

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

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

**Appeal No. 2016AP001720
Waukesha County Circuit Court Case Nos. 2016CV000725**

CITY OF WAUKESHA,

Plaintiff-Respondent,

v.

DEREK R. PIKE,

Defendant-Appellant.

**AN APPEAL FROM THE DECISION AND ORDER OF
THE TRIAL COURT UPHOLDING THE FINDING OF
THE CITY OF WAUKESHA MUNICIPAL COURT
FINDING THAT THE DEFENDANT REFUSED
CHEMICAL TESTING IN THE CIRCUIT COURT FOR
WAUKESHA COUNTY, THE HONORABLE MICHAEL
P. MAXWELL, JUDGE, PRESIDING**

**THE BRIEF AND APPENDIX OF THE DEFENDANT-
APPELLANT DEREK R. PIKE**

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STATEMENT OF THE ISSUES

Did the additional information obtained by Officer Fisher after the traffic stop provide sufficient additional suspicion to continue the detention of Mr. Pike for field sobriety testing?

Answer: The trial court answered yes.

STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

Because this is an appeal within Wis. Stats. Sec. 752.31(2), the resulting decision is not eligible for publication. Because the issues in this appeal may be resolved through the application of established law, the briefs in this matter should adequately address the arguments; oral argument will not be necessary.

STATEMENT OF THE CASE/FACTS

The defendant-appellant, Derek R. Pike (Mr. Pike) was charged with operating a motor vehicle while under the influence of an intoxicant a violation of Wis. Stat. § 346.63 (1)(a) and refusing to submit to a chemical test a violation of Wis. Stat. §343.305(9) stemming from an offense allegedly occurring on February 14, 2014. Mr. Pike timely filed a written request for refusal hearing in the City of Waukesha Municipal Court on February 17, 2014. Subsequently, on February 20, 2014, Mr. Pike filed a motion challenging his continued detention. A hearing on the Mr. Pike's motion was held on December 10, 2014. A refusal hearing and court trial were held in municipal court on March 9, 2016, the Honorable Joseph Cook, City of Waukesha Municipal Court Judge, presiding. The municipal court denied Mr. Pike's motion challenging the continued detention, found that he refused to submit to chemical testing in violation of Wis. Stat. §343.305(9), but found him not guilty of operating a motor vehicle while under the influence of an intoxicant. Mr. Pike timely appealed the refusal determination to the circuit court and requested a record review of the Municipal Court's ruling. The transcript from the motion hearing and court trial/refusal hearing were prepared and filed

with the Circuit Court. (R.36:1-42). Both parties submitted briefs on the suppression issue.

The court, the Honorable Michael P. Maxwell, presiding, issued a decision and order on July 27, 2016, finding among other things, that Officer Fisher did have sufficient suspicion to extend the stop of Mr. Pike for field sobriety test. (R.30:1-7/ A.App. 1-7). Mr. Pike by counsel timely filed a Notice of Appeal on August 30, 2016.

The appeal herein stems from the circuit court ruling upholding the decision of the municipal court and finding that Officer Fisher had the requisite level of suspicion to continue to detain Mr. Pike for field sobriety testing, and that he improperly refused to submit to a chemical test under Wis. Stat. §343.305(9). The facts that are pertinent to this appeal were received through the testimony of Officer Fisher at the motion hearing on December 10, 2014, and stipulated to for purposes of consideration at the refusal hearing on May 9, 2016.

Officer Fisher testified that he was employed as a City of Waukesha Police Officer on February 14, 2014 and was on duty at 1:07 a.m. (R.35:7/ A.App. 8). Fisher testified that on that date at about that time, he stopped Mr. Pike's vehicle in the City of Waukesha for failing to display a front license plate. (R.35:8/

A.App. 9). Upon making contact with the driver, Mr. Pike, Officer Fisher questioned Mr. Pike as to where he was coming from that evening. Pike indicated he was coming from Rooters nightclub. (R.35:9/ A.App. 10). Fisher asked Mr. Pike how much alcohol he had consumed, and Mr. Pike said two twelve ounce Miller Lites. While speaking with Mr. Pike “a little bit longer”, Fisher began to observe an odor of intoxicant emitting from Mr. Pike’s vehicle and breath. *Id.* On cross-examination, Fisher conceded that the only reason that he requested Mr. Pike to exit the vehicle for field sobriety testing was because he observed an odor of intoxicant and Mr. Pike admitted consuming two beers at a bar. (R.35:12/ A.App. 11). Mr. Pike’s speech was normal. *Id.* Aside from the odor of intoxicant, Fisher provided no testimony suggesting he observed any other signs of potential impairment. Officer Fisher subsequently asked Mr. Pike to exit the vehicle for field sobriety testing. Based on the results of those tests, Fisher arrested Mr. Pike for OWI, and eventually requested that Mr. Pike provide a chemical test of his blood, which Mr. Pike refused. (R.36:22-23/ A.App. 14-15). The sole issue on appeal is whether Officer Fisher had the requisite level of suspicion to continue to detain Mr. Pike for field sobriety testing. Thus, it is unnecessary to detail the

observations made on the field sobriety tests or subsequent to the arrest and request for the chemical test. Furthermore, for purposes of the court trial and refusal hearing on March 9, 2016, the parties stipulated to the testimony provided by Officer Fisher at the motion hearing in municipal court on December 10, 2014. (R.36: 3-4/ A.App. 12-13).

The Municipal Court found that Mr. Pike unlawfully refused chemical testing, and found that Officer Fisher had the requisite level of suspicion to continue to detain Mr. Pike for field sobriety testing. (R.36:34-36/ A.App. 16-18). Mr. Pike timely requested an appeal on the record to circuit court. A Decision and Order was issued by the circuit court on July 26, 2016 upholding the municipal court's finding that Mr. Pike unlawfully refused chemical testing, among other things. The specifically found that the evidence was sufficient for Officer Fisher to continue to detain Mr. Pike for field sobriety testing. (R.30:7/ A.App. 7). The defendant timely filed a Notice of Appeal on August 30, 2016.

STANDARD OF REVIEW

In determining whether there is sufficient suspicion to continue a detention, an appellate court accepts the circuit court's factual determinations unless clearly erroneous, but

application of those facts to constitutional principles is a question of law that is reviewed de novo. *State v. Secrist*, 224 Wis.2d 201, 207-208, 589 N.W.2d 387 (1999) see also *State v. Post*, 2007 WI 60, ¶8, 301 Wis.2d 1, 733 N.W.2d 634, *State v. Johnson*, 2007 WI 32, ¶13, 299 Wis.2d 675, 729 N.W.2d 182.

ARGUMENT

THE OBSERVATIONS MADE BY OFFICER FISHER AFTER STOPPING MR. PIKE FOR NOT DISPLAYING A FRONT LICENSE PLATE, DID NOT GIVE OFFICER FISHER THE REQUISTE LEVEL OF SUSPICION TO CONTINUE THE DETENTION OF MR. PIKE FOR FIELD SOBRIETY TESTING

The issues at a refusal hearing under Wis. Stat. §343.305(9) are limited to (a) whether the officer had probable cause to believe that the defendant was operating or driving a motor vehicle while under the influence of an intoxicant, (b) whether the officer complied with the provisions of Wis. Stat. §343.305(4), and (c) whether the defendant refused to submit to chemical testing. In the instant case, the first issue is the only contested issue.

Temporarily detaining an individual during a traffic stop constitutes a "seizure" of "persons" within the meaning of the Fourth Amendment. *Whren v. United States*, 517 U.S. 806, 809-10 (1996), *State v. Post*, 2007 WI 60, ¶10, 301 Wis.2d 1,

733 N.W.2d 634. The Fourth Amendment to the United States Constitution and Article 1 Section 11 of the Wisconsin Constitution protect individuals against unreasonable searches and seizures. Thus, a traffic stop is lawful only if it is reasonable under Fourth Amendment jurisprudence. *Id.* at 810. If an officer has probable cause to believe a traffic violation has occurred, an officer may conduct a traffic stop. *State v. Gaulrapp*, 207 Wis.2d 600, 558 N.W.2d 696 (Ct.App. 1996). An investigative detention must be supported by a reasonable suspicion grounded in specific articulable facts and reasonable inferences from those facts that an individual is or was violating the law. *State v. Colstad*, 2003 WI App 25, ¶8, 260 Wis. 2d 406, 659 N.W.2d 394.

Initially, the Court must determine if the initial stop of Mr. Pike's vehicle was justified. If so, the court must determine whether during the stop, Officer Fisher became aware of sufficient additional "suspicious factors or additional information that would give rise to, an objective, articulable suspicion that criminal activity is afoot..." *State v. Malone*, 2004 WI 108, ¶24, 274 Wis.2d 540, 683 N.W.2d 1, (citing *State v. Betow*, 226 Wis.2d 90, 94-94, 593 N.W.2d 499 (Ct.App. 1999)) "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." *Id.* at 94-95.

"The question of what constitutes reasonable suspicion is a common sense 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*, 212 Wis.2d 417, 424, 569 N.W.2d 84 (Ct.App. 1997). To meet this test, the officer must show specific and articulable facts, which taken together with rationale inferences from those facts, reasonably warrant the officer's continued intrusion. *Terry v. Ohio*, 392 U.S.1, 21, 88 S.Ct. 1868, 20 L. Ed.2d 889 (1968). To extend the stop, the officer must base that decision on something more than "an officer's inchoate and unpartularized suspicion or hunch." *Id.* The question is whether Officer Fisher "discovered information subsequent to the initial stop which, when combined with the information already acquired, provided reasonable suspicion" that Mr. Pike was driving while under the

influence. *State v. Colstad*, 2003 WI App 25, ¶19, 260 Wis.2d 406, 659 N.W.2d 394.

Officer Fisher stopped Mr. Pike for failing to display a front license plate. There was absolutely nothing about Mr. Pike's driving that suggested that Mr. Pike might be operating his motor vehicle while impaired.

In determining whether the continued detention and request to perform field sobriety tests was proper, it is necessary that Officer Fisher articulate additional suspicious factors that are sufficient to give rise to an articulable suspicion that Mr. Fisher was operating his vehicle while impaired.

“There is probable cause to arrest ‘when the totality of the circumstances within the officer’s knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant probably committed a crime’” *State v. Sykes*, 2005 WI 48, ¶18, 279 Wis.2d 742, 695 N.W.2d 277. The objective facts before the police officer need only lead to the conclusion that guilt is more than a possibility.” *Id.* at ¶18. The state must “present evidence sufficient to establish an officer’s probable cause to believe the person was driving or operating a motor vehicle while under the influence of an intoxicant.” *State v. Nordness*, 128 Wis.2d 15, 35, 381 N.W.2d 300 (1986). “Only

evidence which speaks to the facts and circumstances available to the officer at the time of arrest is relevant to a determination of probable cause in a revocation hearing.” *Id.* at footnote 6.

Here, the only evidence articulated by Officer Fisher is that Mr. Pike had consumed two beers at a bar earlier in the evening. Fisher observed an odor of intoxicant consistent with this consumption. What is lacking from this record is any evidence that Mr. Pike might be impaired. The odor of intoxicant observed by Officer Fisher simply shows Mr. Pike consumed intoxicant. Everyone that consumes intoxicant is not necessarily impaired. Mr. Pike’s driving did not suggest he might be impaired, he was stopped for failing to display a front plate. Mr. Pike’s speech was normal. Furthermore, the record is silent as to any other potential indicators of impairment (motor coordination problems, red, glassy or blood shot eyes).

In its ruling, the trial court referred to an unpublished case, *State v. Wendt*, No. 2010AP75, unpublished slip opinion (WI App August 17, 2010) to support its decision. In that case a vehicle was stopped because it was idling for a period of time with a snow plow up by a business. The officer approached and made contact with the driver. Upon contact the officer observed the defendant to have slurred speech and glassy eyes. *Id.*

Wendt is easily distinguishable from Mr. Pike's case, inasmuch as the Officer in *Wendt* did have specific facts that suggested that the operator might be impaired, slurred speech and glassy eyes. Here, aside from the odor of intoxicant, there were no other indicators that Mr. Pike might be impaired. The information possessed by Officer Fisher was nothing more than an inchoate and unparticularized hunch that Mr. Pike might be impaired.

The observations made by Officer Fisher after the stop, did not provide reasonable suspicion that Mr. Pike was operating his motor vehicle while impaired thus justifying the request that Mr. Pike exit the vehicle to perform field sobriety tests. Because of this, the continued detention of Mr. Pike was unreasonable and violated both the Fourth Amendment of the United States Constitution and Article I, Section 11 of the Wisconsin Constitution.

CONCLUSION

Because Officer Fisher's continued detention of Mr. Pike was unreasonable, the trial court erred when it upheld the municipal court's finding that the officer had the appropriate level of suspicion to continue the detention and that the refusal was improper. The court should reverse the trial court's ruling and vacate the judgment of conviction.

Dated this 19th day of December, 2016.

Respectfully Submitted

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FORM AND LENGTH CERTIFICATION

The undersigned hereby certify that this brief and appendix conform to the rules contained in secs. 809.19(6) and 809.19(8) (b) and (c). This brief has been produced with a proportional serif font. The length of this brief is 19 pages. The word count is 3850.

Dated this 19th day of December, 2016.

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**CERTIFICATION OF COMPLIANCE WITH RULE
809.19(12)**

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 19th day of December, 2016.

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or a judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 19th day of December, 2016.

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APPENDIX