

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

November 8, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-1516-CR

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

JESSE J. SCHLOEMER,

Defendant-Respondent.

APPEAL from an order of the circuit court for Washington County: LEO F. SCHLAEFER, Judge. *Affirmed.*

NETTESHEIM, J. The State appeals from a trial court order suppressing evidence obtained by the Village of Jackson Police Department of Jesse J. Schloemer's intoxicated use of a motor vehicle. Because we conclude that the officer failed to articulate sufficient reasonable grounds for stopping Schloemer's vehicle pursuant to § 345.22, STATS., we affirm the suppression order.

FACTS

At approximately 3:00 a.m. on September 24, 1994, Officer Craig Knox of the Jackson Police Department was parked in his squad car with the window rolled down when he heard a vehicle approaching with what he believed was a loud exhaust. When the vehicle passed, Knox followed it for almost one-half mile to observe its driving pattern before he pulled over the driver. Knox issued the driver of the vehicle, Schloemer, a warning citation for a defective exhaust and, after closer contact, citations for operating a motor vehicle while intoxicated and with a prohibited blood alcohol concentration, contrary to § 346.63(1)(a) and (b), STATS.

Several days after Schloemer received the citations, he took his vehicle to the West Bend Police Department without fixing or altering the exhaust system. At that time, an officer inspected the muffler and pipes on the vehicle, and listened as Schloemer started it. The officer indicated that the vehicle sounded good and signed off on the warning citation.

Prior to trial for the intoxicated driving charges, the trial court granted Schloemer's motion to suppress all evidence obtained as a result of the September 24 stop. At the evidentiary hearing, the court found that there had not been a sufficient showing that Knox had a reasonable and articulable suspicion that Schloemer had violated a traffic regulation to justify his stop of the vehicle. The State appeals.

DISCUSSION

A law enforcement officer's stop of a vehicle and detention of its occupants constitutes a seizure under the Fourth Amendment. *See State v.*

Baudhuin, 141 Wis.2d 642, 648, 416 N.W.2d 60, 62 (1987). The validity of such a search and seizure initially depends upon whether the vehicle was lawfully stopped. *Id.* We independently review the legality of the initial stop as a matter of law. *See id.*

Section 347.39, STATS., provides, in part:

- (1) 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*. [Emphasis added.]¹

Pursuant to § 345.22, STATS., an officer may arrest an individual for the violation of a traffic regulation without a warrant if the officer has reasonable grounds to believe that the person is violating or has violated a traffic regulation. *Baudhuin*, 141 Wis.2d at 648, 416 N.W.2d at 62. Implicit in this statutory authority to arrest for a traffic violation is the authority to stop the vehicle when the officer has reasonable grounds to believe that a violation has occurred. *Id.*

At the evidentiary hearing, Knox gave the following testimony in support of his decision to stop Schloemer's vehicle:

I heard a vehicle traveling westbound on Highway 60 which appeared to have a loud exhaust system. The vehicle passed my vehicle confirming this was the only vehicle on the roadway with this exhaust.

I then followed this vehicle approximately five-tenths of a mile up to Highway P, at which time I activated my red and blue lights to stop this vehicle.

¹ The Village of Jackson has adopted chs. 340 to 348, STATS., as part of its ordinances.

The court concluded that based on the above-quoted testimony, Knox did not have reasonable grounds to stop Schloemer's vehicle pursuant to § 345.22, STATS.

On appeal, the State contends that because Knox's attention was initially drawn to the loud exhaust, the stop was legal pursuant to §§ 345.22 and 347.39, STATS. Schloemer, however, maintains that Knox did not sufficiently articulate the facts supporting his opinion that a violation of the traffic laws had occurred. We agree with Schloemer.

Under the reasonable grounds standard, an officer should have before him or her articulable facts to believe that a defendant has violated a traffic regulation. See *Baudhuin*, 141 Wis.2d at 650, 416 N.W.2d at 63. In *Baudhuin*, the officer stopped the defendant for impeding traffic and subsequently detected the odor of intoxicants on his breath, leading to charges that he had violated § 346.63, STATS. *Baudhuin*, 141 Wis.2d at 646, 416 N.W.2d at 61.

In upholding the legality of the stop, the supreme court noted that the officer had before him "objective facts" of Baudhuin's apparent violation of the law that prompted the initial stop. *Id.* at 650, 416 N.W.2d at 63. Significantly, in support of the officer's opinion that Baudhuin was impeding traffic, the officer noted that Baudhuin was traveling 17 m.p.h. in a 25 m.p.h. zone, there were eight to ten vehicles backed up behind the officer while he paced Baudhuin's speed and there were no obvious signs of flat tires, defective lights or any other condition to explain the slow speed. *Id.* at 645, 416 N.W.2d.

at 61. Based on all of these articulated facts, the officer believed that Baudhuin was impeding traffic. *Id.*

Here, we have no such articulation of the facts. Knox merely stated that Schloemer's car "appeared to have a loud exhaust system." The trial court determined that there was insufficient evidence regarding the degree of noise that Schloemer's vehicle made such that the court could make a meaningful comparison and analysis. We conclude that the trial court was correctly concerned about the lack of evidence regarding whether there was "any excessive or unusual noise" as defined in § 347.39(1), STATS.

Knox did not testify about the approximate distance from which he heard Schloemer's vehicle or about its rate of speed, which could impact on how long the car was audible upon approach or passing. Knox also acknowledged that his window was down, that Schloemer's was the only vehicle on the road, that it was relatively quiet that night, and that he had not tested to see whether Schloemer's vehicle could be heard with the window raised. Further, the later examination of Schloemer's vehicle by the West Bend Police Department confirmed that the vehicle did not give off excessive exhaust noise. Therefore, the officer signed off on the warning citation, despite the fact that the vehicle had not been repaired since the September 24 stop.

All of these factors support the trial court's determination that Knox's meager and conclusionary testimony did not demonstrate articulable facts to support his opinion that the vehicle was emitting noise disruptive enough to be classified as "excessive or unusual" pursuant to § 347.39(1), STATS.

See *Baudhuin*, 141 Wis.2d at 650, 416 N.W.2d at 63. Knox's bare statement, without more, that Schloemer's car "appeared to have a loud exhaust system" is insufficient.

We conclude that sufficient facts were not articulated to support a reasonable suspicion by Knox that Schloemer had violated a traffic regulation. Therefore, Knox's subsequent stop of Schloemer's vehicle was unlawful, and the trial court properly suppressed the evidence obtained as a result of the stop.

By the Court. – Order affirmed.

This opinion will not be published.

See RULE 809.23(1)(b)4, STATS.