

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**May 1, 2013**

Diane M. Fremgen  
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. 2013AP101-FT**

Cir. Ct. Nos. 2012TR3543  
2012TR3545

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**COUNTY OF FOND DU LAC,**

**PLAINTIFF-RESPONDENT,**

**V.**

**NATHAN M. KOHLWEY,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Fond du Lac County: PETER L. GRIMM, Judge. *Affirmed.*

¶1 NEUBAUER, P.J.<sup>1</sup> Nathan M. Kohlwey appeals from a judgment of conviction for operating a motor vehicle with a prohibited alcohol content

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

(PAC) in violation of WIS. STAT. § 346.63(1). He argues that he was unconstitutionally detained when sheriff's deputies questioned him after stopping the car in which he was a passenger. We hold that the deputies had reasonable suspicion to question Kohlwey because they had reasonable suspicion that Kohlwey was the intoxicated driver about whom they had been dispatched. We affirm.

¶2 Late at night on March 28, 2012, a motorist called 911 to report that she had been behind a black Chevrolet S-10 pickup truck stopped at a rural intersection, controlled by a stop sign, for an unusually long time. She had gotten out of her car and knocked on the truck's window. Her knock woke the male driver, who drove off down a dead-end road. The caller stated that she thought the driver of the truck might be intoxicated. The caller identified herself and provided her phone number.

¶3 Approximately forty-five minutes later, Fond du Lac County Sheriff's Deputy Travis Dowland arrived in the area and spotted a car coming towards the same intersection from the dead-end road. There were only four residences down the dead-end road, one of which was abandoned. Dowland noticed that the car did not have a front license plate and advised Deputy Christopher Randall, who was also responding to the call, that he could not obtain a plate number. As the car passed Randall, he looked around and observed that it had no rear plate. Randall pulled the car over. As Randall approached the vehicle, he noticed what appeared to be a Wisconsin temporary registration plate inside the vehicle near the rear window. Randall asked for the occupants' drivers' licenses. He noticed that there was a "fairly strong odor of intoxicants" coming from the vehicle and asked the driver to step out so that he could determine if the odor came from the driver. After determining that the

driver did not smell like alcohol, Randall asked him what kind of vehicle the passenger drove. The driver told Randall that Kohlwey drove an S-10 pickup truck, and Randall told the driver that the deputies were responding to a call about an S-10 pickup truck with the driver asleep at the wheel. The driver told Randall that Kohlwey “on occasion would fall asleep at odd moments.” Randall asked him why he was there, and the driver told him Kohlwey had called him to pick him up. Randall told Dowland that Kohlwey was most likely the driver of the S-10 pickup truck that was the subject of the call.

¶4 Dowland then questioned Kohlwey about driving that evening. Kohlwey admitted that he must have fallen asleep at the intersection. It was immediately apparent that Kohlwey had been drinking: Dowland testified that “[t]he odor of intoxicants was noticeable” “as soon as I made contact.” Kohlwey told Dowland that he drove down the road, not realizing it was a dead-end, and crashed into some trees. He said that after he crashed he called his friend to come and pick him up. Dowland testified that he could tell Kohlwey had been drinking; he had the odor of alcohol on his breath, his eyes were bloodshot and glassy, and his speech was slurred. He told Dowland, “I’m not going to lie, I have been drinking.” Dowland administered field sobriety tests and arrested Kohlwey for operating a motor vehicle while intoxicated (OWI). Dowland testified that the time between the stop and Dowland’s determination that Kohlwey was the driver of the S-10 truck was two to three minutes.

¶5 Kohlwey moved to suppress the evidence gained from the stop. The circuit court denied his motion, finding that there was reasonable suspicion for the officers to continue their questioning based on a combination of facts: the remote area, the lateness of the hour, the citizen report of a drunk driver, the vehicle driving down a dead-end road with only four houses on it, and the smell of

intoxicants coming from Kohlwey. The circuit court also ruled that Kohlwey lacked constitutional standing to challenge the stop because he was only a passenger. The circuit court found Kohlwey guilty of both OWI and PAC; Kohlwey was convicted of PAC.

#### *Standard of Review*

¶6 A circuit court’s findings of fact will be upheld unless they are clearly erroneous. *State v. Young*, 212 Wis. 2d 417, 424, 569 N.W.2d 84 (Ct. App. 1997). However, whether a seizure violated the constitutional requirement of reasonableness is a question of law we review de novo. *Id.* Similarly, whether a person has standing to challenge a seizure is a question of law we review de novo. *State v. Guzy*, 139 Wis. 2d 663, 671, 407 N.W.2d 548 (1987).

#### *Standing*

¶7 First, Kohlwey has standing to challenge his seizure. The County concedes that Kohlwey has standing to challenge the stop, even though he was a passenger. This concession is appropriate because passengers do have standing to challenge traffic stops as unreasonable seizures—driver and passenger alike are seized when a car is pulled over. *Id.* at 674-75.

#### *Reasonable Suspicion to Question Passenger*

¶8 A stop and seizure is permitted only if police have “a suspicion grounded in specific, articulable facts and reasonable inferences from those facts, that the individual has committed a crime.” *Id.* at 675. Individual facts may by themselves be innocuous, but if all the facts taken together provide reasonable suspicion, the constitutional standard is met. *State v. Waldner*, 206 Wis. 2d 51,

58, 556 N.W.2d 681 (1996). Further, “[p]olice officers are not required to rule out the possibility of innocent behavior.” *Id.* at 60.

¶9 Expansion of the original seizure is permitted as long as the expansion is supported by reasonable suspicion. See *State v. Malone*, 2004 WI 108, ¶45, 274 Wis. 2d 540, 683 N.W.2d 1. In *Malone*, the officer pulled over a speeding car in which Malone was riding. *Id.*, ¶2. The officer asked for the passengers’ drivers’ licenses because he saw that they were not wearing seatbelts. *Id.*, ¶5. When returning to the vehicle after checking the licenses in his squad car, the officer noticed an inordinate amount of air fresheners hanging from the rear view mirror. *Id.*, ¶6. Based on his experience, he knew that air fresheners were used to mask drug odors. *Id.* The officer then asked the driver and passengers to step out of the vehicle. *Id.*, ¶¶7-9. They told conflicting stories about where they were going and what they were doing. *Id.* Additionally, all three were fidgety. *Id.*, ¶¶7-10. The officer asked Malone if he would consent to a pat down, which he did. *Id.*, ¶10. The officer found marijuana in Malone’s pocket and arrested him. *Id.* A search of the car found other drug paraphernalia, and Malone was ultimately convicted of conspiracy to deliver tetrahydrocannabinols (THC). *Id.*, ¶¶11-12.

¶10 Malone challenged the stop, arguing that the officer impermissibly extended the stop to question Malone beyond what was necessary to investigate the initial traffic stop and with an insufficient factual basis to initiate a separate investigation of Malone. *Id.*, ¶16. Our supreme court disagreed, holding that an officer’s questioning of a passenger beyond that justified by the initial stop is permissible as long as “the officer developed reasonable suspicion that criminal activity was afoot.” *Id.*, ¶47.

The original purpose of the stop was to investigate the traffic violation. The purpose of the stop was transformed as [the officer] became aware of additional information that justified expanding his investigation to pursue his reasonable suspicion that the occupants of the vehicle might be committing or about to commit a crime involving narcotics.

*Id.*, ¶45. The extension of a stop to a passenger in the vehicle must be judged by the same standard as any other stop: is the officer aware of articulable and specific facts giving rise to the reasonable suspicion that a crime had been, was being, or was about to be committed. *See id.*, ¶4.

¶11 Turning to the facts of our case, it is undisputed that the deputies' decision to pull over the car was reasonable because the vehicle lacked both front and rear license plates.<sup>2</sup> The deputies knew that a citizen had reported an apparently intoxicated driver about forty-five minutes earlier in the same area. The deputies knew that there were only about four residences along the dead-end road the car was on, and it was late at night. When Randall talked to the driver, he smelled the odor of alcohol coming from the car. The driver told Randall that the passenger, Kohlwey, drove a vehicle that matched the report of the drunk driver and that Kohlwey had a tendency to fall asleep. Randall told Dowland that Kohlwey was "possibly the driver of another vehicle that had been dispatched as an intoxicated driver." When Dowland then talked to Kohlwey, Kohlwey

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<sup>2</sup> Kohlwey argues that the stop "became an unreasonable detention once [Randall] was satisfied that the temporary plate was valid." This argument is not supported by any citation to the record. Randall testified that he saw the temporary plate and that "it appeared to be the typical temporary registration plate that is issued by DOT." Kohlwey does not point us to any testimony that supports his suggestion that the officers were able to check the validity of the temporary plate. In fact, Dowland's testimony about the temporary plate was, "I don't know if it had expired, if it was valid." We are not obliged to search the record to find support for a party's assertions, *see N.J.W. v. State*, 168 Wis. 2d 646, 654, 485 N.W.2d 70 (Ct. App. 1992), but here we have, and there is no support.

appeared intoxicated, with bloodshot, glassy eyes and the smell of alcohol on his breath. The main goal of an investigative stop is to quickly resolve ambiguity associated with suspicious conduct. *State v. Anderson*, 155 Wis. 2d 77, 83-84, 454 N.W.2d 763 (1990). Here, beginning with a citizen's report of a male possible drunk driver on the same dead-end road around midnight and the smell of intoxicants, and extending to questions about and to the male passenger who appeared to be intoxicated, the deputies had specific articulable facts to support their reasonable suspicion that a crime had been committed.

¶12 In conclusion, we hold that the very brief investigation and its extension to Kohlwey were supported by reasonable suspicion. The officers could reasonably suspect that a crime had been committed because they had received a late-night citizen's report of a male possible drunk driver on a sparsely populated rural dead-end road, detected intoxicants emanating from the vehicle, learned that Kohlwey drove a vehicle that matched the description of the drunk-driver report, determined that Kohlwey was the driver of the reported vehicle, and observed visible signs of intoxication and detected the odor of intoxicants coming from Kohlwey.

*By the Court.*—Judgment affirmed.

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

