STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2016AP001815-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRIAN L. ZIEGLMEIER,

Defendant-Appellant.

On Appeal from an Order Denying Suppression
Entered in the Marathon County Circuit Court,
the Honorable Gregory E. Grau presiding, and a Judgment of
Conviction entered in the Marathon County Circuit Court,
the Honorable R. Thomas Cane presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

COLLEEN MARION
Assistant State Public Defender
State Bar No. 1089028

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-5176
marionc@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

OTHER AUTHORITIES CITED

ISSUE PRESENTED

Whether the State proved that reasonable suspicion of operating while intoxicated justified compelling Mr. Zieglmeier to perform field sobriety tests.

The trial court answered: yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested, as the briefs can adequately set forth the arguments. This case does not qualify for publication because it is a misdemeanor appeal. *See* Wis. Stat. §§ 809.23(1)(b)4 and 751.31(2)(f).

STATEMENT OF THE CASE AND FACTS

Law enforcement pulled Mr. Zieglmeier over for speeding. Subsequently, field sobriety tests were conducted and Mr. Zieglmeier was arrested for operating under the influence of an intoxicant. The State charged Mr. Zieglmeier with: count one operating a motor vehicle while intoxicated (3rd), contrary to Wis. Stat. § 346.63(1)(a); and count two, operating a motor vehicle while revoked, contrary to Wis. Stat. § 343.44(1)(b). (R1:1-5).

Mr. Zieglmeier filed a motion to suppress the evidence obtained pursuant to the field sobriety tests based on his Fourth Amendment right to be free from unreasonable seizures. (8:1-3). A hearing was held on the suppression motion on May 4, 2016. (19:1-20; App. 101-120). Video recorded by law enforcement squad cameras was introduced as Exhibit 1. (19:2; App. 102, 9:1-2).

Officer Maureen Pilsner testified that she was on duty with the Wausau Police Department on Sunday, December 6, 2015. (19:3; App. 103). At around 2:07 p.m., a vehicle was "clocked" traveling at 42 miles per hour in a 25 miles-per-hour speed zone. (19:3-4; App. 103-04). Officer Pilsner conducted a traffic stop of the vehicle in an adjacent parking lot. (19:4; App. 104). The vehicle pulled over appropriately. (19:6; App. 106).

Officer Pilsner made contact with the vehicle's single occupant, Mr. Zieglmeier. (19:4; App. 104). Mr. Zieglmeier answered Officer Pilsner's questions appropriately. (19:7-8; App. 107-08). He did not seem disoriented or "lost." (19:8; App. 108). Officer Pilsner asked Mr. Zieglmeier if he knew why she stopped him and he stated that he was going too fast. (19:4-5; App. 104-05). Officer Pilsner smelled the odor of intoxicants. She asked Mr. Zieglmeier if he had been drinking and he said yes, he'd had two beers. He was on his way to a nearby tavern, which was located a few blocks away. (19:5, 13; App. 105, App. 113). At officer Pilsner's request, Mr. Zieglmeier began looking through his car for proof of insurance. (19:10; App. 110).

Officer Pilsner returned to her squad car to "run" Mr. Zieglmeier's information through dispatch. Dispatch advised that there was a warrant for Mr. Zieglmeier based on failure to pay a court-mandated financial obligation. (19:5; App. 105). Two other officers, Officers Albee and Landretti, were also on scene. (19:12; App. 112). Officer Landretti removed Mr. Zieglmeier from his vehicle and placed him in handcuffs. (19:5; App. 105). Officer Pilsner testified that at that point, "we could really smell the alcohol and decided to do field sobriety tests." (*Id.*).

However, Officer Pilsner also agreed that she told Officer Albee that she was *not* convinced that the odor of alcohol was strong enough to warrant field sobriety tests. (19:9-10; App. 109-10). Ultimately, Officer Albee decided to conduct the tests. Following the field sobriety tests, Mr. Zieglmeier was arrested for operating under the influence.

Mr. Zieglmeier argued that the field sobriety tests were unlawfully conducted because there was no reasonable suspicion to believe that he was operating under the influence of an intoxicant, and therefore, the evidence should be suppressed. (19:15-16; App. 115-16).

The court denied Mr. Zieglmeier's suppression motion. The court found that the defendant was traveling 42 mph in a 25-mph zone in the middle of the afternoon on a "rather major road" in the city of Wausau. (19:16; App. 116). The court also questioned Mr. Zieglmeier's judgment because he was near to his destination and knew that he had an outstanding warrant but was speeding anyway. (19:17; App. 117). The court opined that Mr. Zieglmeier "expressed some confusion" about his insurance situation and noted that Mr. Zieglmeier acknowledged drinking beers prior to the stop. (19:17-18; App. 117-18). Finally, the court found that there was a "noticeable odor" of intoxicants, but acknowledged that the degree of strength of that odor was disputed and declined to make a finding as to "how strong it was." (19:18; App. 118).

Based on these findings, the court ruled that "law enforcement did have reasonable suspicion to extend the stop and conduct field sobriety tests. Accordingly, the motion . . . is denied." (19:18; App. 118).

Following the court's denial of his suppression motion, Mr. Zieglmeier pled no contest to count one. (20:1-18). Count two was dismissed and read in. The court imposed two years of probation, 28 months' license revocation, 28 months' ignition interlock, a $1,527.00 fine and 160 days in jail as a condition of probation. (14:1-3; App. 121-22).

This appeal follows.[1]

ARGUMENT

Law Enforcement Lacked Reasonable Suspicion to Compel Mr. Zieglmeier to Perform Field Sobriety Tests; therefore, Law Enforcement Violated Mr. Zieglmeier's Fourth Amendment Right to be Free from Unreasonable Seizures and the Evidence Obtained Pursuant to the Field Sobriety Tests must be Suppressed.

A. Introduction.

Officer Pilsner's testimony showed that there was probable cause to pull Mr. Zieglmeier over for driving over the speed limit, which is prohibited by law. Thus, the seizure was valid at its inception. However, the scope of the seizure was unconstitutional. The State failed to prove that reasonable suspicion existed to justify conducting field sobriety tests. Drinking before driving is not illegal in Wisconsin. What is illegal is driving under the influence of an intoxicant, which requires proof that the person "has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to

[1] An order denying a motion to suppress evidence may be reviewed on appeal notwithstanding a no contest or guilty plea. Wis. Stat. § 971.31(10).

handle and control a motor vehicle." *See* WIS JI-CRIMINAL 2663A. Here, there were insufficient facts to lead a reasonable police officer to believe that Mr. Zieglmeier was operating under the influence. Therefore, the evidence obtained pursuant to the field sobriety tests, including the results of the field sobriety tests, and the subsequent blood test, should have been suppressed.

Had the circuit court properly granted suppression, Mr. Zieglmeier would not have entered a plea to the charge.[2] As such, Mr. Zieglmeier respectfully asks this Court to reverse the trial court and remand with directions to suppress the evidence and to allow Mr. Zieglmeier to withdraw his plea.

B. Standard of Review.

The right to be secure against unreasonable seizures is protected by the Fourth Amendment to the United States Constitution and Article 1, Section 11 of the Wisconsin Constitution.[3] The question of whether police conduct violated the Fourth Amendment is a question of constitutional fact. ***State v. Griffith***, 2000 WI 72, ¶23, 236 Wis. 2d 48, 613 N.W.2d 72.

A question of constitutional fact is reviewed under a two-step standard of review. ***State v. Hajicek***, 2001 WI 3,

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[2] "In a guilty plea situation following the denial of a motion to suppress, the test for harmless error on appeal is whether there is a reasonable possibility that the erroneous admission of the disputed evidence contributed to the conviction." ***State v. Semrau***, 2000 WI App 54, ¶22, 233 Wis. 2d 508, 608 N.W.2d 376.

[3] Appellate courts have "in large part interpreted the protections against unreasonable searches and seizures afforded by the state and federal constitutions coextensively." ***State v. Post***, 2007 WI 60, ¶10 n.2, 301 Wis. 2d 1, 733 N.W.2d 634 (internal citation omitted).

¶15, 240 Wis. 2d 349, 620 N.W.2d 781. The trial court's findings of historical fact are reviewed under the clearly-erroneous standard, while the court's determinations of constitutional facts are reviewed de novo. ***Id.***

C. The scope of the seizure was unreasonably expanded to conduct field sobriety tests in violation of the Fourth Amendment.

1. The State must show that any Fourth Amendment seizure is justified at its inception and reasonable in scope and duration.

A traffic stop is a seizure for purposes of the Fourth Amendment. ***State v. Arias***, 2008 WI 84, ¶29, 311 Wis. 2d 358, 752 N.W.2d 748 (citing ***Terry v. Ohio***, 392 U.S. 1 (1968) and characterizing a traffic stop as a "***Terry*** stop"). [4] In analyzing the constitutionality of a Fourth Amendment seizure, a reviewing court first determines whether it was justified at its inception by either probable cause or reasonable suspicion. ***Terry***, 392 U.S. at 20-22. Second, the court must determine whether the detention lasted no longer than was necessary to effectuate the purpose of the stop, and whether the investigative means used were "the least intrusive means reasonably available to verify or dispel the officer's suspicion." ***Florida v. Royer***, 460 U.S. 491, 500 (1983).

During a lawful seizure, the scope of the officer's inquiry may be broadened beyond the purpose of the stop, or a new investigation may begin, "if . . . the officer becomes

[4] The ***Terry*** standard has also been codified by Wis. Stat. § 968.24. In interpreting Wis. Stat. § 968.24 courts apply ***Terry*** and cases that followed. *See* ***State v. Williamson***, 113 Wis. 2d 389, 399–400, 335 N.W.2d 814 (1983).

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." ***State v. Betow***, 226 Wis. 2d 90, 94-95, 593 N.W.2d 499 (Ct. App. 1999). In analyzing the constitutionality of the new investigation, "[t]he validity of the extension is tested in the same manner, and under the same criteria, as the initial stop." ***Id.***

The State carries the burden of proving the constitutionality of a Fourth Amendment seizure. ***Post***, 301 Wis. 2d 1, ¶12 (citing ***State v. Taylor***, 60 Wis. 2d 506, 519, 210 N.W.2d 873 (1973)).

2. Here, the scope of the seizure was unreasonable because the State failed to prove that reasonable suspicion justified administering field sobriety tests.

Mr. Zieglmeier does not challenge the initial stop. Pursuant to Wis. Stat. § 346.57(5), no person shall drive a vehicle in excess of any speed limit established pursuant to law and indicated by official signs. The trial court found that Mr. Zieglmeier was driving over the speed limit. (19:16; App. 116). Therefore, the initial stop was justified by probable cause of a law violation.

However, the seizure was unconstitutional in its scope and duration because law enforcement conducted field sobriety tests without legal justification. Before compelling a person to perform field sobriety tests, an officer must have reasonable suspicion that the person has been driving after the person "has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle."

See WIS JI-CRIMINAL 2663A. The question is "whether the officer discovered information subsequent to the initial stop which, when combined with information already acquired, provided reasonable suspicion [of] driving while under the influence of an intoxicant." ***State v. Colstad***, 2003 WI App 25, 260 Wis. 2d 406, 659 N.W.2d 394.

"Reasonable suspicion" is "suspicion grounded in specific, articulable facts and reasonable inferences from those facts, that the individual has committed [or was committing or is about to commit] a crime. An inchoate and unparticularized suspicion or hunch . . . will not suffice." ***State v. Waldner***, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996) (internal citation omitted). The test for reasonableness is objective and common sense. It asks what a reasonable police officer would reasonably believe under the circumstances, in light of his or her training and experience. ***Id.*** at 56.

Here, the circumstances did not establish reasonable suspicion of driving under the influence of an intoxicant. Officer Pilsner pulled Mr. Zieglmeier over for speeding. There was no indication of swerving or other unsafe driving. There were no citizen complaints regarding Mr. Zieglmeier's driving. When Officer Pilsner activated her emergency lights, Mr. Zieglmeier responded properly by pulling into a parking lot. He answered Officer Pilsner's questions appropriately and did not seem disoriented or confused. There was no indication that when Mr. Zieglmeier was asked to exit his vehicle, he stumbled or otherwise appeared off balance. It was approximately 2:00 p.m. on a Sunday afternoon in October. It was not bar closing time, which has been held to be a suspicious factor in other cases due to the increased number of intoxicated drivers at that time of night. *See e.g.*,

Post, 301 Wis. 2d 1, ¶36 (driving was less suspicious because it was not bar time).

Officer Pilsner did not testify that Mr. Zieglmeier slurred. She did not testify that he had red or glassy eyes. She did detect an odor of alcohol and Mr. Zieglmeier acknowledged drinking two beers. However, drinking beer before driving is not by itself unlawful. *See* WIS JI-CRIMINAL 2663A ("Not every person who has consumed alcoholic beverages is 'under the influence' as that term is used here. . .").

Officer Pilsner acknowledged telling Officer Albee that in her opinion the odor of alcohol was not strong enough to warrant field sobriety tests. (19:9; App. 109). This fact is significant, given that Officer Pilsner had been a police officer for 25 years, and therefore had decades of training and experience. (19:3; App. 103).

In addition to the speeding, odor of alcohol, and admission to drinking two beers, the trial court relied on the following factors in concluding that reasonable suspicion supported the field sobriety tests: (1) Mr. Zieglmeier's "poor judgment" as reflected by his decision to speed within a few blocks of his destination with the knowledge that he had an outstanding warrant, and (2) the court's impression that Mr. Zieglmeier seemed confused about the "insurance situation." (19:16-17; App. 116-17).

First, driving in excess of a posted speed limit is almost always an exercise in poor judgment, given that it is against the law. This factor is not specific enough to give rise to a reasonable inference of driving under the influence of an intoxicant. Otherwise, law enforcement could compel field sobriety tests during any speeding stop. Second, Officer Pilsner did not testify that Mr. Zieglmeier seemed

confused about his insurance or anything else. To the contrary she testified that he did *not* seem disoriented or "lost." (19:8; App. 108).

In ***State v. Gonzalez***, No. 2013AP002585-CR, unpublished slip op. (Ct. App. May 8, 2014) (App. 123-27)[5], this Court reversed the trial court's denial of a suppression motion on similar facts. There, law enforcement stopped the defendant's vehicle at approximately 10:07 p.m. based on a defective headlight. ***Id.*** ¶3. When the officer made contact with the defendant, the officer smelled the odor of intoxicants. ***Id.*** ¶4 The defendant was the only person in the vehicle, but denied drinking. The defendant did not display red eyes or slurred speech. ***Id.*** The officer proceeded with field sobriety tests. ***Id.*** ¶6.

This Court reversed. In response to the State's argument that the odor of alcohol was "enough" to support field sobriety tests, the court "repeat[ed] the point made by a standard jury instruction: 'Not every person who has consumed alcoholic beverages is 'under the influence'. . . . WIS JI-CRIMINAL 2663." ***Id.*** ¶13. *See also* ***County of Sauk v. Leon***, No. 2010AP001593, unpublished slip op. (Ct. App. Nov. 24, 2010) (no reasonable suspicion to perform field sobriety tests where the defendant smelled like alcohol and admitted to drinking one beer) (App. 128-32).

Moreover, the ***Gonzalez*** court found the time of day, 10:07 p.m., to be less suspicious than if the stop occurred during bar time. ***Gonzalez***, ¶16 ("Most cases addressing the time of day factor involve stops around midnight or later,

[5] Authored, unpublished opinions issued on or after July 1, 2009, may be cited for their persuasive value. *See* Wis. Stat. § 809.23(3)(b). In accordance with Wis. Stat. § 809.23(3)(c), a copy of any unpublished decision referenced herein is included in the appendix to this brief.

when there is a stronger inference that a higher percentage of people driving are intoxicated."). The ***Gonzalez*** court concluded that none of the facts alone or considered together amounted to reasonable suspicion of intoxicated driving, and therefore, the seizure was unlawfully extended to conduct field sobriety tests in violation of the defendant's Fourth Amendment rights.

This Court should reach the same conclusion here.

3. The evidence obtained subsequent to the field sobriety tests must be suppressed.

Under the exclusionary rule, the remedy for an unconstitutional seizure is to suppress the evidence it produced. ***State v. Washington***, 2005 WI App 123, ¶10, 284 Wis. 2d 456, 700 N.W.2d 305 (citing ***Wong Sun v. United States***, 371 U.S. 471, 484-85, 487–88 (1963)) ("we have consistently rejected . . . that a search unlawful at its inception may be validated by what it turns up."). This rule extends to derivative evidence acquired as a result of the illegal seizure, unless the state shows sufficient attenuation from the original illegality to dissipate that taint. ***State v. Carroll***, 2010 WI 8, ¶19, 778 N.W.2d 1.

When a defendant enters a plea following the trial court's denial of a suppression motion, and a reviewing court determines that the trial court erred, the defendant should be allowed to withdraw his or her plea unless the State can prove that there was no reasonable probability that the trial court's error contributed to the plea. ***Semrau***, 233 Wis. 2d 508, ¶36. Here, the State cannot meet this test because granting suppression would have eliminated the State's evidence against Mr. Zieglmeier—including the results of the field sobriety tests and the subsequent blood test.

CONCLUSION

For the reasons stated above, Mr. Zieglmeier respectfully asks this Court to reverse the trial court and remand with directions to allow Mr. Zieglmeier to withdraw his plea and to grant suppression of the evidence obtained pursuant to the field sobriety tests.

Dated this 9th day of December, 2016.

Respectfully submitted,

COLLEEN MARION
Assistant State Public Defender
State Bar No. 1089028

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-5176
marionc@opd.wi.gov

Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,977 words.

CERTIFICATE 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 9th day of December, 2016.

Signed:

COLLEEN MARION
Assistant State Public Defender
State Bar No. 1089028

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-5176
marionc@opd.wi.gov

Attorney for Defendant-Appellant

A P P E N D I X

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Page

CERTIFICATION AS TO APPENDIX

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 § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) 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 the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation 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 9th day of December, 2016.

Signed:

COLLEEN MARION
Assistant State Public Defender
State Bar No. 1089028

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-5176
marionc@opd.wi.gov

Attorney for Defendant-Appellant