

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 28, 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. 97-3428

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

BRUCE A. PICKENS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sauk County:
VIRGINIA A. WOLFE, Judge. *Affirmed.*

VERGERONT, J.¹ Bruce Pickens appeals a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant contrary to § 346.63(1)(a), STATS. He contends that the trial court erroneously denied his

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

motion to suppress evidence on the ground that the arresting officer did not have reasonable suspicion to stop him and did not have probable cause to arrest him. We conclude the trial court correctly denied the motion and we therefore affirm.

The arrest occurred on the evening of February 19, 1997. Shawn Becker, then employed by the Sauk Prairie Police Department, testified at the hearing on the motion to suppress as follows. He was on duty at that time in Sauk City and observed a truck pull away from a stop sign and turn right onto Madison Street, heading north. The truck made a wide turn completely into the southbound lane of traffic on Madison Street, traveled in that lane for a quarter of a block and then weaved back into the northbound lane. Officer Becker pulled the truck over and the driver, Pickens, got out of the truck. Pickens placed his hand on the side of the truck as he got out and stayed there, with his hand on the truck. When he took his hand off the truck to pull out his wallet for his driver's license, he swayed back and forth several times. He looked through his wallet a couple times for his license, and when he found it, he handed it to Officer Becker in a slow, hesitant manner. Officer Becker noticed an odor of intoxicants coming from Pickens. In response to the officer's questions, Pickens said he had had a couple of beers, the last one about an hour ago. Officer Becker observed that Pickens' eyes were red and glassy.

Officer Becker then administered four field sobriety tests: the horizontal gaze nystagmus [HGN], the walk and turn test, the one-leg stand, and reciting the English alphabet. He had twenty-four hours of training in standardized field sobriety testing.

The HGN tests for involuntary eye movements. Prior to conducting the HGN test, Officer Becker instructed Pickens to follow his (the officer's) index

finger with his eyes only and keep his head still. Although Pickens said he understood, he moved his head, and Officer Becker had to stop and explain the procedure twice before Pickens followed the instructions. While this was occurring, Pickens was rocking back and forth in a swaying motion. When officer Becker finally administered the test, he observed that Pickens' eyes lacked a smooth pursuit, had a jerkiness of maximum deviation and displayed jerkiness prior to a forty-five degree angle. This, according to Officer Becker, means that all six "clues" (three for each eye) were present and indicates that Pickens could be under the influence of an intoxicant.

Before administering the walk and turn test, Officer Becker asked Pickens if he had any problems with his balance, any physical defect, and Pickens said he "had a problem with his midsection" and pointed to his groin area. He also stated that he stutters and has a problem with his equilibrium. Officer Becker told Pickens that if he had any pain with the two balance tests, he should say so and he would stop the test. Officer Becker instructed Pickens to stand with his right foot in front of his left foot, heel to toe, and keep his arms at his side while he explained the walk and turn test. Pickens stood heel to toe, then started to raise his arms to balance. When Pickens put his arms down at Officer Becker's instruction, Pickens started to step to the side with his right foot several times, displaying poor coordination. Pickens said he could not do the test, did not explain why, and Officer Becker stopped the test.

While Officer Becker was explaining the next test, the one-leg stand, he noted Pickens swaying forward and back several times. Officer Becker instructed Pickens to raise the foot of his choice in front of him about six inches off the ground, with his toe pointed forward and count—one thousand one to one thousand thirty—with his foot raised off the ground. Pickens raised his left foot

and put it down, then picked it up, counted to one thousand three, put his foot down, picked it up again, counted to one thousand seven and put it down. Based on Officer Becker's training, putting one's foot down three times is an automatic failure of the test.

Before asking Pickens to recite the English alphabet, Officer Becker confirmed that Pickens knew it. Pickens sang the alphabet, stopped at the letter T, paused for approximately three seconds, skipped the next two letters and then finished the alphabet.

Officer Becker also noticed an odor that resembled mouthwash coming from Pickens. This was after Officer Becker had gone back to his squad car to contact dispatch and have a check run on Pickens' driving record. Officer Becker asked Pickens if he had used mouthwash and Pickens said no. However, after more questioning on this, Pickens admitted to using mouthwash. Officer Becker informed Pickens that he was arresting him for operating a motor vehicle while under the influence of an intoxicant, placed handcuffs on him and placed him in the squad car.

On cross-examination, Officer Becker acknowledged that there can be other reasons besides intoxication for red and glassy eyes, jerkiness of eyes on the HGN, and balance problems on the balance test.

Pickens also testified at the hearing. He acknowledged that he made a wide right turn onto Madison Street and went into the south bound lane of traffic. That was because there was a car parked on Madison Street, at the corner, facing north, and he had to make a wide turn and go into the southbound lane to get around the car. He estimated he was in the southbound lane "approximately the length of the car, 30 feet, forty feet." Before he went into the southbound lane,

he looked to see whether cars were coming either way. There was a car approaching from the south heading north, about a block away that did not have to brake for his turn. Pickens also testified that he told Officer Becker that he sometimes makes mistakes at the end of the alphabet.

The trial court determined that the officer had reasonable suspicion to stop Pickens² and probable cause to arrest him for driving while under the influence of an intoxicant. On appeal, Pickens contends as he did before the trial court that Officer Becker did not have reasonable suspicion to believe Pickens had committed or was committing any offense, because §§ 346.31(2) and 346.05(1)(b), STATS.,³ both permit a driver to make a turn in the manner that Pickens did in order to drive around the parked car. Pickens also contends that

² The trial court actually said “probable cause to stop the defendant” but we understand from the context that the court intended to say “reasonable suspicion to stop,” and that is clear from the memorandum opinion the court issued after a trial to the court based on a stipulated record.

³ Section 346.31(2), STATS., provides:

(2) RIGHT TURNS. Both the approach for a right turn and the right turn shall be made as closely as practicable to the right-hand edge or curb of the roadway. If, because of the size of the vehicle or the nature of the intersecting roadway, the turn cannot be made from the traffic lane next to the right-hand edge of the roadway, the turn shall be made with due regard for all other traffic.

Section 346.05(1)(b), STATS., provides:

Vehicles to be driven on right side of roadway; (1) Upon all roadways of sufficient width the operator of a vehicle shall drive on the right half of the roadway and in the right-hand lane of a 3-lane highway, except:

....

(b) When overtaking and passing under circumstances in which the rules relating to overtaking and passing permit or require driving on the left half of the roadway

Officer Becker lacked probable cause to arrest him because the results of the field balance tests and the evidence of his swaying could not be considered since Pickens said he had problems with his equilibrium. The remaining evidence, according to Pickens, is insufficient to establish probable cause to believe he was under the influence of an intoxicant.

To execute a valid investigatory stop consistent with the Fourth Amendment prohibition against unreasonable searches and seizures, a law enforcement officer must reasonably suspect, in light of his or her experience, that some kind of criminal activity or conduct constituting a civil forfeiture has taken or is taking place. *See State v. Krier*, 165 Wis.2d 673, 678, 478 N.W.2d 63, 65-66 (Ct. App. 1991). Upon stopping the individual, the officer may make reasonable inquiries to dispel or confirm the suspicions that justified the stop. *Terry v. Ohio*, 392 U.S. 1, 22 (1968).

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. *State v. Dunn*, 158 Wis.2d 138, 146, 462 N.W.2d 538, 541 (Ct. App. 1990). The question of what constitutes reasonable suspicion is a common sense test: under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience. *State v. Jackson*, 147 Wis.2d 824, 834, 434 N.W.2d 386, 390 (1989).

In determining whether probable cause exists for the arrest, we must look to the totality of the circumstances to determine whether the arresting officer's knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant was operating a motor vehicle while under the

influence of an intoxicant. *State v. Babbitt*, 188 Wis.2d 349, 356, 525 N.W.2d 102, 104 (Ct. App. 1994). In determining whether probable cause exists, we look to the totality of the circumstances. *Id.*

In reviewing a trial court's decision on a motion to suppress evidence, we do not reverse a trial court's findings of fact unless they are clearly erroneous. *State v. Richardson*, 156 Wis.2d 128, 137-38, 456 N.W.2d 830, 833-34 (1990). Whether those facts meet the constitutional standard is a question of law, which we review de novo. *Id.*

We conclude that Officer Becker did have reasonable suspicion to stop Pickens. Although it is undisputed that a car was parked on Madison Street, facing north, there was no testimony that it was obstructing the northbound lane of traffic. Therefore, the evidence of the car being parked there does not, as Pickens presumes, mean that it was necessary to drive into the southbound lane to turn onto Madison street. The trial court stated, after being advised of Pickens' argument based on § 346.31(2), STATS.: "I'll note that for the record, however, I understand the officer's testimony was not consistent with that theory. So that's why I find there was [reasonable suspicion] to make the stop. He stated he was in the northbound lane. I'm sorry—in the southbound lane." We understand the court to be making a factual finding here that it was unnecessary for Pickens to travel completely into the southbound lane to avoid a parked car, and that is not a clearly erroneous finding.

Pickens argues that there is no inconsistency between his testimony and Officer Becker's, as the trial court found there was. However, Officer Becker's testimony did not simply describe a wide turn. He testified that the truck traveled completely in the southbound lane for a quarter of a block, and was

“weaving back over to the north bound lane.” This indicates driving in the wrong lane and driving erratically, not the careful and deliberate effort to turn as narrowly as possible to avoid a parked car, which Pickens describes. Although the court did not make an express finding that it found the officer more credible than Pickens, that is implicit in the court’s discussion and conclusion, and we accept the trial court’s credibility determination. *See Rivera v. Eisenberg*, 95 Wis.2d 384, 388, 290 N.W.2d 539, 541 (Ct. App. 1980) (trial court is the ultimate arbiter of the credibility of witnesses).

Finally, even if the parked car necessitated traveling in the southbound lane for a quarter of a block, this lawful explanation for the conduct Officer Becker observed does not make the stop unreasonable. Officers are not required to rule out the possibility of innocent behavior before initiating a brief investigatory stop. *State v. Anderson*, 155 Wis.2d 77, 84, 454 N.W.2d 763, 766 (1990). If any reasonable inference of wrongful conduct can be objectively discerned, the officers may temporarily detain for the purpose of inquiry, notwithstanding the existence of innocent inferences. *Id.* The officer’s observations of Pickens’ driving provided a reasonable basis to suspect that he was not driving on the right half of the roadway as required by § 346.05(1), STATS.

Pickens’ argument concerning probable cause is based on the premise that because Pickens said he had equilibrium problems and had trouble with the end of the alphabet, evidence of his swaying, inability to do the balance tests and successfully complete the alphabet test may not be considered as part of the totality of the circumstances within Officer Becker’s knowledge at the time of arrest. We disagree. Pickens stated that he had a problem with his midsection, but did not explain what that had to do with the tests. He said he had a problem with equilibrium, but did not elaborate. When he told Officer Becker he could not do

the walk and turn test, he did not explain why or relate that to any medical problem. He acknowledged on cross-examination that he did know the alphabet when he was asked to perform that test; and that is what he told the officer, according to Officer Becker's testimony. Although he testified that he told Officer Becker he had trouble with the end of the alphabet, he did not explain that further to Officer Becker. Officer Becker could reasonably interpret these vague statements as not indicating medical or educational limitations that undermined the reliability of the test results or his observations. Officer Becker was not obligated to accept as true each vague statement and dispense with the testing.

We conclude that Officer Becker's observations of Pickens' driving, his red and glassy eyes, the odor of intoxicants, his swaying, and his performance or lack of performance on each of the field sobriety tests constitute probable cause to believe he was driving under the influence of intoxicants at the time he was arrested. The trial court therefore properly denied the motion to suppress the evidence discovered in his car and other evidence obtained after the arrest.

By the Court.—Judgment affirmed.

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

