COURT OF APPEALS
DECISION
DATED AND FILED

January 13, 2000

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* WIS. STAT. § 808.10 and RULE 809.62.

No. 99-1166

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RONALD J. ANDERSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: STEVEN D. EBERT, Judge. *Reversed.*

¶1 EICH, J.[1] Ronald J. Anderson appeals from a judgment convicting him of operating a boat while intoxicated. The dispositive issue is whether, on the observed facts, the arresting officer had a reasonable basis to suspect that

[1] This appeal is decided by one judge pursuant to WIS. STATS. § 752.31(2)(f) (1997-98).

Anderson was intoxicated so as to justify detaining him for further investigation. We think not and reverse the judgment.

¶2 The facts are not in dispute. Michael Cross, a Department of Natural Resources conservation warden saw Anderson operating a boat towing a water skier at approximately 8:45 p.m. on a May evening. He observed nothing unusual or illegal in Anderson's operation of the boat. Because, however, there is a boating regulation prohibiting water-skiing after sunset (and because a DNR pamphlet listed the "official" sunset time for that date as 8:27 p.m.[2]), Cross decided to stop Anderson. Responding to Cross's signal, Anderson stopped his boat in the water and, at Cross's request, brought the skier on board—all without incident. When Cross asked Anderson for his drivers license, Anderson handed him a University of Wisconsin student ID card.[3] According to Cross, he again asked to see Anderson's drivers license and Anderson held out his open wallet with the license visible through a transparent pane. Cross asked him to remove the license from the wallet and hand it to him, which Anderson did, again without incident.[4] At this point, Cross noted a "mild" or "moderate" odor of intoxicants about Anderson's person and, when asked, Anderson told Cross he had consumed about one and one-half beers.

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[2] Warden Cross agreed that this "official" sunset time would not necessarily be apparent to a boater without consulting the pamphlet.

[3] Both the skier and another passenger in Anderson's boat testified that they heard Cross ask Anderson for "some identification" and that he used the words "drivers license" or "photo ID."

[4] Cross also testified at the suppression hearing that when he asked to see the boat's registration slip, Anderson was unable to locate it and seemed "uncertain" as to whether it was on the boat at all. It also appears that Anderson promptly produced the boat's life preservers in response to Cross's question whether the required number of preservers was on board. Cross didn't see either event as eventful or unusual, and the State does not mention them in its argument.

¶3 Then, while both men were still standing in their boats, Cross asked Anderson whether he would agree to submit to some field sobriety tests, and he said he would.[5] Anderson recited the alphabet without incident (although, according to Cross, his speech was somewhat slurred), and completed the "finger-count" test in similar fashion (although Cross said he had to remind Anderson to pay attention to his instructions). Cross agreed that Anderson "passed" both tests. Cross testified, however, that Anderson failed the Horizontal Gaze Nystagmus (HGN) test because his eyes did not "smooth[ly] pursu[e] the officer's moving penlight." He then arrested Anderson for operating a boat while intoxicated.

¶4 Anderson moved to suppress all evidence of his encounter with Cross other than the skiing-after-sunset stop on grounds that Cross lacked reasonable suspicion to detain him for sobriety testing. Alternatively, he argued that—even after the sobriety tests—Cross lacked probable cause to arrest him for intoxicated operation of a boat. The trial court denied the motion and, on stipulated facts (as we have recounted them above), found Anderson guilty of the violation. Because, as indicated, we conclude that Cross had no grounds to detain Anderson for any purpose other than possible violation of post-sunset water-skiing regulations, we need not consider his probable-cause arguments.

¶5 Review of a circuit court's ruling that an officer did, or did not, have reasonable grounds to detain a suspect is a question of law which we review de novo. ***State v. Betow,*** 226 Wis. 2d 90, 93, 593 N.W.2d 499 (Ct. App. 1999). There is no dispute that Cross could properly stop Anderson for towing a skier

[5] According to Cross, he decided to request the tests because Anderson was towing a skier after sunset, smelled (mildly or "moderately") of intoxicants, didn't have the registration card on board, and didn't immediately follow his (Cross's) instruction to produce his drivers license.

after sunset. However, whether he could detain him to investigate other potential offenses—such as the intoxicated operation of a boat—depends on whether, after the initial stop, Cross became aware of "additional suspicious factors which are sufficient to give rise to an articulable suspicion that [Anderson] has committed or is committing an offense … separate and distinct from the acts that prompted [Cross]'s intervention in the first place." ***Id.*** And while "reasonable suspicion" is a lesser standard than probable cause to arrest, there must still be "specific and articulable facts [available to the officer] which, together with the rational inferences from those facts, would reasonably warrant th[e] intrusion." ***State v. Allen***, 226 Wis. 2d 66, 71, 593 N.W.2d 504 (Ct. App. 1999) (quoted source omitted).

¶6 In this case the State attempts to justify Cross's detention of Anderson on the following facts: (i) Anderson "did not follow Cross's instructions to produce his drivers license" when first asked for identification; (ii) when specifically asked to produce the license, Cross didn't remove it from the wallet, but extended the wallet to Cross (with the license visible behind a plastic pane); (iii) the mild or moderate odor of intoxicants about Anderson's person (and Anderson's related one-and-one-half beers admission); and (iv) Cross's observation that Anderson's speed was "slurred" and "deliberate" when reciting the alphabet.

¶7 To begin with, we agree with Anderson that the last assertion—slurred or deliberate speech—is not properly a part of the reasonable-suspicion-to-detain analysis, for whatever Cross may have observed in this respect, that observation came after the detention had been effected and during the field tests being administered in furtherance of the claimed alcohol violation.

¶8 The question is, then, whether, in the context of all facts observed by Cross that evening, "an officer of reasonable caution" would be warranted in suspecting that Anderson was intoxicated. Cross observed nothing unusual or untoward about (a) Anderson's operation of the boat while towing the skier, or (b) his responsiveness or physical dexterity in bringing the boat to a stop and bringing the skier on board when Cross activated his lights, or (c) his ability to retrieve his wallet and remove his drivers license (or to locate and produce the boat's life preservers) when requested to do so. In other words, up to the point Cross decided to detain him, there was nothing in Anderson's appearance, speech, coordination, dexterity or boat-operating ability, that would in any way peak a reasonable officer's interest. All Cross observed that could even be considered suspect was the fact that, in response to a somewhat ambiguous request for identification, Anderson produced a student ID rather than his drivers license (and, when asked for the license, handed Cross his wallet, opened to the license, rather than physically extracting the license from the wallet)—responses that do not seem to us to be at all unreasonable under the circumstances—and that there was a faint or moderate odor of alcohol on his person.[6]

¶9 Given the fact that it is not illegal *per se* to operate a boat after drinking beer—but only to operate a boat while impaired by intoxication—and given the further fact that Anderson's acknowledgment of having one and one-half beers prior to his contact with Cross is the only real suggestion of intoxication in the record, we don't think there were reasonable grounds for Cross to detain

[6] As indicated, when asked, Anderson stated that he had consumed one and one-half beers.

Anderson on suspicion of operating a boat while intoxicated. We therefore reverse the conviction.

By the Court.—Judgment reversed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4 (1997-98).