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DISTRICT IV

05-18-2015

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appeal No. 14-AP-2860-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

TIMOTHY J RELYEA,

Defendant-Appellant.

PLAINTIFF-RESPONDENT'S BRIEF

ON APPEAL FROM THE CIRCUIT COURT OF DANE COUNTY,
BRANCH 7, THE HONORABLE WILLIAM E HANRAHAN, PRESIDING

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STATEMENT OF ISSUE

I. Does drinking out of a bottle consistent with that of a beer bottle while operating a motor vehicle establish reasonable suspicion to conduct an investigatory stop?

STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The State does not request oral argument or publication because the issues in this case can be resolved by applying established legal principles to the facts.

STATEMENT OF THE CASE AND FACTS

On March 29, 2014, at approximately 5:30 p.m., Stoughton Police Sergeant Brian Gowan was traveling eastbound on Main Street in the City of Stoughton, WI. (R. 33, p. 5). The weather conditions were clear and sunny. *Id.* Sgt. Gowan observed a truck pass him traveling in the opposite direction going approximately 25 miles per hour. *Id.* at 6. Sgt. Gowan observed the driver, later identified as the defendant, through an open side window guzzling from a bottle. *Id.* Sgt. Gowan believed this bottle to be that of a microbrew. *Id.* Sgt. Gowan has seen numerous people consume microbrews and has even done so himself. *Id.* When the defendant finished his guzzle, he "looked around almost to see if anyone was looking" and then put the bottle down out of sight. *Id.*

Acting on the belief that the defendant was consuming an alcoholic beverage while operating a vehicle, *Id.* at 13, Sgt. Gowan made a U-turn and initiated a traffic stop. *Id.* at 7. Sgt. Gowan ultimately arrested the defendant for operating a motor vehicle while intoxicated. The defendant was charged with Operating While Intoxicated and Operating a Motor Vehicle with a Prohibited Alcohol Concentration, both as a second offense. (R. 3)

On May 27, 2014, the defendant filed a Motion to Suppress Evidence Based Upon an Unconstitutional Automobile Stop. (R. 17). The Honorable William E. Hanrahan held a motion hearing on June 12, 2014. The sole issue addressed at the motion hearing was whether Sgt. Gowan had reasonable suspicion or probable cause to stop the defendant's vehicle. (R. 33, p. 3).¹ The defendant later agreed that reasonable suspicion was the appropriate burden. *Id.* at 15. The trial court found the arresting officer had reasonable suspicion to conduct a traffic stop when, "[The officer] observe[d] through an open window a vehicle driven by the defendant. The defendant appeared to be guzzling a liquid out of what looks like a beer bottle." *Id.* at 20.

On July 8, 2014, the defendant entered a guilty plea to Operating with a Prohibited Alcohol Concentration as a 2nd Offense. (R. 23) He now appeals from the judgment of conviction, asserting the trial court erred in denying his motion to suppress.

¹ At the outset of the motion hearing, defendant's counsel, Patrick Stangl, indicated the sole issue was the stop and the hearing would be confined to such. (R. 33, p. 3). Curiously, at the conclusion of the evidentiary portion of the hearing Attorney Stangl made a motion for dismissal because venue and identification were not established. *Id.* at 15. The trial court denied the motion because those issues were outside the scope of the motion hearing. *Id.* at 16.

ARGUMENT

I. THE CIRCUIT COURT PROPERLY DENIED THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE.

The defendant argues that drinking out of a bottle that is consistent with that of a microbrew bottle while operating a motor vehicle cannot establish reasonable suspicion to facilitate an investigatory stop. This argument fails because, based on the totality of circumstances, a reasonable police officer would reasonably suspect the defendant was consuming an alcoholic beverage while operating a motor vehicle.

A. Standard of review.

When reviewing the circuit court's denial of a motion to suppress evidence, this court will uphold the circuit court's factual findings unless clearly erroneous, but reviews its application of the facts to constitutional principles de novo. *State v. Stout*, 2002 WI App 41, ¶9, 250 Wis. 2d 768, 641 N.W.2d 474.

B. An investigatory stop or seizure requires only reasonable suspicion.

The Fourth Amendment to the United States Constitution protects individuals from unreasonable searches and seizures. *State v. Young*, 2006 WI 98, ¶18, 294 Wis. 2d 1, 717 N.W.2d 729. An investigatory or *Terry* stop typically involves temporary questioning of an individual. See *Terry v. Ohio*, 392 U.S. 1 (1968); *Young*, ¶20. Such a stop is constitutional if the officer has reasonable suspicion to believe that a crime has been, is being, or is about to be committed. *Id.* Accordingly, an investigatory stop permits police to briefly detain a person in order to ascertain the presence of possible criminal behavior, even though there is no probable cause supporting an arrest. *Id.*

Reasonable suspicion means that the police officer “possess[es] specific and articulable facts that warrant a reasonable belief that criminal activity is afoot.” *Id.* at ¶21. “A mere hunch that a person has been, is, or will be involved in criminal activity is insufficient.” *Id.* However, officers need not eliminate the possibility of innocent behavior before initiating an investigatory stop. *Id.* In other words:

[I]f any reasonable inference of wrongful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, the officers have the right to temporarily detain the individual for the purpose of inquiry.

State v. Anderson, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990).

The reasonable suspicion test is not limited to criminal matters. An officer may perform an investigatory stop of a vehicle based upon a reasonable suspicion of a non-criminal traffic violation or civil traffic ordinance. *State v. Colstad*, 2003 WI App 25, ¶11, 260 Wis. 2d 406, 415, 659 N.W.2d 394, 398.

C. Sgt. Gowan had reasonable suspicion to conduct an investigatory stop of the defendant because he had reasonable suspicion that the defendant was consuming alcohol in a motor vehicle.

Sgt. Gowan had clear, articulable facts that justified a temporary stop. On a clear and sunny day, Sgt. Gowan was traveling at a slow rate of speed in heavy traffic. (R. 33, p. 5) As he crossed paths with the defendant's vehicle, he had a clear view into the defendant's side window. *Id.* at 6. Sgt. Gowan observed the defendant drinking out of bottle that was consistent with a microbrew bottle. *Id.* After taking a guzzle out of the bottle, the defendant looked around as if to see if anyone was looking and put the bottle out of sight. *Id.*

When determining whether an officer has reasonable suspicion for an investigatory stop, the court must examine the totality of circumstances known to the officer. *State v. Williams*, 2001 WI 21 ¶ 22, 241 Wis. 2d 631, 717 N.W.2d 729. A reasonable inference after seeing someone drinking out of a bottle that looks like a beer bottle is that the person is, in fact, drinking out of a beer bottle. That the defendant then looked around suspiciously and hid the bottle out of sight only furthers the inference that he was consuming a beer. The defendant's actions reasonably led Sgt. Gowan to suspect the defendant was engaged in a traffic violation. (See Wis. Stat. § 346.935(1) - No person

may drink alcohol beverages while he is in any motor vehicle.)

The law is sufficiently flexible to allow officers the opportunity "to temporarily freeze a situation, particularly where failure to act will result in the disappearance of a potential suspect." *State v. Guzy*, 139 Wis.2d 663, 676, 407 N.W.2d 548 (1987). Here, the defendant was in his vehicle and traveling away from Sgt. Gowan. A failure to temporarily detain the defendant would have likely resulted in his disappearance and the loss of evidence.

The defendant attempts to frame Sgt. Gowan's actions as acting on a mere hunch. The defendant likens Sgt. Gowan's observation and actions as justifying an investigatory stop if an individual is seen drinking out of any bottle. There is no evidence to support this assertion. Sgt. Gowan did not observe the defendant drinking out of just any bottle. Rather, he observed the defendant guzzling out of a bottle that looked like a microbrew bottle. (R. 33, p. 6). Having seen numerous people consume microbrews in the past and even partaken in such, Sgt. Gowan reasonably suspected the defendant was drinking a microbrew beer. *Id.* Furthermore, Sgt. Gowan then observed the

defendant look around suspiciously and move the bottle out of sight. *Id.* This led Sgt. Gowan to believe the defendant was consuming alcohol. These are clear, articulable facts; not a hunch.

The sum of the facts provided Sgt. Gowan with ample reasonable suspicion that the defendant had an open intoxicant while operating a vehicle.

CONCLUSION

For the foregoing reasons, the State respectfully asks this court affirm the trial court's denial of the motion to suppress.

Dated this 18th day of May, 2015, at Madison, Wisconsin.

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CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19(8) (b) and (c) for a brief produced using the following font:

Monospaced font: 10 characters per inch; double spaced; 1.5 inch margin on left side and 1 inch margins on the other 3 sides. The length of this brief is 9 pages.

Dated: 05/18/2015 .

Signed,

Attorney

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 18th day of May, 2015.

Shaun W. O'Connell
Assistant District Attorney
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Dated this day of , 20 .

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