

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**April 1, 2015**

Diane M. Fremgen  
Clerk of Court of Appeals

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2014AP2628**

**Cir. Ct. Nos. 2013TR10638  
2013TR10639**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**COUNTY OF WINNEBAGO,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JOSHUA R. HUNTER,**

**DEFENDANT-APPELLANT.**

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APPEAL from judgments of the circuit court for Winnebago County: SCOTT C. WOLDT, Judge. *Affirmed.*

¶1 GUNDRUM, J.<sup>1</sup> Joshua Hunter appeals from judgments of conviction for operating a motor vehicle while under the influence of an intoxicant

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

(OWI) and with a prohibited alcohol concentration. He contends the circuit court erred in denying his motion to suppress evidence, arguing that he was detained by law enforcement for an excessive, unlawful length of time in relation to his OWI arrest. For the following reasons, we affirm.

### ***Background***

¶2 Winnebago County Sheriff’s Deputies David Roth and Bradley Vinje were the only two witnesses to testify at the hearing on Hunter’s motion. Their relevant testimony is as follows.

¶3 Roth testified that around 2:36 a.m. on August 1, 2013, he was on duty during the Experimental Aircraft Association (EAA) convention and “working the EAA grounds” when Hunter pulled his vehicle into the EAA parking lot. Roth stated:

At the time I was dealing with a couple of guys that knocked over ... one of the ticket booths ... and so we were in the process of arresting two guys and a vehicle—there was like—there was one, two—there was two regular officers, and there was probably five reserves, and then there was a bunch of EAA security personnel, and the vehicle was coming for the location where we were, and it was stopped by EAA security before it came into the pile of guys that were dealing with the other intoxicated individuals.

In response to a question about whether there was “anything about the way the vehicle was driving that would cause you to have attention to the vehicle,” Roth responded: “I couldn’t answer that because I was dealing with the other situation and so I did not actually stop that vehicle, it was stopped by EAA security.”

¶4 A security guard informed Roth that Hunter entered the lot in such a manner that the guard had to jump out of the way of Hunter’s vehicle to avoid

being struck. As part of Roth's answer to a question about whether it "would be normal for security to stop this vehicle because there's no access allowed into this lot," Roth responded in part by explaining that Hunter's vehicle "was stopped by EAA security[] because the EAA security was squawking on their radio to stop this car because it almost hit the guard over here on West Waukau." Roth further explained:

[F]irst the security guards made contact, and then they—they told ... Reserve Deputy Ryden that the guy in the vehicle was intoxicated. After I got done arresting the individuals [involved in the ticket booth incident]—so that car sat there for maybe five—five to ten minutes, and then after I got done with my incident, because I was the only patrol deputy there, then I dealt with ... that car.

¶5 Roth made contact with Hunter, identified him by his driver's license, spoke with him for "a short while," noticed a "heavy odor of intoxicants in the vehicle," observed Hunter's speech to be slurred and his eyes glassy, and concluded that Hunter and a female in the vehicle both "appeared to be intoxicated." Roth "called Deputy Vinje over" to perform field sobriety tests on Hunter because Roth was "dealing with this other thing."<sup>2</sup>

¶6 Roth provided the following testimony on cross-examination:

[Hunter's counsel]: All right, and then who stops Mr. Hunter's vehicle then? Who's the person?

[Roth]: [S]omebody in the EA (*sic*) security ... 'cuz there's like four security guards of EAA that are out there with ... myself and the reserve deputies.

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<sup>2</sup> As noted, Roth had previously indicated that he had finished arresting two individuals related to the ticket booth incident and went over to Hunter after he was "done with" that incident. In responding to a question moments later, however, Roth stated that he called Vinje over to administer field sobriety tests to Hunter because Roth was still "dealing with this other thing."

[Hunter's counsel]: How far from [the security guard who accused Hunter of nearly hitting him] does the stop occur?

[Roth]: Oh, probably about 200 to 300 yards, so a good distance.

[Hunter's counsel]: And then once they stop Mr. Hunter's vehicle, you said he sits there for about five to ten minutes waiting for you to finish up your—the other incident; is that fair to say?

[Roth]: Yes.

[Hunter's counsel]: Were there officers standing by him to make sure that he stayed there?

[Roth]: The security guards were right in that general vicinity.

[Hunter's counsel]: Did the security guards tell you, aside from the conclusion that the person might be intoxicated, what they observed?...

[Roth]: [W]hat they did is they told ... Reserve Deputy Ryden. Reserve Deputy Ryden came up to me after I was done, then handed me ... the traffic stop, basically, for the vehicle.

¶7 Vinje testified next and stated that he was parked in a cul-de-sac near two highways when he was called by Roth to come to the EAA grounds. It took him “about five minutes” to arrive. Upon arrival, Vinje detected a “light odor of intoxicants from [Hunter's] breath” and observed Hunter's eyes to be “bloodshot and watery.” Vinje believed Hunter told him he had consumed “approximately ... two or three beers.” Vinje administered field sobriety tests and a preliminary breath test to Hunter. Following those tests, Vinje placed Hunter under arrest.

¶8 On cross-examination, Vinje confirmed that when he arrived on the scene, Hunter was still in his vehicle and the security guards were “around the

vehicle watching it.” Vinje further confirmed that when he arrived on the scene Hunter was not free to leave at any point.

¶9 In response to closing argument by Hunter’s counsel that it was unreasonable for Hunter to be detained “for about 10 to 15 minutes until Officer Vinje arrived,” the court stated its finding that “I don’t think he was detained by law enforcement at that point. It sounds like he was detained by security staff at the EAA.” The circuit court also concluded that it did not “think it was unreasonable, even if he was detained by the Sheriff’s Department.” The court denied Hunter’s motion and Hunter appeals.

### *Discussion*

¶10 In reviewing a motion to suppress, we will uphold a circuit court’s findings of fact unless they are clearly erroneous; however, “we independently apply constitutional principles to those facts.” *State v. Hess*, 2010 WI 82, ¶19, 327 Wis. 2d 524, 785 N.W.2d 568.

¶11 Hunter does not contend that the initial stop of his vehicle was unlawful, but “argues that the continued detention violated the Fourth Amendment when a ‘pile’ of personnel, including deputies, reserve deputies and EAA security, stood around his vehicle preventing him from leaving for at least five to ten minutes before Deputy Roth even initiated contact.” He further asserts that the OWI investigation did not actually begin for at least five more minutes, when Vinje arrived. Hunter asserts that for his detention to be constitutional, officers must have “diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the person.” (Quoting *State v. Quartana*, 213 Wis. 2d 440, 448, 570 N.W.2d 618 (Ct.

App. 1997)). He contends the deputies in this case did not “diligently pursue” such a means. We disagree.

¶12 Hunter’s argument is founded upon his assertion that “a ‘pile’ of personnel, including deputies, reserve deputies and EAA security, stood around his vehicle preventing him from leaving for at least five to ten minutes before Deputy Roth even initiated contact.” Hunter misreads the hearing testimony, perhaps related to two parts of his “Statement of the Case/Facts” in his brief-in-chief, in which Hunter writes: “On cross examination Roth testified ‘there was like five or six deputies and reserve deputies, and then there was probably maybe a good four EAA security guards’” and “Security personnel and a reserve deputy made first contact with Mr. Hunter.”

¶13 The portions of the transcript Hunter cites as support for these statements are:

[Hunter’s counsel]: So you said you were investigating a separate incident; is that correct?

[Roth]: Yes.

[Hunter’s counsel]: And ... you received some sort of call from ... the security people or a reserve deputy?

[Roth]: No. No. Everybody was—it was like a big pile of guys, to be honest with ’ya so there’s the—like the—there was like five or six deputies and reserve deputies, and then there was probably maybe a good four EAA security guards there.

and

[Roth]: So that’s why [Hunter’s car] was stopped by EAA security, because the EAA security was squawking on their radio to stop this car because it almost hit the guard over here on West Waukau.

[Hunter's counsel]: Okay, and is that when you made contact with the vehicle then?

[Roth]: [F]irst the *security guards made contact*, and then they—*they told* Deputy—or Reserve Deputy Ryden that the guy in the vehicle was intoxicated. After I got done arresting the individuals [involved in the ticket booth incident]—so that car sat there for maybe five—five to ten minutes, and then after I got done with my incident, because I was the only patrol deputy there, then I dealt with the—that car.

[Hunter's counsel]: Okay, and is that because a reserve is not—are they allowed to conduct traffic stops on vehicles?

[Roth]: They're—actually, they're probably—the reserve deputies are allowed to stop vehicles, but I don't think they deal with that on a everyday basis, and during EAA there's like two—two deputies out there at night, myself and—and another, one of the detectives who works with me, and so basically, any incidents we handle out there, and then the reserves are just there to help us, so the reserves aren't gonna, you know, conduct any field sobriety or make that determination. (Emphasis added.)

The testimony does not indicate that “[s]ecurity personnel *and a reserve deputy* made first contact with Mr. Hunter,” as Hunter represents. (Emphasis added.)

The testimony only indicates that *security guards* made first contact with Hunter, and that the guards then “*told ... Reserve Deputy Ryden*” that Hunter was intoxicated. (Emphasis added.) Further, nowhere in these passages or elsewhere in Roth's testimony does he state that “deputies, reserve deputies and EAA security, stood around his vehicle preventing him from leaving for at least five to ten minutes before Deputy Roth even initiated contact.”

¶14 As previously referenced, Roth did make one statement at the hearing—“the vehicle was coming for the location where we were, and it was stopped by EAA security before it came into the pile of guys that were dealing with the other intoxicated individuals”—that could potentially be read as

suggesting Hunter’s vehicle may have subsequently proceeded “into the pile of guys” after the vehicle was initially stopped by security guards. *See supra* ¶3. Even if this were a correct reading of this statement, however, there is no indication how long the vehicle was stopped by security before it would have moved into the “pile of guys” or that any law enforcement officer actually made contact with Hunter prior to Roth making contact and beginning the OWI investigation. In light of all the testimony provided, however, we think the more accurate reading of this statement by Roth is that Roth was merely indicating that Hunter’s vehicle was headed for the “pile of guys” and the security guards stopped and detained it before it could reach the “pile.”<sup>3</sup> In particular, after testifying that EAA security guards were the ones who stopped Hunter’s vehicle, Roth provided the following testimony:

[Hunter’s counsel]: And then once they stop Mr. Hunter’s vehicle, you said he *sits there* for about five to ten minutes *waiting* for you to finish up your—the other incident; is that fair to say?

[Roth]: Yes.

[Hunter’s counsel]: Were there officers standing by him to make sure that he *stayed there*?

[Roth]: The security guards were right in that general vicinity. (Emphasis added.)

¶15 The circuit court found that it was EAA security guards, not law enforcement officers, who detained Hunter prior to law enforcement’s start of the OWI investigation. We uphold the circuit court’s finding on this point.

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<sup>3</sup> This reading also appears to be more consistent with the circuit court’s finding: “I don’t think he was detained by law enforcement at that point. It sounds like he was detained by security staff at the EAA.”

According to Roth's testimony, Hunter was detained by security guards for about five to ten minutes prior to Roth making contact with him and beginning the OWI investigation. Because Fourth Amendment protection only applies to government action, see *State v. Butler*, 2009 WI App 52, ¶12, 317 Wis. 2d 515, 768 N.W.2d 46, we conclude that this detention of Hunter by EAA security guards is of no constitutional consequence because it was not performed by law enforcement officers.

¶16 We further conclude that Hunter's assertion that the OWI investigation did not begin until Vinje arrived is also incorrect. When Roth approached Hunter's vehicle, he spoke with Hunter and observed Hunter's speech was slurred and eyes were glassy, confirmed Hunter's identity by Hunter's driver's license, noted a "heavy odor of intoxicants in the vehicle," and concluded that Hunter and a female in the vehicle both "appeared to be intoxicated." Roth clearly began the OWI investigation. Roth then "called Deputy Vinje" to assist him by having Vinje administer field sobriety tests to Hunter. Vinje was not on the EAA grounds when he received the call but arrived about five minutes later and continued the OWI investigation by making his own observations about the smell of alcohol coming from Hunter, Hunter's eyes being "bloodshot and watery," learning that Hunter had consumed beer, and administering field sobriety tests and a preliminary breath test to Hunter.

¶17 Once a law enforcement officer, Roth, made contact with Hunter, he "diligently pursued a means of investigation" that did in fact lead to his belief that Hunter "appeared to be intoxicated," a belief which was further supported by Vinje's continuation of the investigation. See *Quartana*, 213 Wis. 2d at 448. "The touchstone of the Fourth Amendment is reasonableness." *Florida v. Jimeno*, 500 U.S. 248, 250 (1991) (Douglas, J., concurring) (citing *Katz v. United States*,

389 U.S. 347, 360 (1967)). All of the law enforcement officers' actions in this case were reasonable.

*By the Court.*—Judgments affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

