

*BROWN V. STATE*<sup>1</sup>

*Brown v. State* rearticulated the standard of particularized suspicion by weakening the effect of an officer's experience on the propriety of an investigatory stop. In *Brown*, the Montana Supreme Court discussed the requirement that an "experienced" officer have particularized suspicion of criminal activity prior to performing an investigative stop.<sup>2</sup> The Court determined that past decisions misinterpreted the standard established in *United States v. Cortez*.<sup>3</sup> Based on the correct understanding of *Cortez*, particularized suspicion requires only that the information available to an officer be sufficient "to allow a hypothetical 'experienced' officer" to have particularized suspicion that an individual is engaged in criminal activity.<sup>4</sup>

*Brown* developed from an investigative stop performed in the early hours of June 10, 2007.<sup>5</sup> Around 2:50 a.m., Hill County Deputy Sheriff Stephen Martin witnessed a vehicle, barely moving along the roadway, suddenly pull over and turn off its lights.<sup>6</sup> Deputy Martin wondered if the vehicle was experiencing problems, pulled behind it, and approached the driver, David Brown.<sup>7</sup> As soon as Brown rolled down his window, Martin smelled alcohol.<sup>8</sup> Brown admitted to having been drinking but said he pulled over because he and his son had been fighting and his son had exited the vehicle.<sup>9</sup> Martin did not see any other individuals in the vicinity but observed a plastic Budweiser container in the cup holder and noticed that Brown was slurring his speech.<sup>10</sup> Consequently, Deputy Martin requested that Brown exit his vehicle and

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<sup>1</sup> *Brown v. State*, 203 P.3d 842 (Mont. 2009).

<sup>2</sup> *Id.* at 844.

<sup>3</sup> *Id.* at 845 (discussing *U.S. v. Cortez*, 449 U.S. 411 (1981)).

<sup>4</sup> *Id.* at 846.

<sup>5</sup> *Id.* at 843.

<sup>6</sup> *Id.*

<sup>7</sup> *Brown*, 203 P.3d at 843.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

submit to a field sobriety test.<sup>11</sup> Martin performed a horizontal gaze nystagmus (“HGN”) test and requested that Brown take a breathalyzer test.<sup>12</sup> When Brown refused to take the test, he was arrested for driving under the influence (“DUI”) and transported to the Havre detention facility.<sup>13</sup> There, Deputy Martin again performed an HGN test, and Brown again refused to take a breathalyzer test.<sup>14</sup> Brown’s license was suspended for refusing the breathalyzers under Montana Code Annotated § 61–8–402(4).<sup>15</sup>

Brown later petitioned to have his driver’s license reinstated, contending that he had been illegally arrested.<sup>16</sup> He argued that Deputy Martin was too inexperienced to have had reasonable grounds to believe that Brown was driving under the influence of alcohol, as required to suspend his license.<sup>17</sup> First, Martin had been a police officer for less than one year and had conducted only four prior DUI investigations.<sup>18</sup> Second, the district court indicated that Martin had administered both HGN tests improperly and compromised the results.<sup>19</sup> Brown believed both circumstances proved that Martin lacked the experience, required by *State v. Gopher*, to establish a particularized suspicion that Brown was involved in criminal activity.<sup>20</sup> Brown pointed out that in adopting the particularized suspicion standard in *Gopher*, the Court commented that an officer’s experience is an important element of the *Cortez* analysis.<sup>21</sup> The Court in *Gopher*

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 844.

<sup>13</sup> *Brown*, 203 P.3d at 844.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* (citing Mont. Code Ann. § 61–8–402(4) (2007)).

<sup>16</sup> *Id.*

<sup>17</sup> Apps.’ Opening Br. at 10–12, *Brown v. State*, 203 P.3d 842 (Mont. 2009).

<sup>18</sup> *Id.* at 14.

<sup>19</sup> *Id.* at 8–9; *Brown*, 203 P.3d at 844.

<sup>20</sup> *Id.* at 12–14 (referring to *State v. Gopher*, 631 P.2d 293 (Mont. 1981)).

<sup>21</sup> *Id.* at 13–14 (citing *Gopher*, 631 P.2d at 295).

emphasized that “experienced law enforcement authorities are allowed to draw certain conclusions which laymen could not properly draw.”<sup>22</sup>

Here, the majority disagreed that Deputy Martin’s level of experience was a determinative factor in proving whether the suspension of Brown’s license was proper.<sup>23</sup> The Court observed that under Montana Code Annotated § 61–8–403(4)(a) a court will uphold the suspension of a driver’s license if the arresting officer had “reasonable grounds” to believe that the person driving was under the influence of alcohol and refused to submit to one or more sobriety tests.<sup>24</sup> Because the “reasonable grounds” requirement is equivalent to the “particularized suspicion” standard necessary to make an investigative stop under Montana Code Annotated § 46–5–401, a court will not overturn a license suspension if the arresting officer had a particularized suspicion that the person driving was under the influence of alcohol.<sup>25</sup> The Court explained that neither § 61–8–403 nor § 46–5–401 require an investigating officer to have certain training or experience.<sup>26</sup> Instead, that impression arose from the Court’s previous misinterpretation of *United States v. Cortez*, from which the particularized suspicion standard was adopted.<sup>27</sup>

In *Cortez*, the United States Supreme Court set forth the following two-part test to determine if an investigative stop was proper:

First, the assessment must be based upon all the circumstances. The analysis proceeds with various objective observations, information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kinds of lawbreakers. From these data, a *trained officer* draws inferences and makes deductions—inferences and deductions that might well elude an untrained person . . . . The second element . . . is the concept that the process just

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<sup>22</sup> *Id.*; *Brown*, 203 P.3d at 846 (quoting *Gopher*, 631 P.2d at 295).

<sup>23</sup> *Brown*, 203 P.3d at 845–846.

<sup>24</sup> *Id.* at 844.

<sup>25</sup> *Id.* at 844–845.

<sup>26</sup> *Id.* at 845.

<sup>27</sup> *Id.*

described must raise a suspicion that the particular individual being stopped is engaged in wrongdoing.<sup>28</sup>

Based on this articulation of particularized suspicion, the *Brown* majority reasoned that it had inaccurately applied the standard in the past.<sup>29</sup> First, *Cortez* primarily referred to a “trained” officer.<sup>30</sup> The opinion only later referred to an experienced officer “in the context of what an ‘experienced’ officer might infer” from the circumstances.<sup>31</sup> Second, when *Gopher* adopted the particularized suspicion standard from *Cortez*, it erred by discussing the officer’s experience. Although *Gopher*’s holding specifically held that “a trained police officer” must have particularized suspicion to perform an investigatory stop, the opinion also referenced an “experienced” officer several times.<sup>32</sup> Third, the Court compounded the problem in subsequent cases by looking at the officer’s training and experience in analyzing whether particularized suspicion was present. For instance, in *State v. Schatz*, the Court discussed the officer’s nine years of experience and concluded that the “*experienced* law enforcement officer had a ‘particularized suspicion’ sufficient to effectuate” the arrest.<sup>33</sup> In *State v. Morsette*, the Court again referred to the officer’s experience and discussed his training and years as an officer to analyze whether he was in fact “experienced.”<sup>34</sup>

Despite these earlier misinterpretations, the majority stressed that no Montana statute requires an officer to have a specific amount of experience to establish particularized suspicion.<sup>35</sup> Based on this absence and the language of *Cortez*, the test for particularized suspicion requires only that “the information available to the investigating officer—whether a rookie or a veteran—

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<sup>28</sup> *Id.* (quoting *Cortez*, 449 U.S. at 418) (emphasis in original).

<sup>29</sup> *Brown*, 203 P.3d at 845.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 846 (quoting *Gopher*, 631 P.2d at 296).

<sup>33</sup> *Id.* at 846 (quoting *State v. Schatz*, 634 P.2d 1193 (Mont. 1981)) (emphasis in original).

<sup>34</sup> *Id.* (quoting *State v. Morsette*, 654 P.2d 503 (Mont. 1982)).

<sup>35</sup> *Brown*, 203 P.3d at 846.

be sufficient to allow a hypothetical ‘experienced’ officer to have either particularized suspicion for a stop, or probable cause for an arrest.”<sup>36</sup> Instead of determining whether an officer had the relevant experience to establish particularized suspicion that a crime was being committed, a court should ascertain only whether the officer made reasonable inferences that a hypothetical experienced officer would make under the same circumstances.<sup>37</sup>

*Brown*, however, did not completely dispose of an officer’s experience as a component of the particularized suspicion standard. The Court commented that an officer’s experience could be a factor used to determine the reasonable inferences an officer can make from the circumstances.<sup>38</sup> While a rookie officer could establish particularized suspicion to pull over a vehicle driving slowly and weaving across the centerline, he might not be able to establish sufficient particularized suspicion under other circumstances that are “demonstrably beyond his or her training or experience.”<sup>39</sup>

In review of *Brown*’s appeal, the Court determined that Deputy Martin had correctly inferred from several observations that *Brown* was engaged in criminal activity.<sup>40</sup> From the vehicle’s slow speed at 2:50 a.m. and its sudden move to pull over and turn off its lights, Martin could have reasonably suspected that the vehicle’s driver was under the influence of alcohol in violation of Montana Code Annotated § 61–8–401.<sup>41</sup> Additionally, the odor of alcohol, *Brown*’s slurred speech, and his explanation for pulling over when no other individual appeared anywhere nearby, were all objective observations that justified Martin’s move from particularized

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 846–847.

<sup>39</sup> *Id.* at 847.

<sup>40</sup> *Id.*

<sup>41</sup> *Brown*, 203 P.3d at 847.

suspicion to probable cause for the DUI arrest.<sup>42</sup> From these facts, Deputy Martin had reasonable grounds to revoke Brown’s license under Montana Code Annotated § 61–8–403(4)(a).<sup>43</sup>

*Brown* is significant for its new articulation of the particularized suspicion standard required for an officer to make an investigative stop. As seen in *Brown*, this standard also applies to other realms such as the “reasonable grounds” needed to suspend an individual’s license. When analyzing particularized suspicion, Montana courts will not look to whether an investigating officer is experienced, but whether the officer made inferences that a hypothetical, experienced officer would make under the same circumstances. Montana practitioners should be aware that an officer’s experience is no longer a defining factor of particularized suspicion.

— *Erin Kraft*

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.*