COURT OF APPEALS
DECISION
DATED AND FILED

August 15, 2002

Cornelia G. Clark
Clerk of Court of Appeals

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.

Appeal No. 02-0287-CR **Cir. Ct. No. 00-CT-2751**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RANDOLPH O. NEUMEYER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: STEVEN D. EBERT, Judge. *Affirmed*.

¶1 ROGGENSACK, J.[1] Randolph O. Neumeyer appeals his conviction for operating a motor vehicle while intoxicated (OMVWI), his third

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). In addition, all further references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

offense contrary to WIS. STAT. § 346.63(1)(a). Neumeyer claims that the circuit court erred in denying his motions to suppress evidence obtained as a result of a police officer's stop of his vehicle. Because we concluded that the traffic stop was supported by reasonable suspicion that Neumeyer had violated the law and that the frisk and brief transport of Neumeyer while temporarily handcuffed did not constitute an arrest, we affirm the circuit court's order denying the motions to suppress and the judgment of conviction.

BACKGROUND

¶2 On November 17, 2000, at approximately 1:00 a.m., Deputy Sheriff Garrett Page of the Dane County Sheriff's Department observed Neumeyer's car weaving in its traffic lane. Page followed Neumeyer for approximately three-tenths of a mile as he continued to weave. Believing the driver was having a difficult time maintaining control of his car, Page decided to stop the car and investigate further. Page contacted Neumeyer and noticed a strong odor of intoxicants on his breath and that he had slurred speech. Neumeyer admitted that he had "a few beers" and agreed to a field sobriety test, exiting his car.

¶3 Because it had started to snow and the ground was somewhat slippery, Page asked Neumeyer if he would agree to allow Page to transport him to a nearby gas station. The gas station had a sheltered area where, as Page explained, Neumeyer would have a better opportunity to successfully perform the field sobriety test. Neumeyer agreed. Page then explained that because his police car did not have a divider between the front and back seats, for safety reasons he would need to conduct a pat down search and handcuff Neumeyer for the short drive to the gas station. Neumeyer did not object and was transported to the gas

station. Immediately upon their arrival, Page removed the handcuffs, administered the field sobriety tests and subsequently arrested Neumeyer for OMVWI.

¶4 Neumeyer moved to suppress all evidence relating to the traffic stop, claiming that Page did not have reasonable suspicion to initiate the stop. Additionally, Neumeyer argued that the frisk and brief transport constituted an arrest made without probable cause, rendering any evidence gathered thereafter inadmissible. The circuit court denied both motions to suppress and Neumeyer pled no contest to the charges. He now appeals.

DISCUSSION

Standard of Review.

¶5 When we review a motion to suppress evidence, we will uphold a circuit court's findings of fact unless they are clearly erroneous. ***State v. Eckert***, 203 Wis. 2d 497, 518, 553 N.W.2d 539, 547 (Ct. App. 1996). However, the application of constitutional principles to the facts as found is a question of law which we decide without deference to the circuit court's decision. ***State v. Patricia A.P.***, 195 Wis. 2d 855, 862, 537 N.W.2d 47, 49-50 (Ct. App. 1995).

Reasonable Suspicion.

¶6 The Fourth Amendment prohibits unreasonable searches and seizures. *See* U.S. CONST. amend. IV. The detention of a motorist by a law enforcement officer constitutes a "seizure" of the person within the meaning of the Fourth Amendment. ***Berkemer v. McCarty***, 468 U.S. 420, 436-37 (1984). Statements given and items seized during a period of illegal detention are inadmissible. ***Florida v. Royer***, 460 U.S. 491, 501 (1983). However, an investigative detention is not "unreasonable" if it is brief in nature, and justified by

a reasonable suspicion that the motorist has committed, or is about to commit, a crime. ***Berkemer***, 468 U.S. at 439.

¶7 The reasonable suspicion necessary to detain a suspect for investigative questioning must be based on specific and articulable facts, together with rational inferences drawn from those facts, sufficient to lead a reasonable law enforcement officer to believe that criminal activity may be afoot, and that action is appropriate. ***Terry v. Ohio***, 392 U.S. 1, 21-22 (1968). "The question of what constitutes reasonable suspicion is a common sense test. Under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience?" ***State v. Jackson***, 147 Wis. 2d 824, 834, 434 N.W.2d 386, 390 (1989). The test is designed to balance the personal intrusion into a suspect's privacy occasioned by the stop against the societal interests in solving crime and bringing offenders to justice. ***State v. Guzy***, 139 Wis. 2d 663, 680, 407 N.W.2d 548, 556 (1987).

¶8 Neumeyer contends that Page did not have a reasonable suspicion to stop his vehicle. He asserts that weaving within a traffic lane is not unusual or illegal conduct. He contends that "[a] lane is, by definition, a zone in which a vehicle is entitled to travel." While Neumeyer's statement is true, whether the observed conduct is lawful is not determinative of whether reasonable suspicion exists to make a stop. ***State v. Waldner***, 206 Wis. 2d 51, 59, 556 N.W.2d 681, 685 (1996). Reasonable inferences of criminal activity can be drawn from perfectly legal behavior. ***Id.*** Here, Page observed Neumeyer weave between the fog stripe and center line of his traffic lane for approximately three-tenths of a mile. The road was in reasonable condition, without large potholes or other obstructions that may have justified Neumeyer's erratic driving. This conduct created a reasonable

suspicion that Neumeyer was driving while impaired; therefore, we conclude that Page had reasonable suspicion to make an investigative stop.

Arrest.

¶9 Neumeyer contends that he was placed "in custody" when Page frisked, temporarily handcuffed and transported him to a nearby gas station. We disagree. The standard used to determine the moment of arrest for Fourth Amendment purposes is an objective test which assesses the totality of the circumstances. ***State v. Swanson***, 164 Wis. 2d 437, 446, 475 N.W.2d 148, 152 (1991). The critical determination is whether a reasonable person in the defendant's position would have considered himself or herself to be "in custody," given the degree of restraint under the circumstances. ***Id.*** at 447, 475 N.W.2d at 152. However, "[a] restraint of liberty does not ipso facto prove that an arrest has taken place." ***State v. Quartana***, 213 Wis. 2d 440, 449, 570 N.W.2d 618, 622 (Ct. App. 1997). And finally, a police officer is authorized to conduct a protective frisk as part of an investigative encounter when the officer has concerns for his personal safety. *See* ***State v. McGill***, 2000 WI 38, ¶22, 234 Wis. 2d 560, 609 N.W.2d 795.

¶10 At the time that Neumeyer was transported to the gas station, it had started to the snow, the ground was slippery and the road was not well lit. The gas station was located approximately three-tenths of a mile away and offered protection from the snow and better lighting. Neumeyer agreed to allow Page to transport him to the gas station. He did not object when Page informed him that because the squad had no safety shield between the front and back seats, he would need to conduct a frisk and apply handcuffs.

¶11 Additionally, Page testified that at no time prior to administering the field sobriety test did he communicate to Neumeyer that he was under arrest. Rather, Page explained to Neumeyer that the frisk and handcuffs were for "his safety" and the handcuffs would be removed immediately upon their arrival. A reasonable person in Neumeyer's position would be aware that the detention was only temporary and limited in scope. That is, if he passed the field sobriety test, he would be free to go. Accordingly, we conclude that no arrest occurred prior to the completion of the field sobriety tests.

CONCLUSION

¶12 We conclude that the traffic stop was supported by reasonable suspicion that Neumeyer had violated the law and that the frisk and brief transport of Neumeyer while temporarily handcuffed did not constitute an arrest. Therefore, we affirm the circuit court's order denying the motions to suppress and the judgment of conviction.

By the Court.—Judgment and order affirmed.

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