

COURT OF APPEALS OF WISCONSIN
DISTRICT III

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

VILLAGE OF LITTLE CHUTE,

Plaintiff - Respondent,

v.

Appeal No. 13 AP 2536

Case No. 13 CV 429

RONALD A. ROSIN,

Defendant-Appellant.

BRIEF OF PLAINTIFF - RESPONDENT

**APPEAL FROM A JUDGMENT OF CONVICTION
ENTERED IN THE CIRCUIT COURT FOR
OUTAGAMIE COUNTY
THE HONORABLE NANCY KRUEGER PRESIDING**

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ISSUES PRESENTED FOR REVIEW

May a law enforcement officer request that a person perform field sobriety tests when the officer reasonably suspects the person is guilty of OWI, or must the law enforcement wait until he or she has probable cause?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested. Publication is neither appropriate nor requested, as Wisconsin Statutes §809.23(1)(b) states, in pertinent part, “an opinion should not be published when...the decision is by one court of appeals judge under s.752.31(2) and (3).” §752.31(2) indicates that municipal ordinance violation cases, cases involving violations of traffic regulations, and cases involving civil forfeitures shall be decided by one court of appeals judge. The present matter falls in all three of these categories. To this parties’ knowledge, a three-judge panel has not been requested by the Defendant-Appellant.

STATEMENT OF THE CASE

On or about March 1st, 2013, the Village of Little Chute municipal court found Ronald A. Rosin (hereinafter "Rosin") guilty of Operating a Motor Vehicle While Under the Influence of an Intoxicant on November 16, 2012, contrary to Village of Little Chute Ordinance 26-1 adopting Wisconsin Statute §346.63(1)(a) (hereinafter "OWI") and Operating a Motor Vehicle With a Prohibited Alcohol Concentration on November 16, 2012 contrary to Village of Little Chute Ordinance 26-1 adopting Wisconsin Statute §346.63(1)(a) (hereinafter "PAC").

Rosin filed a request for a trial de novo, resulting in the matter being transferred to Outagamie County Circuit Court. The parties stipulated to a court trial, despite the fact that a jury demand had earlier been made by Rosin. On the morning of trial, Rosin filed a notice of motion and motion to suppress evidence.

Officer Michael Grumann provided testimony consisting of his initial observations up to the point in time that he requested Rosin perform field sobriety tests. The parties argued the suppression motion and Rosin's motion to suppress was denied. The parties then stipulated to other

pertinent facts and the Circuit Court found Rosin guilty of OWI and PAC. Rosin only appeals the circuit court's decision denying Rosin's motion to suppress.

STATEMENT OF FACTS

Ronald A. Rosin was charged with OWI and PAC. Officer Michael Grumann testified for the Village of Little Chute (hereinafter the "Village"). R.28-2. Officer Grumann is a police officer for the Fox Valley Metropolitan Police Department and has been employed in that capacity for 10 years. R.28-3. He received a degree in Police Science from Lake Shore Technical College in 2001, completed a standardized field sobriety training course at Fox Valley Technical College in 2003, completed a drugs that impair driving course at Fox Valley Technical College in 2005, and an advanced roadside impaired driving course at Northeast Wisconsin Technical College in 2010. R.28-3, 4. He also completed a Drug Evaluation and Classification Program. *Id.* His resume is part of the Record and contains a more detailed summary of his training and experience. R 8-1.

Officer Grumann was on duty on November 16, 2012 at approximately 12:37 a.m. R.28-5. He was situated in the

Walgreens parking lot near the intersection of Madison Street and West Lincoln Avenue in the Village of Little Chute and was monitoring traffic within his stationery vehicle. *Id.* At or about 12:37 a.m., he noticed a silver Chevrolet Impala driving west on West Lincoln Avenue make a left-hand turn to go over the Community Bridge. R.28-6. When the vehicle made the left-hand turn, it turned wide into the right (farthest) lane of traffic instead of turning into the left (closest) lane of traffic. *Id.* The vehicle also turned beyond the right (farthest) lane of traffic, crossing over a solid white line separating the right lane of traffic from a bicycle lane. *Id.* The vehicle almost struck the curb. *Id.* Officer Grumann followed the vehicle and again saw the vehicle drift to the right with its passenger-side tires crossing over the while bicycle lane line. R.28-7.

Officer Grumann initiated a traffic stop. *Id.* Rosin was identified by his Wisconsin driver's license. R.28-8. Officer Grumann initially noticed a slight odor of alcoholic beverages coming from the vehicle. However, the odor was masked by a strong odor of cigarette smoke. *Id.* He also noticed that Rosin's eyes were watery and bloodshot. *Id.* The strong odor of cigarette smoke was alarming to Officer

Grumann because, through his training and experience, Officer Grumann knows that people sometimes try to disguise the odor of alcohol with cigarette smoke. *Id.* Rosin indicated that he was coming from the "Up The Hill Bar." Rosin initially admitted to having one beer. *Id.* Officer Grumann briefly returned to his car to perform his normal checks, and then re-approached Rosin's vehicle and asked Rosin to exit the vehicle. R.28-9.

After Rosin exited the vehicle, Officer Grumann noticed that the cigarette smoke had started to dissipate and he could then smell a strong odor of alcoholic beverages coming from Rosin's person. R.28-10. He continued to observe Rosin's watery and bloodshot eyes. *Id.*

The circuit court found that specific and articulable facts existed to indicate by the totality of the circumstances that there was a reasonable suspicion to believe that Rosin was operating a motor vehicle while under the influence of an intoxicant. The circuit court also reviewed the resume of Officer Grumann and noticed that he appears to be well qualified both by experience and training as an officer and, in particular, related to training concerning field sobriety and

impaired driving. R.28-22, 23. Accordingly, the circuit court denied Rosin's motion to suppress evidence. R.28-23.

Rosin admits, and the parties stipulated, that Rosin "failed the field sobriety tests," that the Defendant's performance on said field sobriety tests would lead to a finding that Officer Grumann had probable cause to arrest Mr. Rosin for operating while under the influence of an intoxicant," and that there was otherwise "probable cause for the arrest." R.28-23, 24. The parties also stipulated that Officer Grumann read the Informing the Accused form verbatim to the Defendant in accordance with applicable guidelines and statutes, that Officer Grumann observed a qualified withdrawal nurse acting under the care of a physician withdraw blood from Rosin's arm in accordance with all statutory and administrative guidelines. R.28-24. Furthermore, the parties stipulated that blood was drawn within three (3) hours of driving, and stipulated to the admission of Exhibit 3, the Blood/Urine Analysis form from the Wisconsin Statute Laboratory of Hygiene, indicating that .164 g/100mL of ethanol was found in the Defendant's bloodstream. R.28-24. The circuit court took judicial notice of this test result and Rosin did not object. *Id.*

The circuit court clarified that Rosin was stipulating that there was probable cause for the arrest, that Officer Grumann complied with the Informing the Accused requirements, that the form was read to the Defendant, that a medical technician appropriately withdrew the blood and placed it in a container that was sent to the State Laboratory of Hygiene, that there were no chain of custody or hearsay objections or issues, and that the blood alcohol level was detected at .164 and the Defendant's BAC was stipulated to. R.28-25.

Following the court trial, the circuit court found Rosin guilty of both OWI and PAC, and made a specific finding that Rosin's blood alcohol concentration was greater than .15 g/100mL; specifically that his BAC was .164 g of ethanol per 100mL of blood while he was driving on November 16, 2012. R.28-29.

At trial, the only contested issue was whether a police officer, having reasonable suspicion that an individual is guilty of OWI, may request that individual to perform field sobriety tests. Rosin argued that an officer must have probable cause to believe that an individual is guilty of OWI

before the officer may request a defendant to perform field sobriety testing. The circuit court disagreed.

ARGUMENT

I. WISCONSIN COURTS HAVE LONG HELD THAT REASONABLE SUSPICION, BUT NOT PROBABLE CAUSE, IS REQUIRED IN ORDER FOR A LAW ENFORCEMENT OFFICER TO DETAIN A DEFENDANT FOR THE PURPOSE OF CONDUCTING FIELD SOBRIETY TESTS.

- a. A police officer may temporarily detain a person when the officer reasonably suspects the person has committed a violation of a non-criminal traffic regulation.**

The Fourth Amendment to the United States Constitution provides that “[t]he right of the people to be secure in their persons ... against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause....” In *Terry v. Ohio*, the U.S. Supreme Court allowed that, although investigative stops are seizures within the meaning of the Fourth Amendment, in some circumstances police officers may conduct such stops even where there is no probable cause to make an arrest. 392 U.S. 1, 22, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Such a

stop must be based on more than an officer's "inchoate and unparticularized suspicion or 'hunch.'" *Id.* at 27, 88 S.Ct. 1868. Rather, the officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" the intrusion of the stop. *Id.* at 21, 88 S.Ct. 1868.

The Supreme Court adopted the *Terry* standard for investigative stops in *State v. Chambers*, 55 Wis.2d 289, 294, 198 N.W.2d 377 (1972). The Wisconsin legislature codified the standard in Wis. Stat. § 968.24.

The Court of Appeals extended the rule of Wis. Stat. § 968.24 to allow law enforcement officers who reasonably suspect that a person has committed a *non-criminal traffic law* to detain and temporarily question the person. *State v. Griffin*, 183 Wis.2d 327, 333–34, 515 N.W.2d 535 (Ct.App.1994).

- b. An officer may extend a traffic stop to request a person to perform field sobriety tests if the officer discovers additional information leading to a reasonable suspicion that a person is guilty of OWI.**

Police officers are required to have reasonable suspicion to believe that a person was operating while

impaired before detaining an individual for field sobriety tests. *See, eg, County of Jefferson v. Renz*, 231 Wis.2d 293, 310, 603 N.W.2d 541 (1999).

In *Renz*, the Wisconsin Supreme Court held,

“After stopping the car and contacting the driver, the officer’s observations of the driver may cause the officer to suspect the driver of operating the vehicle while intoxicated. If his observations of the driver are not sufficient to establish probable cause for an OWI violation, the officer may request the driver to perform various field sobriety tests.

Renz, 231 Wis.2d at 310.

An extension of a stop to request field sobriety tests is reasonable if “the officer discovered information subsequent to the initial stop which, when combined with information already acquired, provided reasonable suspicion that [the defendant] was driving while under the influence of an intoxicant.” *State v. Colstad*, 2003 WI App. 25, ¶ 19, 260 Wis.2d 406, 659 N.W.2d 394.

If, during a valid traffic stop, the officer becomes aware of additional suspicious factors which are sufficient to give rise to an articulable suspicion that the person has committed or is committing an offense or offenses separate and distinct from the acts that prompted the officer’s intervention in the first place, the stop may be extended and a new investigation begun. The validity of the extension is tested in the same manner, and under the same criteria, as the initial stop.

State v. Betow, 226 Wis.2d 90, 94-95, 593 N.W.2d 499 (Ct. App. 1999).

Thus, what must be determined is whether the officer discovered information subsequent to the initial stop which, when combined with information already acquired, provided reasonable suspicion that Rosin was driving under the influence of an intoxicant.

When asking a person to perform field sobriety tests, an officer has reasonable suspicion if he or she is able to “point to specific and articulable facts which, taken together with rationale inferences from those facts, reasonably warrant” the intrusion of those tests. *State v. Post*, 2007 WI 60, ¶10, 301 Wis.2d 1, 733 N.W.2d 634.

“[W]hat constitutes reasonable suspicion is a commonsense test: Under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience.” *State v. Young*, 2012 Wis.2d 417, 424, 569 N.W.2d 84 (Ct. App. 1997).

- c. **Officer Grumann had sufficient articulable information to reasonably suspect that Rosin was driving under the influence of an intoxicant.**

At 12:37 a.m. on November 26, 2012, Officer Grumann noticed Rosin make an illegal left turn. Not only did Rosin turn left into the right lane of traffic contrary to Wis. Stat. §346.31(3)(c), but he also crossed over a solid white line designating a bicycle lane and almost struck the curb. Thereafter, Officer Grumann noticed Rosin drift back and forth into and out of the bicycle lane.

At this point in time, Officer Grumann had probable cause to believe that Rosin had violated a traffic law. In addition, he was aware of facts indicative of OWI, including Rosin's bad and illegal driving and the time of day.

When Officer Grumann approached Rosin, he noticed additional indicators of OWI:

1. A slight odor of alcoholic beverages coming from the vehicle.
2. A strong odor of cigarette smoke known to Officer Grumann as a common attempt to mask the odor of intoxicants.

3. Rosin's eyes were watery and bloodshot.
4. Rosin admitted that he was coming from the
"Up The Hill Bar."
5. An admission to drinking.

These additional suspicious factors taken together with the already-known factors, gave rise to a suspicion that Rosin committed an offense separate and distinct from Rosin's illegal driving, namely OWI. Thus, Officer Grumann was entitled to begin a new investigation.

Officer Grumann next asked Rosin to exit his vehicle. At this point, Officer Grumann noticed that the cigarette smoke had dissipated and the odor of alcoholic beverages coming from Rosin was now characterized as strong. He continued to notice Rosin's watery and bloodshot eyes.

At this point, Officer Grumann reasonably suspected that Rosin was guilty of OWI. Under existing Wisconsin law, Officer Grumann was entitled to request Rosin to perform field sobriety tests.

CONCLUSION

Because Wisconsin law permits an officer who reasonably suspects a person of OWI to request that said person perform field sobriety tests, the Court of Appeals

should affirm the circuit court's Order denying Rosin's motion to suppress evidence. Although this is the only issue that Rosin has argued on appeal, this will effectively result in the affirmation the circuit court's entire Order, including Rosin's adjudication of guilt of the OWI and PAC charges.

CERTIFICATION

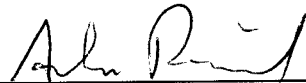
I hereby certify that this Brief conforms to the rules contained in Wisconsin Statutes Section 809.19(8)(b) and 809.19(8)(c) for a brief produced using the following font:

Proportional font: double-spaced, 2-inch margins on the left side and right side and 1-inch margins on the top and bottom. The length of this brief is 13 pages and contains 2259 words.

Dated this 10th day of January, 2014.

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ELECTRONIC BRIEF CERTIFICATION

As required by section 809.19(12)(f) of the Wisconsin Statutes, I certify that the text of the electronic copy of this Brief is identical to the text paper copy of the Brief.

Respectfully signed this 10 day of January, 2014.

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