COURT OF APPEALS
DECISION
DATED AND FILED

November 27, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0481 **Cir. Ct. No. 01-CT-353**

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

IN RE IMPOSITION OF COSTS ON ATTORNEY IN, STATE OF WISCONSIN V. BENTON W. MOLLE:

JAMES R. KOBY,

APPELLANT,

V.

LA CROSSE COUNTY CIRCUIT COURT,

RESPONDENT.

APPEAL from an order of the circuit court for La Crosse County: JOHN J. PERLICH, Judge. *Reversed.*

Before Vergeront, P.J., Dykman and Lundsten, JJ.

¶1 PER CURIAM. Attorney James Koby appeals an order which imposed sanctions on him for filing what the trial court deemed to be a frivolous suppression motion. Koby contends that the relevant statute, WIS. STAT.

§ 802.05(1) (1999-2000),[1] does not apply in criminal cases. We do not address that question, however, because we conclude that Koby had a good faith basis to bring a suppression motion even if the statute does apply.

¶2 This special action for costs arises out of a drunk driving case. Koby filed a pretrial suppression motion, seeking to exclude statements made by his client during and after a traffic stop, any evidence relating to the field sobriety tests administered to his client during the stop, and the results of a subsequent blood alcohol test. Koby argued that the arresting officer lacked reasonable suspicion to detain his client and administer the sobriety tests. Koby's client had been stopped in the early morning hours for operating his motorcycle at forty-one miles per hour in a thirty-mile-per-hour zone. After the stop, the investigating officer detected an odor of alcohol on Koby's client's breath. The client admitted to the officer that he had been drinking some beer. Acting on this information, the officer detained the client for field sobriety testing.

¶3 After an evidentiary hearing on Koby's suppression motion, the trial court denied the motion and assessed costs upon counsel because the court concluded that the motion was without a good faith basis in either fact or law.

¶4 WISCONSIN STAT. § 802.05(1) provides, in relevant part, that an attorney's signature on a motion constitutes a certificate that, "to the best of the attorney's … knowledge, information and belief, formed after reasonable inquiry, the [motion] is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law."

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

WISCONSIN STAT. § 814.025 permits the trial court to impose sanctions when an attorney raises a defense which is not well-grounded in fact or law. The test is not whether the position taken by the attorney can or will prevail, but rather whether it was so indefensible that the attorney should have known that it was frivolous. ***Zinda v. Krause***, 191 Wis. 2d 154, 176, 528 N.W.2d 55 (Ct. App. 1995). All doubts are resolved in favor of the attorney. ***Id.***

¶5 The question here, then, is not whether the trial court properly denied the suppression motion (we are satisfied it did), but rather whether Koby should have known the motion was so indefensible as to be frivolous. We agree with the trial court that the motion itself was rather perfunctory and weak. In particular, we are unaware of any Wisconsin cases in which a factually similar temporary detention was found to be unconstitutional.

¶6 By the same token, the State has not located any case upholding a temporary detention with the circumstances present here—namely, a defendant stopped for moderate speeding near bar time who exhibits an odor of intoxicants and admits to having consumed some beer. Perhaps the closest case is ***State v. Swanson***, 164 Wis. 2d 437, 475 N.W.2d 148 (1991). In ***Swanson***, the Wisconsin Supreme Court indicated that erratic driving near bar-closing time, coupled with an odor of intoxicants, supplied reasonable suspicion to detain a motorist and investigate whether he was driving while intoxicated. ***Id.*** at 453 n.6.

¶7 While the facts here might be compared with those in ***Swanson***, we are not persuaded that the speeding in this case can be characterized as "erratic" driving. In ***Swanson***, the erratic driving consisted of driving up onto a sidewalk and nearly hitting a pedestrian. ***Id.*** at 442. Given that the reasonable suspicion standard is a fact-intensive inquiry which is continually evolving and may well

turn on small distinctions, that an attorney is permitted to argue for the extension of existing law, and that an attorney is supposed to be accorded a presumption of having acted in good faith, we are satisfied that Koby could reasonably have argued that ***Swanson*** and other similar cases, though relevant, were distinguishable and should not control the outcome here. Therefore, while the trial court correctly concluded that the investigating officer had reasonable suspicion to support a temporary detention, we cannot say the suppression motion lacked a basis in fact or law, particularly in light of an attorney's ethical duty to zealously represent the interests of his client in the context of a criminal case. Here, the primary indication of intoxication was an odor of intoxicants on the defendant's breath and the record does not reveal whether it was a strong, weak, or moderate odor. While we agree that even a weak odor of intoxicants on a driver's breath, combined with a speeding violation at bar time, constitutes reasonable suspicion, we conclude it is not frivolous to argue otherwise. Accordingly, we reverse the order imposing sanctions on counsel.

By the Court.—Order reversed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5.