

RECEIVED

09-28-2017

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

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

Appellate Case No. 2017AP1417

FOND DU LAC COUNTY,
Plaintiff-Appellant,
vs.

ISAAC ANTHONY DAHLKE,
Defendant-Respondent.

APPEAL OF AN ORDER GRANTING A MOTION TO
SUPPRESS AND DISMISSING THE CASE ENTERED IN
FOND DU LAC COUNTY CIRCUIT COURT
THE HONORABLE ROBERT J. WIRTZ, PRESIDING

BRIEF OF PLAINTIFF-APPELLANT,
FOND DU LAC COUNTY

Eric Toney
District Attorney

Curtis A. Borsheim
State Bar. No. 1004536
Assistant District Attorney
Attorney for Plaintiff-Appellant

District Attorney's Office
160 S. Macy Street
Fond du Lac, WI 54935
(920)929-3048

TABLE OF CONTENTS

ISSUES PRESENTED FOR REVIEW.....	1
STATEMENT ON ORAL ARGUMENT AND PUBLICATION.....	2
STATEMENT OF THE FACTS AND THE PROCEDURAL HISTORY OF THE CASE....	2
SUMMARY OF THE ARGUMENT.....	4
ARGUMENT.....	5
Deputy Olson lawfully stopped Dahlke’s vehicle to investigate the forfeiture offense of being in a closed park after Olson observed the vehicle being driven into a closed park after hours.....	5
A. Applicable constitutional provision.....	5
B. Applicable ordinances.....	5
C. Standard of review.....	6
D. A deputy has the authority to stop an automobile and seize its occupants when the officer has probable cause to believe that an occupant has committed a non-traffic forfeiture offense.....	7

1. General legal principles governing the reasonableness of traffic stops.....	7
2. Officers may conduct traffic stops based on probable cause to believe that a non-criminal forfeiture violation has occurred.....	8
3. An officer's authority to seize a person without a warrant extends to non-traffic forfeiture violations...	9
4. Any law enforcement officer has the authority to investigate park closure violations... ..	10
5. Deputy Olson had probable cause to believe that the occupants the Dahlke vehicle were in a closed park.....	10
E. Alternatively, Deputy Olson acted lawfully and on reasonable suspicion when he stopped Dahlke's vehicle based upon his observation of vehicle in a closed park where illegal activity after hours was known to occur.....	10
1. Officers may conduct traffic stops based upon reasonable suspicion that a non-traffic forfeiture violation has occurred.....	11

2. Deputy Olson had reasonable suspicion that Dahlke may be someone in his vehicle engaging in illegal activity.....	12
--	----

CONCLUSION.....	12
-----------------	----

CASES CITED

<i>County of Jefferson v. Renz</i> , 231 Wis. 2d 293, 603 N.W.2d 541, (Ct. App. 1999).....	11
<i>Johnson v. State</i> , 75 Wis. 2d 344, 249 N.W.2d 593 (Ct. App. 1977).....	8
<i>Miesen v. D.O.T.</i> , 226 Wis. 2d 298, 594 N.W.2d 821 (Ct. App. 1999).....	10
<i>State v. Arias</i> , 2008 WI 84, 311 Wis. 2d 358 752 N.W.2d 748	6

<i>State v. Baudhuin</i> , 141 Wis. 2d 642 416 N.W.2d 60, (Ct. App. 1987).....	7, 8
<i>State vs. Brereton</i> , 2013 WI 17, 345 Wis. 2d 563, 826 N.W.2d 369	6
<i>State v. Brown</i> , 2014 WI 69, 355 Wis. 2d 668, 850 N.W. 2d 66	7
<i>State v. Felix</i> , 2012 WI 36, 339 Wis. 2d 670 811 N.W.2d 775	5
<i>State v. Griffin</i> , 183 Wis. 2d 327, 515 N.W.2d 535 (Ct. App. 1994).....	11
<i>State v. Matasek</i> , 2014 WI 27, 353 Wis. 2d 601, 846 N.W.2d 811	7
<i>State v. Popke</i> , 2009 WI 37, 317 Wis. 2d 118, 765 N.W.2d 569	7- 9

<i>State v. Thomas</i> , 2015AP1518-CR, unpublished slip op., Par.11	9
---	---

<i>Whren v. United States</i> , 517 U.S. 806, (Ct. App. 1996).....	7
--	---

STATUTES CITED

Wis. Stat. § 110.07(1)(a)	11
Wis. Stat. § 287.81	9
Wis. Stat. § 345.22	8

ORDINANCES CITED

Fond du Lac County Ordinance Sec. 42.31	5
Fond du Lac County Ordinance Sec. 42.34	6
Fond du Lac County Ordinance Sec. 42.35	6

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. IV.....	5
Wis. Const. Art. I, § 11.....	5

Respectfully submitted,

Curtis A. Borsheim
Assistant District Attorney
State Bar No. 1004536

City-County Government Center
160 South Macy Street
Fond du Lac, WI 54935
(920) 929-3048

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

Appellate Case No. 2017AP1417

FOND DU LAC COUNTY,
Plaintiff-Appellant,
vs.

ISAAC ANTHONY DAHLKE,
Defendant-Respondent.

APPEAL OF AN ORDER GRANTING A MOTION TO
SUPPRESS AND DISMISSING THE CASE ENTERED IN
FOND DU LAC COUNTY CIRCUIT, THE HONORABLE
ROBERT J. WIRTZ, PRESIDING

BRIEF OF PLAINTIFF-APPELLANT,
FOND DU LAC COUNTY

ISSUES PRESENTED FOR REVIEW

Deputy Olson saw a vehicle enter a closed county park. May an officer's observation of a non-traffic forfeiture offense form the basis for a stop of the vehicle and seizure of its occupants?

The circuit court granted Dahlke's motion to dismiss resulting from the traffic stop. It concluded that no one would have known that Wayside park was a county park and further

that being in the park after hours was not enough for a stop.
(22: 41-42)

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not believe that this case meets the statutory criteria to justify oral argument or publication.

STATEMENT OF THE FACTS AND THE PROCEDURAL HISTORY OF THE CASE

On November 13, 2016, Deputy Lucas Olson issued a citation for possession of marijuana, 1st offense, in violation of Fond du Lac County Ordinance 038-207, to Isaac Dahlke.
(1: 1)

Subsequently, Dahlke, through counsel, entered a “not guilty” plea to the violation and also filed a motion to dismiss for unlawful stop. (4: 1-4)

On February 20, 2017, an evidentiary hearing was held on Dahlke’s motion. (22: 1-43) Judge Robert J. Wirtz found, on that day, that there was an insufficient basis for the traffic stop and granted Dahlke’s motion.

During the testimony on February 20, 2017, Deputy Lucas Olson, of the Fond du Lac County Sheriff’s Department, testified that he was traveling southbound on Highway U.S. 45 in Fond du Lac County, Wisconsin, at approximately 12:26 a.m. on November 13, 2017. (22:4). Deputy Olson testified that he observed another vehicle traveling southbound on Highway U.S. 45 ahead of him which was turned into the Wayside Park. (22:4) When the vehicle was turned into Wayside Park, Deputy Olson considered it to be suspicious in nature because the park was closed and was an area known for being a place for use of

illegal drugs and drinking, especially at that time of the morning.(22: 5 20-23) Deputy Olson testified that Wayside Park is a county park in Fond du Lac County, and that it was closed at the time the vehicle turned in. The park is owned and maintained by the county. (22:5: 16-23).

Deputy Olson testified that there is sign at the entrance of Wayside Park that provides the rules and regulations of the park, including the hours that the park was open, The sign is fairly large, and the sign is illuminated when headlights are shined on it. (22: 6:25, 7:4-6). Wayside Park has 2 entrances, northernmost and southernmost. (22: 6:7-8). Aerial photographs of Wayside Park are depicted in exhibits. (7: 1-4)

Deputy Olson testified that he saw the Dahlke vehicle after he entered Wayside Park, and he could see that the headlights of the Dahlke vehicle were facing west. (22: 9:11-12). The possible routes of travel for the Dahlke vehicle, once it had turned around, would be that it could go straight and exit the park from the southernmost exit onto Highway U.S. 45 or it could have been turned to the right to head north, towards the northernmost entrance of the Wayside Park. (22: 9:13-18). Deputy Olson turned his squad around and followed the Dahlke vehicle and effected a traffic stop by activating his squad's emergency lights within Wayside Park. Deputy Olson testified that the traffic stop of the Dahlke vehicle was based upon the fact that the Dahlke vehicle was in the park after hours. (22: 20 14-16).

On or about March 21, 2017, the circuit court signed an Order granting the motion to dismiss for Unlawful stop. (8:1)

On or about March 31, 2017, the circuit court signed an Order vacating the Order granting the motion to dismiss. (11: 1). The circuit court thereafter reviewed materials

submitted on behalf of the State for reconsideration of the motion, (10: 1-3) as well as materials submitted in support of the motion to dismiss, (12: 1-2).

The circuit court rendered its decision on the State's motion for reconsideration on April 19, 2017. (23: 1-9) An Order granting Dahlke's motion to dismiss was signed on or about April 27, 2017. (15:1)

SUMMARY OF THE ARGUMENT

The circuit court erred when it granted Dahlke's motion to dismiss due to an unlawful stop.

A law enforcement officer may lawfully seize a person without a warrant for a civil non-traffic forfeiture offense if (1) the violation occurs in the officer's presence, and (2) the statute authorized the officer to do so.

Fond du Lac County Ordinance Sec. 42.35 provides that the hours of use by the public for any park, trail, or outdoor recreation area shall be from 6:00 a.m. to 10:00 p.m., and that it is unlawful for any person to be in any park, trail or outdoor recreation area ... outside of the established hours.

Fond du Lac County Ordinance Sec. 42.34 (a) provides that any law enforcement officer may issue a citation or arrest any offender who is in violation of any provision of this article.

The county ordinance violation occurred in the presence of Deputy Olson and the county ordinance authorized an a citation or arrest of Dahlke under the circumstances, justifying the traffic stop.

The motion to dismiss should have been denied.

ARGUMENT

Deputy Olson lawfully stopped Dahlke’s vehicle to investigate the forfeiture offense of being in Wayside Park after hours.

A. Applicable constitutional provisions.

The Fourth Amendment to the United States Constitution and Article I, § 11 of the Wisconsin Constitution protect “[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures.” U.S. Const. amend. IV; Wis. Const. Art. I, § 11. The Wisconsin Supreme Court has historically interpreted Article I, § 11 and its protections against unreasonable searches and seizures in a manner consistent with the United States Supreme Court’s interpretation of the Fourth Amendment. *State v. Felix*, 2012 WI 36, ¶ 38, 339 Wis. 2d 670, 811 N.W.2d 775 (finding no reason “to depart from our customary practice of interpreting Article I, Section 11 in accord with the Fourth Amendment”).

B. Applicable ordinances.

Fond du Lac County Ordinance Sec. 42.31 – Application

This article shall apply to the grounds, buildings thereon, and waters therein for each park, trail, and outdoor recreation area or facility owned or managed by Fond du Lac County which is under the jurisdiction of the Fond du Lac County Parks and Development Committee or its successor committee. ...

The parks, trails and outdoor recreation areas or facilities governed by this Article include, but are not limited to, ...Highway 45 Wayside Park,

Fond du Lac County Ordinance Sec. 42.35 provides that the hours of use by the public for any park, trail or outdoor recreation area shall be from 6:00 a.m. to 10:00 p.m. and makes it unlawful for any person to be in any park, trail or outdoor recreation area except registered campers in designated campgrounds, outside the established hours.

Fond du Lac County Ordinance Sec. 42.34 authorizes any law enforcement officer to issue a citation or arrest any offender who is in violation of any provision of the ordinance.

C. Standard of review.

Whether police conduct violates the protections against unreasonable searches and seizures presents a question of constitutional fact. On review, an appellate court will uphold the circuit court's factual findings unless they are clearly erroneous. But the application of Fourth Amendment principles to the facts found presents a question of law that appellate courts review independently. *State v. Brereton*, 2013 WI 17, ¶ 17, 345 Wis. 2d 563, 826 N.W.2d 369. "A finding is clearly erroneous if 'it is against the great weight and clear preponderance of the evidence.'" *State v. Arias*, 2008 WI 84, ¶ 12, 311 Wis. 2d 358, 752 N.W.2d 748 (citations omitted).

The applicability of the Fond du Lac County Ordinances to Dahlke's case presents a question of statutory interpretation. Statutory interpretation and a statute's application to specific facts present questions of law that this Court reviews independently, benefiting from the lower

courts' analysis. *State v. Matasek*, 2014 WI 27, ¶ 10, 353 Wis. 2d 601, 846 N.W.2d 811.

D. A deputy has the authority to stop an automobile and seize its occupants when the officer has probable cause or reasonable suspicion to believe that an occupant has committed a non-traffic forfeiture offense.

Wisconsin courts have long recognized an officer's authority to seize persons who commit forfeiture offenses. This authority is not limited to violations of traffic regulations and extends to non-traffic forfeiture offenses. These same principles that allow an officer to stop an automobile in the course of enforcing civil traffic regulations reasonably extend to non-traffic forfeiture offenses as well.

1. General legal principles governing the reasonableness of traffic stops.

An officer's detention of an individual during a traffic stop constitutes a seizure of a person within the meaning of the Fourth Amendment. A seizure must be reasonable under the circumstances. A traffic seizure is reasonable if the officer has probable cause or reasonable suspicion to believe that a crime or a traffic violation has occurred. *State v. Popke*, 2009 WI 37, ¶ 11, 317 Wis. 2d 118, 765 N.W.2d 569; see also *State v. Brown*, 2014 WI 69, ¶ 20, 355 Wis. 2d 668, 850 N.W.2d 66 ("A traffic stop can be based on probable cause or reasonable suspicion.").

The State bears the burden of proving that a stop satisfies the reasonableness requirement. *Id.* The constitutional reasonableness of a traffic stop does not depend on the actual motivations of the individual officer involved. *Whren v. United States*, 517 U.S. 806, 812-13 (1996). As long as the

officer has an objectively reasonable basis to seize and search an automobile and its occupants, an officer's subjective intent does not render otherwise lawful conduct illegal or unconstitutional. *State v. Baudhuin*, 141 Wis. 2d 642, 651-52, 416 N.W.2d 60 (1987).

2. Officers may conduct traffic stops based on probable cause to believe that a non-criminal forfeiture violation has occurred.

Probable cause refers to the “‘quantum of evidence which would lead a reasonable police officer to believe’” that a crime or a traffic violation has occurred. *Popke*, 317 Wis. 2d 118, ¶ 14, (citing *Johnson v. State*, 75 Wis. 2d 344, 348, 249 N.W.2d 593 (1977)). Probable cause exists when the officer has reasonable grounds to believe that the person is committing or has committed a crime or a traffic violation. The evidence need not establish proof beyond a reasonable doubt or even that guilt is more probable than not, but rather, probable cause requires that the information “lead a reasonable officer to believe that guilt is more than a possibility.” *Popke*, 317 Wis. 2d 118, ¶ 14 (internal quotation marks and citation omitted).

An officer possesses the authority to arrest a person without a warrant for violating a non-criminal “traffic regulation” if the officer has reasonable grounds to believe that the person is violating a traffic regulation. Wis. Stat. § 345.22. “Implicit in the authority to arrest for a traffic violation is the authority to stop the vehicle where the officer has reasonable grounds to believe the violation has occurred.” *Baudhuin*, 141 Wis. 2d at 648; *see also Johnson*, 75 Wis. 2d at 348 (“‘Reasonable grounds’ and probable cause are synonymous.”) (quoted source omitted).

The automobile stops in *Popke* and *Baudhuin* related to potential violations of traffic regulations. But nothing in those decisions precludes extension of the principles that supported those stops to non-traffic forfeiture offenses.

3. An officer's authority to seize a person without a warrant extends to non-traffic forfeiture violations.

In *State v. Iverson*, 365 2d 302, 871 N.W.2d 661 (2015), the Wisconsin Supreme Court held that: “(1) the Wisconsin Legislature has explicitly authorized state troopers to conduct traffic stops in order to investigate violations of [Wis. Stat. § 287.81](#) and to arrest violators of the statute under specified conditions; (2) a traffic stop to enforce [§ 287.81](#) is generally reasonable if an officer has probable cause or reasonable suspicion that a violation of [§ 287.81](#) has occurred; (3) discarding a cigarette butt onto a highway violates [§ 287.81](#); and (4) based on his observations, the officer in this case had probable cause to believe that an occupant of Iverson's vehicle had violated [§ 287.81](#) by throwing a cigarette butt onto the highway.an officer may arrest a person without a warrant for a non-criminal ordinance violation as long as (1) the violation occurs in the officer's presence, unless other factors exist; and (2) a statute authorizes the officer to do so. Id. at 457-58. “ at Par. 4

The violation of the littering statute was a non-traffic ordinance violation. See also: *State v. Thomas*, No. 2015AP1518-CR, unpublished slip op., paragraph11, (WI App June 21, 2016). (stop for parking violation);

4. Deputy Olson had probable cause to believe that Dahlke had violated the Fond du Lac County Ordinance establishing park hours.

For the reasons provided above, Deputy Olson had authority to stop the Dahlke vehicle and its occupants. The enumerated Fond du Lac County Ordinances establish the “open” and “closed” hours for the county parks and further authorize any law enforcement officer to write a citation or arrest anyone violating the ordinance.

E. Alternatively, Deputy Olson acted lawfully and on reasonable suspicion when he stopped Dahlke’s vehicle based upon his prior knowledge of illegal activity at this park during closed hours.

Deputy Olson had probable cause for a traffic stop based upon his observation that the Dahlke vehicle was in the Wayside Park after hours. Because the higher probable cause standard has been met, this Court need not decide whether reasonable suspicion supported the traffic stop. *See Miesen v. D.O.T.*, 226 Wis. 2d 298, 309, 594 N.W.2d 821 (Ct. App. 1999) (appellate courts should decide cases on the narrowest ground possible).

Should this Court disagree and determine that Olson lacked probable cause for the stop, then the State contends that Olson acted lawfully and upon reasonable suspicion. Olson acted lawfully because an officer may conduct a traffic stop based upon reasonable suspicion that a person inside a vehicle has committed a non-traffic forfeiture offense. In this case, Olson’s observations provided reasonable suspicion that an occupant in Dahlke’s vehicle may about to engage in illegal activity.

1. Officers may conduct traffic stops based upon reasonable suspicion that a non-traffic forfeiture violation has occurred.

Wisconsin courts have upheld the temporary seizure of an automobile's driver based solely upon an officer's reasonable suspicion that the driver had violated a non-criminal traffic regulation. In *State v. Griffin*, 183 Wis. 2d 327, 330-31, 515 N.W.2d 535 (Ct. App. 1994), the court held that an officer may perform an investigatory stop of a vehicle based on a reasonable suspicion of a non-criminal traffic violation. Relying on *Griffin*, this Court subsequently explained: "[A]n officer may make an investigative stop if the officer 'reasonably suspects' that a person has committed or is about to commit a crime, . . . or reasonably suspects that a person is violating the non-criminal traffic laws." *County of Jefferson v. Renz*, 231 Wis. 2d 293, 310, 603 N.W.2d 541 (1999) (quoted source omitted) (footnote omitted). In several cases decided after *Renz*, the court of appeals has upheld stops based solely upon an officer's reasonable suspicion that a vehicle's operator had committed a non-criminal traffic offense.

When the Legislature has expressly authorized an officer to conduct a traffic stop to investigate a non-traffic forfeiture offense, this Court should find that it includes the authority to conduct an investigatory stop based on reasonable suspicion. Here, Wis. Stat. § 110.07(1)(a)1. expressly authorizes officers to stop moving vehicles to investigate specific forfeiture offenses, including littering. *Id.* (troopers shall "have the authority . . . to stop such vehicles while en route at any time upon the public highways to examine the same and make arrests for all violations thereof"). Wis. Stat. § 110.07(1)(a).

Wisconsin courts have consistently held that officers may conduct a vehicle stop based solely upon an officer's

reasonable suspicion that a person has violated a non-criminal traffic regulation. No sound reason exists for differentiating between traffic and non-traffic forfeiture offenses, permitting officers to conduct investigatory stops for the former, but not the latter. Prohibiting an officer from briefly seizing a person whom the officer reasonably and articulably suspects of violating a non-traffic forfeiture offense prevents the officer from enforcing laws that the Legislature has deemed important to enforce.

2. Deputy Olson had reasonable suspicion that someone in the Dahlke vehicle may be engaging in illegal activity.

For the same reasons articulated above, the record demonstrates that Deputy Olson had a reasonable suspicion that an occupant in Dahlke's vehicle may about to be engaged in illegal activity. Deputy Olson saw Dahlke's vehicle being driven into a closed park. This park was one in which Deputy Olson was aware of prior drug and alcohol related violations after park hours. Under the circumstances, Deputy Olson acted reasonably when he stopped the Dahlke vehicle and temporarily seized its occupants for the purpose of investigating the suspicious circumstance.

CONCLUSION

The State respectfully requests this Court to reverse the circuit court's decision granting Dahlke's motion to suppress evidence and dismissing his case.

Dated this 22ND day of September, 2017.

Respectfully submitted,

ERIC TONEY
District Attorney

CURTIS A. BORSHEIM
Assistant District Attorney
State Bar No. 1004536

Attorneys for Plaintiff-
Appellant

City/County Government Center
160 South Macy Street
Fond du Lac WI 54935
(920) 929-3048
(920) 929-7134 (fax)

CERTIFICATION TO FORM AND LENGTH

I hereby certify that this brief confirms to the rule contained in Wis. Stat. §809.19(8)(b) and (c) for a brief produced with proportional and serif font. The length of this brief's body is 4,037 words.

Dated this 22nd of September, 2017.

Curtis A. Borsheim
Assistant District Attorney
State Bar No. 1004536

Fond du Lac County District
Attorney's Office
160 South Macy Street
Fond du Lac WI 54935
920-929-3048

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. §

(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 Wis. Stat § (Rule) 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 22nd day of September, 2017.

Curtis A. Borsheim
Assistant District Attorney
State Bar No. 1004536

Fond du Lac County District
Attorney's Office
160 South Macy Street
Fond du Lac WI 54935
920-929-3048

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 Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or 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 this appeal is taken from a circuit court order or 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 22nd day of September, 2017.

Curtis A. Borsheim
Assistant District Attorney

