COURT OF APPEALS
DECISION
DATED AND RELEASED

MARCH 27, 1996

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, 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. 95-2828

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CLEMENS BARTZEN,

Defendant-Appellant.

APPEAL from an order of the circuit court for Sheboygan County: GARY LANGHOFF, Judge. *Affirmed.*

ANDERSON, P.J. Clemens Bartzen appeals from an order whereby he was adjudicated as unreasonably refusing to submit to a chemical test of his breath contrary to § 343.305, STATS. On appeal, Bartzen claims that the arresting officer failed to have reasonable suspicion that he was operating a motor vehicle while intoxicated. Bartzen also raises the claim that there was a procedural violation of the implied consent law. He claims that the form used is defective in that it fails to inform an accused driver that he must have been

driving or operating a motor vehicle as prescribed in § 343.305(4)(c). Under the totality of the circumstances, we conclude that the officer had reasonable suspicion to stop Bartzen. We further conclude that the form is in substantial compliance with the reasonable objectives of § 343.305(4). We therefore affirm the trial court.

On July 10, 1995, at approximately 7:30 p.m., Officer Joel L. Clark was traveling westbound on Geele Avenue in the city of Sheboygan. At the same time, Bartzen was attempting to enter his vehicle which was parked outside a bar. Clark observed that Bartzen was having difficulty entering his vehicle.

Clark then proceeded to park his car to further observe Bartzen. He noted that it took Bartzen approximately two minutes to successfully enter his vehicle. Bartzen started his vehicle and began traveling eastbound on Geele Avenue. Clark proceeded to follow Bartzen and, in doing so, noted Bartzen's turning maneuver was very slow and deliberate. Shortly after the turn, Clark activated his lights to prompt Bartzen to pull over. Instead, Bartzen proceeded to travel six more blocks before pulling over in front of his residence.

Clark observed Bartzen having difficulty getting out of his vehicle. Bartzen explained that he had had something to drink, but that he was not drunk. Bartzen also had difficulty retrieving his driver's license for Clark. At this point, Clark asked Bartzen to perform some field sobriety tests. He initially refused, but eventually performed some tests before being placed under arrest for operating a motor vehicle while under the influence.

At the police station, Bartzen was read the Informing the Accused form. After completely reading the form to Bartzen, the officer then asked if he would submit to an evidentiary chemical test of his breath. Bartzen continually replied "no" to this question after several attempts by the officer to explain the consequences of not submitting to a test.

The issues raised in this appeal are: (1) Clark's decision to stop and detain the defendant and (2) whether the Informing the Accused form was defective. These issues are questions of law and we are not bound by the lower court's decisions. ***State v. Guzy,*** 139 Wis.2d 663, 671, 407 N.W.2d 548, 552, *cert. denied*, 484 U.S. 979 (1987).

Bartzen frames his first issue as a pretextual stop argument. Utilizing the Seventh Circuit's decision in ***United States v. Trigg***, 878 F.2d 1037, 1041 (7th Cir. 1989), Bartzen argues that since no traffic code had been violated, Clark had no authority to stop him. However, the correct issue before the court should be whether the arresting officer had reasonable suspicion to support the traffic stop.

The Wisconsin Supreme Court has given guidance to lower courts and police officers as to how this issue should be resolved. ***Guzy***, 139 Wis.2d at 679, 407 N.W.2d at 555. The court concluded that the reasonableness of an investigative stop depends upon the facts and circumstances before the officer at the time of the stop. ***Id.*** The rule was summed as follows:

> In sum, a balance must be struck between the interests of society in solving crime and bringing offenders to justice and the rights of members of that society to be free from

> unreasonable intrusion. Our conclusion strikes that balance. The focus is on reasonableness.

Id.

Looking at the facts and circumstances present in this case, we must determine whether the officer had reasonable suspicion to stop Bartzen. First, Clark observed Bartzen having trouble unlocking his car door, which happened to be parked in front of a bar. This was to be the first of several elements which led Clark to make the investigative stop. This observation alone may not have been sufficient to equal a reasonable suspicion, but when combined with the following observations, it was sufficient as a part of Clark's reasonable suspicion.

Second, Clark further observed Bartzen make a slow, deliberate turn from Geele Avenue to Eighth Street, at a rate of two to three miles per hour. From knowlege gained through recruit school and experience on the job, he has learned some of the indicators of intoxication. Clark noted in his testimony that overcautiousness is sometimes an indicator.

Third, Bartzen failed to pull over when Clark activated his lights or when he sounded his siren. Bartzen finally pulled over in front of his house, six blocks after Clark began pursuing him with his lights on. Although other inferences can be made as to why Bartzen did not pull over immediately, the arresting officer can safely make an inference, in light of all the previous observations, that Bartzen might be violating the law by operating his vehicle while intoxicated. The possibility of other inferences does not destroy the right

of the officer to temporarily freeze the situation in order to investigate further. ***State v. Jackson***, 147 Wis.2d 824, 835, 434 N.W.2d 386, 391 (1989).

In ***Terry v. Ohio***, 392 U.S. 1 (1968), the United States Supreme Court held that under the Fourth Amendment, a police officer may in appropriate circumstances detain a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest. ***Id***. at 22. ***Terry*** allows police officers to adopt an intermediary response between an arrest and no action at all. The police officer in this case implemented the intermediary response to further investigate his suspicion of intoxication in light of the facts known to the officer at that time. ***Adams v. Williams***, 407 U.S. 143, 145 (1972).

Because Clark made a valid ***Terry*** stop, this court concludes that the stop was reasonable under the Fourth Amendment.

Next, Bartzen claims that paragraph four of the Informing the Accused form, which was read to him in full, was defective. Bartzen focuses on the fact that the form did not reveal that any possible sanction would require proof that he had been "driving a motor vehicle." Section 343.305(4)(c), STATS.

This claim of a defective form has already been answered in the supreme court's decision in ***Village of Oregon v. Bryant***, 188 Wis.2d 680, 524 N.W.2d 635 (1984). The court held that none of the information given to the accused by the department of transportation forms constituted misinformation or failed to provide sufficient information. ***Id.*** at 683-84, 524 N.W.2d at 640. In ***Village of Oregon*** and in this case, the defendants were read the same statutorily prescribed Informing the Accused information. Thus, Bartzen's argument fails under the same reasoning.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.