

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 27, 2005

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. 04-1976-CR
STATE OF WISCONSIN**

Cir. Ct. No. 03CT000371

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT M. HIPKE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Portage County:
JOHN V. FINN, Judge. *Affirmed.*

¶1 LUNDSTEN, J.¹ Robert M. Hipke appeals a circuit court judgment convicting him of operating a motor vehicle while intoxicated as a third offense. Hipke asserts that the circuit court erred in denying his motion to suppress because

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

the police officer who stopped him did not have the reasonable suspicion required to justify the initial stop. We conclude that the initial stop was valid. We therefore affirm the circuit court's judgment.

Background

¶2 Hipke was charged with drunk driving offenses under WIS. STAT. § 346.63(1) (2001-02) after his vehicle was stopped for having excessively loud exhaust noise. He moved to suppress the evidence of his intoxication that the police obtained during the course of the stop, asserting that the police lacked probable cause or reasonable suspicion to believe Hipke was committing any offense at the time of the stop.

¶3 At the suppression hearing, the deputy sheriff who initiated the stop, Jeffrey Coey, testified that Hipke's vehicle passed Coey's location at approximately 2:30 a.m. on August 6, 2003, as Coey was operating stationary radar on the side of the highway. Coey testified that Hipke's vehicle was "excessively noisy" and that he stopped Hipke because of the vehicle's "excessively loud exhaust."

¶4 After Coey stopped Hipke, Coey noticed an odor of intoxicants emanating from the interior of Hipke's vehicle. Coey had Hipke step out of the vehicle in order to perform field sobriety tests. Hipke eventually submitted to a preliminary breath test, which showed a blood alcohol content of either 0.13 or 0.16.

¶5 At the close of the suppression hearing, Hipke argued that all evidence obtained subsequent to the initial stop must be suppressed because the State had failed to introduce facts sufficient to establish that Hipke's vehicle was

emitting excessive noise in violation of state statute. Citing to WIS. STAT. § 347.39, which sets forth requirements for vehicle mufflers and corresponding noise levels, the circuit court denied Hipke's motion. Hipke pled no contest to operating a motor vehicle while under the influence of an intoxicant in violation of WIS. STAT. § 346.63(1)(a). Hipke appeals the judgment of conviction.

Discussion

¶6 The stop of a vehicle constitutes a seizure under the Fourth Amendment. *State v. Baudhuin*, 141 Wis. 2d 642, 648, 416 N.W.2d 60 (1987). An officer may perform an investigatory stop of a vehicle based on a reasonable suspicion of a non-criminal traffic violation. *State v. Colstad*, 2003 WI App 25, ¶11, 260 Wis. 2d 406, 659 N.W.2d 394, *review denied*, 2003 WI 32, 260 Wis. 2d 752, 661 N.W.2d 100 (No. 01-2988-CR), *cert. denied*, 540 U.S. 877 (2003). The question of what constitutes reasonable suspicion is a common-sense test. *Colstad*, 260 Wis. 2d 406, ¶8. The test is an objective one, and the suspicion must be grounded in specific, articulable facts along with reasonable inferences from those facts. *Id.* A circuit court's determination of whether undisputed facts establish reasonable suspicion allowing police to perform an investigatory stop presents a question of constitutional fact, subject to our *de novo* review. *Id.*

¶7 Hipke asserts that the stop was not supported by reasonable suspicion that his vehicle was making excessive noise. More specifically, Hipke contends that Deputy Coey did not testify about Coey's actual observations, but rather made conclusory statements regarding the noise. We disagree.

¶8 WISCONSIN STAT. § 347.39(1) reads:

No person shall operate on a highway any motor vehicle subject to registration unless such motor vehicle is

equipped with an adequate muffler in constant operation and properly maintained to prevent any excessive or unusual noise or annoying smoke.

Thus, an officer has reasonable suspicion to stop a vehicle for a violation under this statute if the officer hears “excessive or unusual noise” that appears to be caused by an inadequate muffler. Whether a vehicle is producing excessive or unusual noise from an exhaust system will ordinarily involve an officer’s common-sense assessment of the sound level and type of sound emanating from the vehicle.

¶9 Here, Deputy Coey testified that Hipke’s vehicle was “excessively noisy” and had an “excessively loud exhaust.” From this testimony, the circuit court could reasonably infer that Coey heard a loud noise of the sort produced by a car with a defective muffler. In the absence of evidence indicating that there is some reason to believe the officer would not have been able to hear such noise, nothing more is required.

¶10 Hipke relies on *County of Jefferson v. Renz*, 222 Wis. 2d 424, 588 N.W.2d 267 (Ct. App. 1998), *rev’d on other grounds*, 231 Wis. 2d 293, 603 N.W.2d 541 (1999). In *Renz*, we concluded that WIS. STAT. § 347.39 is not unconstitutionally vague.² *Renz*, 222 Wis. 2d at 427. Hipke contends that *Renz* sets a minimum standard for establishing reasonable suspicion under § 347.39. Hipke is wrong. *Renz* only involves the application of the reasonable suspicion standard to particular facts. In *Renz*, we made no effort to explain, as a general

² We need not concern ourselves here with the precedential value of the part of *County of Jefferson v. Renz*, 222 Wis. 2d 424, 588 N.W.2d 267 (Ct. App. 1998), *rev’d on other grounds*, 231 Wis. 2d 293, 603 N.W.2d 541 (1999), on which Hipke relies because we reject Hipke’s *Renz* argument on its merits.

matter, what testimony is necessary to support a conclusion that an officer possessed reasonable suspicion of a violation of § 347.39.

¶11 Moreover, Coey’s testimony showed he had sufficient experience to assess muffler noise. Coey had more than three years of experience as a police officer at the time of the stop and, in general, his duties on patrol were “[t]raffic enforcement, taking calls.” From Coey’s testimony, the circuit court could reasonably infer that Coey had experience listening to thousands of car mufflers and that he knew the difference between a loud muffler and an excessively loud muffler.

¶12 Because we conclude that Coey’s testimony was sufficient to establish Coey’s reasonable suspicion that Hipke was violating WIS. STAT. § 347.39(1) when Coey stopped Hipke, we affirm the circuit court’s judgment.

By the Court.—Judgment affirmed.

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

