COURT OF APPEALS
DECISION
DATED AND FILED

October 3, 2000

Cornelia G. Clark
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. 00-0754-FT

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

COUNTY OF SHAWANO,

PLAINTIFF-RESPONDENT,

v.

DANIEL D. MCFAUL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Shawano County: EARL SCHMIDT, Judge. *Affirmed.*

¶1 CANE, C.J.[1] Daniel McFaul appeals from his conviction, after a jury trial, for a first offense of operating a motor vehicle with a prohibited alcohol

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(g) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

concentration, contrary to WIS. STAT. § 346.63(1)(b).[2] McFaul contends that because the County failed to produce at the suppression hearing the Menominee tribal officer who initially detained him, the court was compelled to suppress the evidence. Alternatively, he contends that the evidence produced at the suppression hearing was insufficient to support a finding of reasonable suspicion. This court rejects his arguments and affirms the conviction.

¶2 The facts are undisputed. On June 12, 1998, at approximately 9:40 p.m., McFaul was returning to a campground when he passed the turn into the campground. Immediately after missing the turn, McFaul realized what he had done and in an attempt to turn around, became stuck in a steep ditch, causing his truck to be perpendicular to the highway and partially on the roadway and ditch. David Waupekenay, an off-duty Menominee tribal officer, observed McFaul attempting unsuccessfully to drive his vehicle from the ditch. He stopped McFaul from attempting to get his truck from the ditch and called the Shawano County Sheriff's Department for assistance.

¶3 At the suppression hearing, the County did not call Waupekenay as a witness. Instead, it produced Michael Micik, who is a deputy with the Shawano County/Menominee Nation. Micik testified that he was dispatched to the accident scene where he observed two Menominee tribal officers and McFaul in the truck, which was still in the ditch. As McFaul got out of the truck and walked toward Micik, McFaul staggered slightly and his breath smelled of an alcoholic beverage. After McFaul performed some field sobriety tests, Micik arrested him for OWI.

[2] This is an expedited appeal under WIS. STAT. RULE 809.17.

¶4 The only other witness to testify at the suppression hearing was McFaul. He explained how he had missed the turn into the campground and in an attempt to turn around, became stuck in the ditch. While attempting to get his truck out of the ditch, Waupekenay drove up in his minivan and told him to stop. Waupekenay parked his minivan alongside of McFaul's truck, thereby blocking the truck.[3] Waupekenay identified himself as a police officer, told McFaul to stay in the truck and asked what was going on. While McFaul was explaining what had happened, Micik arrived.

¶5 At the suppression hearing, McFaul argued that he had been detained without a reasonable suspicion as a basis for the stop. The trial court denied the motion. After a jury trial, McFaul was acquitted of OWI, but found guilty of operating a motor vehicle with a prohibited alcohol concentration. On appeal, McFaul contends that because at the suppression hearing the County failed to call Waupekenay as a witness, he was denied the right to confront and cross-examine the officer who initially detained him. Alternatively, he contends that because the evidence produced at the suppression hearing was insufficient to support a finding of reasonable suspicion, the court erred by denying his motion to suppress. This court rejects both arguments.

¶6 When reviewing a trial court's denial of a suppression motion, an appellate court "will uphold a trial court's findings of fact unless they are against the great weight and clear preponderance of the evidence." ***State v. Richardson***, 156 Wis. 2d 128, 137, 456 N.W.2d 830 (1990). Whether a search or seizure

[3] At the jury trial, Waupekenay testified that he did not block McFaul and was concerned for McFaul and his passengers' safety. The truck was in a steep ditch, and Waupekenay was concerned that the truck may roll over.

passes statutory and constitutional standards, however, is a question of law that this court reviews de novo. *See* ***id.*** at 137-38.

¶7 The Fourth Amendment to the United States Constitution and art. I, § 11, of the Wisconsin Constitution guarantee citizens the right to be free from unreasonable searches and seizures. Although an investigative stop is deemed a "seizure" under the Fourth Amendment, a police officer may, under appropriate circumstances, conduct an investigative stop when a lesser degree of suspicion exists. *See* ***Terry v. Ohio***, 392 U.S. 1, 22 (1968). The standard required for this exception is reasonable suspicion based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." ***Id.*** at 21.

¶8 Here, because the County had the burden to show that the officer had reasonable suspicion to stop McFaul, it could determine whom it wanted to call as a witness at the suppression hearing.[4] This is not a situation where an accused was denied the right to confront or cross-examine a particular witness. Simply put, it was the County that bore the risk of failing to establish reasonable suspicion for the stop. In ***State v. Swanson***, 164 Wis. 2d 437, 453-54 n.6, 475 N.W.2d 148 (1991), our supreme court explained that erratic driving involving a one-car accident along with the time of the incident can form reasonable suspicion for initial detention, but not probable cause for arrest. Here, based on McFaul's testimony alone, the trial court reasonably concluded that when an officer finds a truck stuck in the ditch, apparently because of erratic driving, and perpendicular to

[4] Both sides agree that the test for the initial detention is under the reasonable suspicion standard.

the roadway at 9:40 p.m., he had a reasonable basis to temporarily stop and detain the individual to inquire whether there was a traffic violation.

¶9 Therefore, the conviction for operating a motor vehicle with a prohibited alcohol concentration is affirmed.

By the Court.—Judgment affirmed.

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