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COURT OF APPEALS
DISTRICT IV

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appeal No. 2016AP000431 - CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

vs.

CYNTHIA J POPP,

Defendant-Respondent.

PLAINTIFF-APPELLANT'S BRIEF

ON APPEAL FROM THE CIRCUIT COURT OF DANE COUNTY,
BRANCH 15, THE HONORABLE STEPHEN E. EHLKE, PRESIDING

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STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The State does not request either oral argument or publication. The single issue may be resolved by applying well-established legal principles to the facts of this case.

STATEMENT OF THE ISSUE

Did the police have reasonable suspicion to detain Popp for the administration of field sobriety tests (FSTs), when the police had observed poor driving, Popp's eyes were either bloodshot or watery from crying, and Popp admitted to drinking wine in the preceding three hours, and police were aware that Popp had three prior operating while intoxicated convictions and was subject a .02 threshold? The trial court ruled that there was no legal basis for detaining Popp.

STATEMENT OF THE CASE

Popp was charged with operating a motor vehicle while under the influence of an intoxicant (OWI) fourth offense and operating with prohibited alcohol concentration (PAC) fourth offense, contrary to Wis. Stat. §§ 346.63(1)(a) and (1)(b), and 346.65(2)(am)4. Because of the age of the prior offenses, the crime is a misdemeanor under Wis. Stat. § 347.307(1).

Popp filed a motion to suppress the blood test result on October 23, 2015. The Honorable Stephen Ehlke, Dane County Circuit Court, held a motion hearing on December 18, 2015. After receiving briefs, the trial court issued an oral ruling granting Popp's motion on February 1, 2016. The state filed a notice of appeal on February 26, 2016.

STATEMENT OF THE FACTS

Officer John Ballard of the Wisconsin State Capitol Police Department was the sole witness at the motion hearing. As the trial court noted, the facts are not particularly in dispute. Ballard has about five years of law enforcement experience (24:5-6). On June 11, 2015 at

around 8:25 P.M., Ballard was on duty in his marked squad car, approaching the intersection of Fish Hatchery Road and Park Street in Madison (24:6). Ballard noticed a blue van in front of him that was exhibiting "poor driving behavior" (24:7). Ballard noticed that the van was straddling the white line while they were stopped at a traffic light (24:7). Ballard followed the van as it turned from Fish Hatchery Road onto Park Street, and saw that the van swerved over the line during the turn (24:7). The van continued swerving within its lane on Park Street, almost hitting the curb at one point and then swerving back over the line again (24:7). Ballard activated his emergency lights but the van failed to stop for seven to ten seconds, so he then activated his siren (24:8). Two to three seconds later, the van stopped in the left turn lane that leads from Park Street onto Vilas Street (24:8). Ballard did not believe the driver activated the turn signal prior to stopping (24:8).

After the van stopped, Ballard contacted the driver and identified her as Cynthia Popp. Ballard observed that Popp was very upset and appeared to have been crying (24:10). Ballard described Popp as "kind of out of it" (24:10).

Ballard saw that Popp's eyes were either bloodshot or watery from crying, but he could not say which was the case (24:19). Popp told Ballard that she was driving to the hospital to see her husband for a "life or death type situation" (24:10). Ballard asked Popp if she consumed any alcohol and she confirmed that she had one glass of wine within the preceding three hours (24:10, 11). Ballard did not smell alcohol on Popp, and he was not sure if the cause of her poor driving behavior was alcohol, prescription medication, or if she was upset (24:12).

Ballard returned to his squad car and, upon running Popp's record, learned that she was subject to a .02 blood alcohol concentration threshold (24:11). Ballard discussed the situation with his supervisor and remarked that he could "take her out and do the field tests, but I know she'll probably pass" (24:24). Nevertheless, they decided to have Popp perform field sobriety tests based on their "standard protocols" (24:12). The defendant's performance on the FSTs led to her arrest and the criminal charges in this case.

The parties submitted briefs after the motion hearing and, on 02/01/2016, the trial court issued an oral ruling in which it granted Popp's motion to suppress. The court,

noting that the facts were essentially undisputed, summarized Ballard's testimony at the motion hearing and found the evidence to be in "equipoise." The court stated that "[t]here is nothing objectively in the record that would tip it towards saying that she's under the influence versus something else... Without anything else, I believe this was simply a hunch" (25:8-9). The state now appeals.

ARGUMENT

I. THE WELL-ESTABLISHED RULE IS THAT REASONABLE SUSPICION IS REQUIRED WHEN AN OFFICER WISHES TO DETAIN A SUSPECT TO PERFORM FIELD SOBRIETY TESTS.

- a. Reasonable suspicion is required generally when an officer detains a suspect.

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 Wisconsin 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 later codified the *Terry* standard in Wis. Stat. § 968.24.

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).

b. An officer may extend a traffic stop to administer field sobriety tests if the officer discovers additional information leading to a reasonable suspicion that a suspect is guilty of Operating While Intoxicated or Operating with a Prohibited Alcohol Concentration.

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, e.g., *County of Jefferson v. Renz*, 231 Wis.2d

293, 310, 603 N.W.2d 541 (1999). In *Renz*, the Wisconsin Supreme Court wrote that,

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. The Wisconsin Supreme Court has consistently discussed the reasonable suspicion standard in these terms. See e.g. *State v. Hogan*, 2015 WI 76, 364 Wis. 2d 167, 868 N.W.2d 124:

The focus of an investigatory stop is on reasonableness, and the determination of reasonableness depends on the totality of circumstances. Although officers sometimes will be confronted with behavior that has a possible innocent explanation, a combination of behaviors—all of which may provide the possibility of innocent explanation—can give rise to reasonable suspicion.

Hogan, 2015 WI 76, ¶ 36, 364 Wis. 2d 167, 183, 868 N.W.2d 124, 131 (internal citations and quotations omitted).

When asking a person to perform field sobriety tests, an officer has reasonable suspicion if he 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.

c. Officer Ballard had specific and articulable information that caused him to reasonably suspect Popp was operating under the influence of an intoxicant and especially that she was operating with a prohibited alcohol concentration.

Ballard observed "poor driving behavior" in the form of Popp swerving, pulling her van over slowly, and pulling over to the turn lane on left side of the roadway. Popp's eyes were either bloodshot or watery from crying. Popp appeared "kind of out of it" and she admitted to drinking glass of wine within the preceding one to three hours. Ballard then learned that Popp was subject to a .02 blood alcohol concentration threshold. Popp's comment about of some sort of "life or death" situation with her husband could provide an innocent explanation for her poor driving and her general demeanor, but the analysis does not end

simply because there exists a possibly innocent explanation. "Although officers sometimes will be confronted with behavior that has a possible innocent explanation, a combination of behaviors—all of which may provide the possibility of innocent explanation—can give rise to reasonable suspicion." *Hogan*, 2015 WI 76, ¶ 36, 364 Wis. 2d 167, 183, 868 N.W.2d 124, 131.

It appears from his testimony that Ballard subjectively believed Popp would pass FSTs. However, we must look to what "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) (emphasis added). A reasonable officer who observed Popp drive and saw her demeanor and heard her admit she had a glass of wine, and then learned that she is subject to a .02 threshold, would reasonably suspect that was operating with a prohibited alcohol concentration. Ballard's subjective belief about whether or not Popp could pass FSTs is not particularly relevant, much less dispositive to the question of reasonable suspicion.

The trial court rested its decision upon its judgment that the available evidence did not tip either in favor of believing Popp was intoxicated or toward the conclusion

that she was simply upset. But this uncertain scenario is exactly the sort of real-world situation where further investigation is reasonably required to determine whether or not a crime has been committed.

The .02 threshold in this case removes any question as to the reasonableness of detaining Popp for FSTs. The Wisconsin Supreme Court recently considered the legality of an arrest of an OWI suspect and concluded as follows:

By the time [Officer] Nisius transported Blatterman to the hospital, Nisius had ascertained Blatterman's prior OWI conviction record and, together with information from dispatch and his own observations, had established probable cause to arrest Blatterman for a 0.02% PAC violation.

State v. Blatterman, 2015 WI 46, ¶ 38, 362 Wis. 2d 138, 165-66, 864 N.W.2d 26, 38-39. By extension, it is appropriate for this Court to view the facts available to Ballard through the lens of the reduced .02 threshold.

CONCLUSION

This Court simply needs to determine if Ballard articulated specific facts that would cause a reasonable officer to reasonably suspect Popp was driving with a blood alcohol concentration of at least .02. Ballard made the requisite showing when he described Popp's driving, demeanor, and admission to drinking wine, and so the trial court's order should be reversed.

Dated this 3rd day of May, 2016.

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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 7 pages.

Dated: _____.

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 3rd day of May, 2016.

Valerian A. Powell
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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 a supplemental appendix that complies with the content requirements of Wis. Stat. § (Rule) 809.19(2)(2); that is, the record documents contained in the respondent's supplemental appendix fall into one of the categories specified in sub. (2)(a).

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 3rd day of May, 2016.

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