COURT OF APPEALS
DECISION
DATED AND FILED

April 16, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2708-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

STEVE A. JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Green County: JAMES R. BEER, Judge. *Affirmed.*

DEININGER, J.[1] Steve Johnson appeals a judgment convicting him of operating a motor vehicle while under the influence of an intoxicant (OMVWI), contrary to 346.63(1)(a), STATS., as a third offense. Johnson claims the trial court erred in denying his motion to suppress all evidence obtained as a consequence of

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

his traffic stop and subsequent detention. We conclude that the arresting officer did not, as Johnson asserts, illegally extend his detention in order to investigate the possibility that Johnson was OMVWI. Accordingly, we affirm the judgment of conviction.

BACKGROUND

At approximately 10:27 p.m., on July 13, 1996, a City of Monroe police officer was sitting in his squad car at a stop sign. From this location, the officer saw Johnson back his motorcycle away from a parking stall, make a U-turn, and accelerate at a high rate. The officer next observed Johnson, who had a passenger on the motorcycle with him, stop at a stop sign, make a left turn and again accelerate at a high rate. The officer believed the motorcycle was speeding and so he pursued Johnson. Johnson next made a right turn, after which he was again observed accelerating to a high speed. After he observed yet another stop and rapid acceleration, the officer turned on his emergency lights and stopped the motorcycle.

After making the traffic stop, the officer approached the motorcycle and Johnson greeted him with a question, "What the fuck are you stopping me for[?]" The officer explained that he stopped Johnson for "erratic driving, driving at a high rate of speed" and for having a taillight that did not conform with statutory requirements. Johnson explained that his motorcycle taillight had a blue dot in its center that made it appear pink. The officer told Johnson to fix the taillight and asked him for his driver's license. During this initial conversation, the officer "detect[ed] a strong odor of intoxicants around [Johnson's] facial areas." The officer asked Johnson whether he had anything to drink that evening and Johnson acknowledged that he had had "two drinks." The officer then asked

Johnson whether he would be willing to perform some field sobriety tests and Johnson agreed to do so. Following the administration of the tests, the officer arrested Johnson for OMVWI.

Johnson moved to suppress all evidence garnered as a result of the traffic stop, contending that the scope of the stop should have been limited to its original justification, that being the faulty taillight, erratic driving and speeding. After the trial court denied the motion to suppress, Johnson pled no contest, and the trial court adjudged him guilty of OMVWI. Johnson appeals the judgment of conviction.

ANALYSIS

When reviewing the denial of a suppression motion, we will uphold the trial court's findings of fact unless they are clearly erroneous. ***State v. Gaulrapp,*** 207 Wis.2d 600, 604, 558 N.W.2d 696, 698 (Ct. App. 1996). However, whether the trial court's findings of fact satisfy the Fourth Amendment's requirement of reasonableness is a question of law which we decide de novo. ***State v. Waldner***, 206 Wis.2d 51, 54, 556 N.W.2d 681, 683 (1996).

The detention of an operator of a motor vehicle during a police stop, even if only temporary and brief, constitutes a "seizure" under the Fourth Amendment. ***Whren v. United States,*** 517 U.S. 806, ___, 116 S. Ct. 1769, 1772 (1996). Thus, not only the basis for a motor vehicle 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). The initial stop of a motor vehicle is "generally reasonable if the officers … have grounds to reasonably suspect a violation has been or will be committed." ***Gaulrapp,*** 207 Wis.2d at 605, 558 N.W.2d at 698-99 (citation omitted). Johnson concedes on this appeal that the arresting officer had a

legal basis to make the traffic stop. His challenge is to the duration and scope of the stop.

The Fourth Amendment's touchstone of reasonableness is measured in objective terms by examining the totality of the circumstances. ***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). The question before us is whether the arresting officer extended Johnson'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 officer, it was not unreasonable to continue Johnson's detention to investigate whether he was OMVWI.

During the officer's initial investigation of Johnson's faulty taillight, erratic driving and speeding, he made observations and obtained information which justified continuing the detention. Johnson argues, however, that the officer illegally expanded the scope of the detention after concerns regarding the taillight, erratic driving, and speeding had dissipated. Johnson maintains that the officer's permissible actions were limited to giving the driver a ticket, or a warning, and requiring him to fix the taillight. According to Johnson, the officer improperly expanded the scope of the stop when he asked whether Johnson had been drinking. Johnson asserts that this inquiry was improper because, "at that moment, [the officer] had made only one observation indicating that [Johnson] had consumed alcohol [the odor of intoxicants from Johnson's facial area] which did not rise to the level of reasonable suspicion that [Johnson's] ability to drive was impaired."

We reject Johnson's claim that the officer could not properly ask Johnson during the traffic stop if he had consumed alcohol. *See* ***Gaulrapp,*** 207 Wis.2d 600, 558 N.W.2d 696. In ***Gaulrapp***, the defendant had been stopped for a loud muffler. After he produced his driver's license and explained where he had been coming from, the officers asked if he had any drugs or weapons inside his vehicle and if they could search his truck and his person. ***Id.*** at 603, 558 N.W.2d at 698. We rejected Gaulrapp's argument "that the very asking of the first question about drugs and firearms, without a reasonable suspicion that he possessed either, transformed the legal stop into an illegal stop." ***Id.*** at 608, 558 N.W.2d at 699. Rather, we concluded that "Gaulrapp's detention was not unreasonably prolonged by the asking of one question." ***Id.*** at 609, 558 N.W.2d at 700.[2]

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 exactly that when he made observations establishing the basis to continue the detention of Johnson to investigate a possible

[2] During argument on his motion to suppress, Johnson's counsel informed the trial court that the legal theory on which his motion was premised was then "pending" before both the U.S. Supreme Court and this court, citing what subsequently became ***Ohio v. Robinette,*** 519 U.S. ___, 117 S. Ct. 417 (1996) and ***State v. Gaulrapp,*** 207 Wis.2d 600, 558 N.W.2d 696 (Ct. App. 1996). Both cases were decided adversely to Johnson's position after the denial of his motion to suppress but before he filed his notice of appeal. Johnson cites neither case in his opening brief to this court, nor does the State in its responsive brief. While Johnson cites ***Gaulrapp*** in his reply brief, he does so only for the general proposition of Fourth Amendment law that the ***Gaulrapp*** court concluded had *not* been violated on facts similar to those presented here. The law firm representing Mr. Johnson in the trial court and on this appeal was also counsel for the defendant-appellant in ***Gaulrapp***. Counsel's attention is directed to SCR 20:3.3(a)(3) (West 1998) (a lawyer shall not knowingly fail to disclose to a court legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel).

OMVWI. The officer had observed Johnson's "erratic driving" prior to the stop, was greeted with a profane and semi-belligerent question on approaching Johnson, and he smelled a "strong odor" of intoxicants during his conversation with Johnson. Before the officer requested the performance of field sobriety tests, Johnson also admitted to having consumed alcohol. We conclude that the foregoing observations and information, acquired during a proper traffic stop, permitted the officer to form a reasonable suspicion that Johnson might be OMVWI. A lawful stop does not become an unreasonable seizure if something occurs during 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).

We therefore affirm the trial court's denial of Johnson's suppression motion and the judgment convicting him of OMVWI.

By the Court.—Judgment affirmed.

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