconstitutional did not render the initial arrest and the search incident to that arrest unlawful under the Fourth Amendment. *See id.* at 40. The Court rejected the argument that the arresting officer lacked probable cause because he should have known the ordinance was invalid and would be judicially declared unconstitutional. *See id.* at 37-38.

When making the stop, Bilskey, like the officer in *DeFillippo*, did not know that the constitutionality of the ordinance would be called into question. Bilskey observed the following when he stopped Sankovich: the car was making a “loud rumbling noise” similar to a “car without a muffler” and the noise could be heard from quite a distance. These observations provided Bilskey with a reasonable basis to conclude that Sankovich was driving with a defective muffler.

Similar to the officer in *DeFillippo*, who, the court determined, had probable cause at the time of arrest to believe that the defendant violated that ordinance, *see DeFillippo*, 443 U.S. at 34, Bilskey had reasonable suspicion to believe that Sankovich's vehicle violated the muffler ordinance. We conclude that *DeFillippo* is controlling and that the questioned validity of the muffler ordinance does not make the initial stop unlawful.

Sankovich maintains that *DeFillippo* does not apply because it was "premised upon application of a 'good faith' exception to the exclusionary rule," and in Wisconsin there is no good faith exception to the state constitutional exclusionary rule. We do not interpret *DeFillippo* as creating a "good faith" exception to the exclusionary rule. Rather, the *DeFillippo* decision is based on a probable cause determination. *See DeFillippo*, 443 U.S. at 39-40. Our supreme court has interpreted *DeFillippo* as follows:

[T]he United States Supreme Court held that the subsequent determination that an ordinance forming the basis for an arrest was unconstitutional, did not render the initial arrest and the search incident to the that arrest unlawful Probable cause is to be determined on the basis of information known to the officer ... at the time of the arrest or search.... "To deter police from enforcing a presumptively valid statute was never remotely in the contemplation of even the most zealous advocate of the exclusionary rule." Generally speaking, the later found unconstitutionality of the underlying substantive statute is not relevant on a motion to suppress. The Supreme Court ... drew a distinction between statutes which by their own terms authorized searches under circumstances which did not satisfy the traditional ... probable cause requirements of the Fourth Amendment, and the statute involved in [*DeFillippo*] where its only relevance to the validity of the arrest and subsequent search was as it pertained to the "facts and circumstances" constituting probable cause.

This is not to say that the constitutionality of the substantive statute under which the defendant was arrested cannot be challenged. It is simply that the motion to suppress, as a general rule, is not the proper vehicle for doing so.

State v. Princess Cinema of Milwaukee, Inc., 96 Wis.2d 646, 649-50, 292 N.W.2d 807, 809 (1980) (citations omitted; quoted source omitted).

Following the rationale in *DeFillippo*, the ordinance in this case required a forfeiture if a muffler failed to comply with the ordinance; it did not authorize an arrest. Once the officer observed the indicia of intoxication, the OWI statute, § 346.63(1)(a), STATS., authorized the arrest of Sankovich. The intoxilyzer test which followed was valid because it was incident to that arrest. The muffler ordinance is “relevant to the validity of the arrest and search only as it pertains to the ‘facts and circumstances’ ... [that] constituted probable cause for arrest.” *DeFillippo*, 443 U.S. at 40. Whether the muffler ordinance is valid or invalid on vagueness grounds does not undermine the validity of the stop made for violation of that ordinance or the subsequent arrest for the OWI violation. The motion to suppress was appropriately denied.

By the Court.—Judgment affirmed.

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

