COURT OF APPEALS
DECISION
DATED AND FILED

AUGUST 12, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3721

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ADAM S. WITCZAK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: ROBERT A. HAASE, Judge. *Affirmed.*

ANDERSON, J. In this appeal, Adam S. Witczak seeks to limit the scope of a traffic stop to the initial reason justifying the stop. He insists that the arresting officer lacked reasonable suspicion to warrant the expansion of the scope of the traffic stop beyond a taillight violation. We conclude evidence was developed during the traffic stop that gave the officer an objectively reasonable

suspicion that authorized further detention. Therefore, we affirm Witczak's conviction for operating a motor vehicle while intoxicated.

Witczak is appealing the denial of his motion to suppress all evidence derived from his detention and arrest. Before the circuit court, Witczak contended that the original reason for his stop was an inoperable taillight and the scope of the ensuing investigation had to be strictly limited to the taillight. It was his contention that the arresting officer did not have an objectively reasonable suspicion that would support an extension of the investigation to crimes other than the taillight violation. The only witness at the hearing on Witczak's suppression motion was the arresting officer.

It was a dark and foggy morning when Officer Trent Morgan of the University of Wisconsin-Oshkosh police department noticed a station wagon passing him without any taillights. Morgan was on bike patrol and radioed for assistance in stopping the station wagon. By the time Morgan had pedaled to the location of the traffic stop another officer was at the driver's side of the station wagon examining Witczak's driver's license. Morgan went to the passenger's side of the station wagon and looked across to Witczak and could see that he had bloodshot eyes.

Morgan started to wonder if Witczak had been drinking and asked him to step onto the sidewalk and talk. While talking with Witczak, Morgan noticed that he was swaying a little bit during the conversation and that he did have bloodshot eyes. Morgan asked Witczak if he had been drinking and Witczak admitted that he had consumed six beers. At this point Morgan asked Witczak to perform "field sobriety tests" and as a result of Witczak's poor performance

Morgan arrested him for operating while intoxicated in violation of § 346.63(1)(a), STATS.

The circuit court denied Witczak's motion to suppress. The court held that it was reasonable for the arresting officer to suspect that the consumption of alcohol was a reason for Witczak's bloodshot eyes despite the many innocent reasons that could explain red and glassy eyes. The court explained that it was the officer's job to investigate whether Witczak was an unsafe driver because of the use of alcohol.

Before this court, Witczak concedes that under ***Terry v. Ohio***, 392 U.S. 1 (1968), Morgan was justified in stopping him for the inoperable taillight. However, he maintains that the mere observation of bloodshot eyes did not provide an objectively reasonable suspicion that would justify the extension of the traffic stop into a drunk driving investigation.

In reviewing a trial court's denial of a motion to suppress evidence, we will 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 the constitutional standards mandated by the Fourth Amendment 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).

The fundamental focus of the Fourth Amendment is reasonableness. *See* ***State v. Waldner***, 206 Wis.2d 51, 55, 556 N.W.2d 681, 684 (1996). Determination of reasonableness depends on the totality of the circumstances. *See* ***id.*** at 53, 556 N.W.2d at 683. For purposes of investigating possible criminal behavior, a police officer does not need probable cause to stop and detain a person.

See ***id***. at 55, 556 N.W.2d at 684. The test is an objective one and focuses on the reasonableness of the officer's actions. *See* ***id***. at 56, 556 N.W.2d at 684. A police officer may stop a person if the officer "possesses specific and articulable facts which would warrant a reasonable belief that criminal activity was afoot." ***Id***. at 55, 556 N.W.2d at 684.

Recent Fourth Amendment cases conclude that the scope of the stop need not be limited to the initial reason for the stop if the period of detention is not unreasonably extended past the length of time required for the initial stop. *See* ***State v. Quartana***, 213 Wis.2d 440, 448, 570 N.W.2d 618, 622 (Ct. App. 1997). Police questioning of a detainee on a subject unrelated to the initial reason for the stop does not violate the constitution unless it unreasonably extends the duration of the detention. *See* ***State v. Gaulrapp***, 207 Wis.2d 600, 607, 558 N.W.2d 696, 699 (Ct. App. 1996). ***Gaulrapp*** is consistent with the United States Supreme Court's conclusion that no constitutional violation occurs when police ask a motorist stopped for speeding to consent to a search of his or her car for drugs and he or she agrees. *See* ***Ohio v. Robinette***, 519 U.S. 33, 117 S. Ct. 417 (1996).

When we apply these Fourth Amendment principles to the facts of this case, we are obliged to affirm the circuit court. The undisputed facts of this case demonstrate that the arresting officer had objectively reasonable suspicions for each extension of the investigation. The first extension of the investigation came when the officer observed Witczak's bloodshot eyes and asked him if he would step onto the sidewalk. Witczak argues that this request was not reasonable because there could be other causes for bloodshot eyes. We disagree. The continuation of Witczak's detention was reasonable because an officer is not required to rule out the possibility of innocent behavior when conducting a ***Terry***-type stop. *See* ***Waldner***, 206 Wis.2d at 61, 556 N.W.2d at 686. It is entirely

reasonable for a veteran police officer to suspect that bloodshot eyes are the result of drinking and to request the individual to step out onto the sidewalk to continue the investigation.

The second extension of the investigative stop occurred only after the officer confirmed his belief that Witczak had bloodshot eyes and watched Witczak sway during their conversation. These observations corroborated Morgan's initial belief that Witczak may have been drinking and justified the escalation of the investigation. The escalation took the form of the question to Witczak of whether he had been drinking. Under the totality of the circumstances, the officer had a reasonable suspicion that merited further investigation.

The third extension of the stop happened after Witczak admitted to having consumed six beers. The extension was Morgan's request that Witczak perform "field sobriety tests." The preceding observations and information acquired during a proper traffic stop, along with Witczak's admission that he had consumed six beers, permitted Morgan to form the reasonable suspicion that Witczak might be operating while intoxicated.

It was entirely reasonable for Morgan to continue his investigation as additional facts came to his attention that aroused his curiosity about Witczak's condition. *See* ***id.***, 206 Wis.2d at 61, 556 N.W.2d at 686. A lawful stop does not become an unreasonable seizure if something occurs during the course of the stop "to give the [officer] the reasonable suspicion needed to support a further detention." ***Valance v. Wisel***, 110 F.3d 1269, 1276-77 (7th Cir. 1997).

By the Court.—Judgment affirmed.

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