

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 24, 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.

**Nos. 98-0021-CR
98-0022-CR**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEVEN SCHELK,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Sheboygan County:
L. EDWARD STENGEL, Judge. *Affirmed.*

NETTESHEIM, J. Steven Schelk appeals from judgments of conviction for operating a motor vehicle while under the influence of an intoxicant (OWI), third offense, contrary to § 346.63(1)(a), STATS., and possession of cocaine contrary to § 961.41(3g)(c), STATS. Schelk argues on appeal that the trial court erroneously denied his motion to suppress evidence because the officers did

not have reasonable suspicion to stop his vehicle. We reject Schelk's argument. We affirm the judgments.

On January 22, 1997, at approximately 1:34 a.m., Officer Ronald Jost of the Sheboygan police department encountered Schelk at the Journey's End Tavern during the course of an assault investigation. Jost questioned Schelk as a witness to the assault. Jost testified that while talking to Schelk he noticed that Schelk "had very glazed-over eyes" and "slurred speech." Jost also noted an odor of intoxicants coming from Schelk. During the course of conversation, Jost informed Schelk that "[he] believed him to be under the influence of intoxicants" and advised him not to drive. When Jost finished talking to Schelk, he observed Schelk leave the tavern and approach a pickup truck. Jost noted that Schelk's balance was inhibited and again advised Schelk that he should not drive a motor vehicle. Schelk agreed and approached his truck to lock its doors. He then proceeded to walk in the opposite direction.

Jost and another officer, Dave Anderson, drove their squad car to a nearby parking lot so that Jost could call in a report regarding the assault and so they could observe Schelk's vehicle. The facts surrounding the subsequent events are somewhat unclear. Jost testified that he and Anderson could not see Schelk's vehicle from the lot where they were parked, whereas Anderson testified that he could. According to the complaint, Jost noticed Schelk's vehicle passing their location at approximately 2:15 a.m. The officers' testimony differs as to whether they were able to observe and identify Schelk as the operator of the vehicle when it passed.

The officers followed the vehicle for two and a half blocks until it pulled off to the side of the road and the driver exited the vehicle. At that point,

Anderson activated the squad's emergency lights. Jost approached Schelk who explained that he was driving to a friend's house. Jost then asked Schelk to perform field sobriety tests. Schelk was unable to do so and was placed under arrest. The officers searched Schelk and discovered what appeared to be cocaine in the pocket of his pants. Schelk was transported to the Sheboygan police department where a breathalyzer test was performed. The test evidenced a prohibited alcohol concentration (PAC). Schelk was charged with OWI, PAC and possession of cocaine.¹

Prior to trial, Schelk filed a motion to suppress evidence based on a lack of reasonable suspicion for the initial stop. Schelk argued that the officers' testimony indicated that they did not observe anything erratic or unusual about the operation of the pickup truck while following it and they did not know the identity of the driver until after the stop was effected. Therefore, the officers acted on a "hunch" that the driver was Schelk when they stopped his vehicle.

At a hearing on April 15, 1997, the trial court denied Schelk's motion. After finding credible Anderson's testimony that he was able to observe Schelk's profile as the vehicle passed, the court stated:

I'm satisfied that looking at the observations that the officers made of Mr. Schelk in Journey's End, the statements, contact that they had with him as he left Journey's End, the very brief period of time that elapsed from the time that he was told not to operate his vehicle, and the period of time in which the vehicle was observed to be driving down the roadway, Officer Anderson's observations, and Mr. Schelk then leaving the vehicle all provided a reasonable suspicion for the officers to

¹ The OWI, PAC and possession charges were filed in two separate cases. The OWI and PAC charges were filed in Case No. 97-CT-48. The charge for possession of cocaine was filed in Case No. 97-CM-111. The appeals from the judgments in these trial court cases were consolidated for purposes of appeal at Schelk's request.

effectuate then the stop and the subsequent arrest of Mr. Schelk.

Schelk was subsequently found guilty of OWI, PAC and possession of cocaine.

When a suppression motion is reviewed, the circuit court's findings of fact will be sustained unless they are clearly erroneous. *See State v. Roberts*, 196 Wis.2d 445, 452, 538 N.W.2d 825, 828 (Ct. App. 1995). However, the question of whether a stop was legally justified presents a question of law that we review de novo. *See State v. Krier*, 165 Wis.2d 673, 676, 478 N.W.2d 63, 65 (Ct. App. 1991).

We begin by noting that Schelk does not challenge the officers' conclusion that he was under the influence of intoxicants at the time of the stop. Rather, Schelk argues on appeal that the arresting officers had no reasonable grounds to believe that a crime was being committed because the officers did not see him enter the vehicle and because the officers gave contradicting testimony as to whether they were able to identify him prior to the stop. However, the trial court found credible Anderson's testimony that he was able to observe Schelk's profile prior to the stop. This finding is supported by evidence in the record.

First, while Jost's attention was focused on calling in a report regarding the assault investigation, Anderson was focused on observing their surroundings and Schelk's vehicle. Anderson's testimony regarding the events which occurred just prior to following Schelk's vehicle is much more detailed than that provided by Jost. Whereas Jost recalled Schelk's vehicle passing their location, Anderson testified that he first saw a vehicle which he believed to be Schelk's passing which prompted him to drive by Journey's End to see if Schelk's pickup truck was still there. Although Schelk's truck was still there, Anderson noted that its lights were on and it was preparing to leave. Anderson turned his

vehicle around in a nearby lot when he observed Schelk's vehicle crossing in front of the patrol car.

Anderson testified that at this point he was able to observe "[Schelk's] profile and his jacket as he was operating his vehicle." When asked how he knew that the driver was Schelk, Anderson replied, "By his hair style, and I have the side profile of just his upper body ... I did not see the front view of his face but only his side and a jacket which was similar to what he was wearing inside the tavern when we spoke to him and again out on the street."

Schelk contends that Anderson's testimony is implausible. In so arguing, he relies on Jost's testimony that he was unable to see who was driving the vehicle or how many passengers it had. However, Jost's testimony does not conflict with or discount Anderson's. Jost testified only as to what he was able to observe. Even if we were to accept Schelk's contention that the officers' testimony was in conflict, inconsistencies and contradictions in the statements of witnesses do not render the testimony inherently or patently incredible, but simply create a question of credibility for the trier of fact to resolve. See *Haskins v. State*, 97 Wis.2d 408, 425, 294 N.W.2d 25, 36 (1980). Here, the trial court found credible Anderson's testimony that he was able to identify Schelk as the driver of the vehicle prior to the stop. We conclude that the trial court's finding that Anderson was able to observe Schelk operating his vehicle prior to the stop is supported by evidence in the record and is not clearly erroneous.

Even without Anderson's identification of Schelk as Schelk was operating his vehicle, we hold that the officers had reasonable suspicion to stop the vehicle. Prior to observing Schelk's vehicle on the roadway, Jost had observed Schelk in an intoxicated condition approaching his vehicle in the tavern parking

lot. Jost instructed Schelk not to drive. Later, as he was driving past the tavern, Anderson noticed that the lights on Schelk's truck were on and the vehicle was preparing to leave. The vehicle then proceeded onto the roadway and the officers followed. While it is possible that someone else was operating Schelk's vehicle, the most reasonable inference is that Schelk was driving.

Schelk also challenges the officers' credibility as to whether they observed a defective brake light on Schelk's vehicle while following it. Schelk points out that the defective brake light was not mentioned in the police report or at the prior administrative hearing. However, we conclude, as did the trial court, that even in the absence of testimony concerning the defective light, the officers had reasonable suspicion to stop Schelk. We affirm the judgments.

By the Court.—Judgments affirmed.

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

