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COURT OF APPEALS
STATE OF WISCONSIN
DISTRICT III

CASE NO. 2016AP002168

STATE OF WISCONSIN,

Plaintiff-Appellant

v.

NEIL R. HEBERT,

Defendant-Respondent.

APPEAL FROM AN ORDER GRANTING SUPPRESSION OF EVIDENCE
AND DISMISSAL IN EAU CLAIRE COUNTY CIRCUIT COURT
THE HONORABLE WILLIAM M. GABLER, SR., PRESIDING

BRIEF OF PLAINTIFF-APPELLANT

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ISSUE PRESENTED FOR REVIEW

DID TROOPER DESPREZ HAVE REASONABLE SUSPICION TO EXTEND
THE TRAFFIC STOP OF THE VEHICLE DRIVEN BY NEIL HEBERT FOR
FURTHER INVESTIGATION OF POSSIBLE DRIVING WHILE UNDER THE
INFLUENCE OF AN INTOXICANT?

THE COURT DECIDED: NO

STATEMENT OF ORAL ARGUMENT AND PUBLICATION

Oral argument should not be necessary for the prosecution of this appeal. It is expected that the parties' legal briefs will fully present and address the issue presented for appeal. Additionally, the court's decision need not be published since it is anticipated that it will be controlled by existing case law.

STATEMENT OF FACTS

On May 22, 2016 at approximately 2:35 a.m., Joseph Desprez, while working as a State Trooper for the Wisconsin State Patrol, was traveling westbound on Harding Avenue in the City and County of Eau Claire when he observed a vehicle that appeared to be traveling faster than the posted speed limit (16:5-6). Trooper Desprez used his front moving radar device to confirm his observation that the suspect vehicle was traveling 37 miles per hour in a posted 30 mile per hour zone (16:6). Trooper Desprez initiated a traffic stop of the suspect vehicle and made contact with the driver (16:5-7). Upon making contact with the vehicle at the driver's side window, Trooper Desprez explained the reason for the traffic stop and requested identification from the driver (16:8). The driver of the vehicle was identified by a Wisconsin photo driver's license as Neil R. Hebert (16:5). While Trooper Desprez spoke with Hebert, he saw that Hebert's eyes were glassy and he detected a moderate odor of intoxicants coming from the vehicle (16:8). Upon initial contact, Trooper Desprez was not able to confirm that the odor of intoxicants was coming from Hebert, as there was also a passenger in the vehicle (16:9).

Trooper Desprez asked Hebert where he was coming from and whether he had consumed any alcohol that evening (16:10). Hebert replied that he had been at an event on Water Street where he had "a couple" of Riverwest Stein beers (16:10). Trooper Desprez then requested that Hebert exit the vehicle to perform

standard field sobriety tests in order to determine whether he could safely operate a motor vehicle (16:10-11). Trooper Desprez conducted the field tests, as he had approximately 100 times in the previous two years, and identified 5 of 6 clues on the Horizontal Gaze Nystagmus (HGN) test, 4 out of 8 clues on the walk and turn test and 2 of 4 clues on the one-leg stand test (16:11-14). Trooper Desprez then asked Hebert to provide a breath sample for a PBT which Hebert did and recorded a value of .138 percent (16:14-15).

Hebert filed a Motion to Suppress Evidence on September 23, 2016 (9). A hearing on that Motion was held on October 25, 2016 (16). The court granted the Motion to Suppress Evidence (16:27-28 and 12). The court ordered dismissal of the case in an Order to Dismiss filed March 6, 2017 (20). The State filed a Notice of Appeal on November 1, 2016 (14). The Court of Appeals on April 7, 2017 ordered that it has jurisdiction over the appeal (19).

ARGUMENT

THE COURT ERRONEOUSLY GRANTED HEBERT'S MOTION TO SUPPRESS WHEN IT RULED TROOPER DESPREZ LACKED REASONABLE SUSPICION TO EXTEND THE TRAFFIC STOP FOR FURTHER INVESTIGATION.

A motion to suppress evidence from a traffic stop presents a question of constitutional fact. *State v. Post*, 2007 WI 60, ¶8, 301 Wis. 2d 1, 733 N.W. 2d 634. The circuit court's findings of historical fact are upheld unless they are clearly erroneous. *Id.* The appellate court reviews the application of constitutional

principles to historical facts independent of the circuit court's conclusions. *State v. Houghton*, 2015 WI 79, ¶18, 364 Wis. 2d 234, 868 N.W. 2d 143.

The court made findings of fact that Trooper Desprez made a traffic stop of the vehicle driven by Hebert for traveling 37 miles per hour in a 30 mile per hour zone at approximately 2:30 a.m. (16:24). The court found that Trooper Desprez smelled a moderate odor of alcohol emanating from the inside of the vehicle and that Hebert admitted he had had a couple of drinks on Water Street at an event with co-workers that had taken place there (16:25). Trooper Desprez's indicators of possible impaired driving consisted of his observation of Hebert's glassy eyes, the moderate odor of alcohol coming from inside the vehicle, and Hebert's concession that he had a couple of drinks, beers, on Water Street (16:25). The court also noted that "everybody says they've had a couple of beers. That's the standard answer for anybody that is stopped, even though they may have had ten beers. But some people do have a beer or a couple of beers" (16:26).

The court found that once Trooper Desprez asked Hebert to get out of the car and to perform field sobriety tests, a reasonable officer, such as Trooper Desprez, could conclude that there was reasonable suspicion or probable cause to arrest Hebert (16:26). The court then held that Trooper Desprez did not have reasonable suspicion to ask Hebert to step out of the vehicle to "turn this from a speeding ticket case into an OWI case" (16:27).

The court cited *State v. Betow*, 226 Wis.2d 90, 593 N.W.2d 499 (Ct. App. 1999) (“[T]he scope of the officer’s inquiry, or the line of questioning, may be broadened beyond the purpose for which the person was stopped only if additional suspicious factors come to the officer’s attention[.]”) . The court then found there could be alternate explanations for each of the factors Trooper Desprez observed which would not lead to the conclusion of intoxication. The court said that it’s common knowledge that everyone has glassy eyes at 2:30 in the morning, if they’ve been up all day, although nothing in the record supported a finding that Hebert had been up all day, or that everyone has glassy eyes at 2:30 in the morning. The court then said “well, then anybody that’s had a beer or two that’s driving on the road at any time of day when stopped by a law enforcement officer, if there’s a moderate smell of alcohol, with glassy eyes, and an admission that a person has had a couple of beers, then everybody that fits that description would be subject to having to get out of the car and do field sobriety tests. That’s not the law.” (16:29).

The question is whether Trooper Desprez possessed reasonable suspicion based on his observations to extend the stop to investigate whether Hebert was intoxicated. “Whether a search or seizure passes muster under the Fourth Amendment depends on whether it is reasonable. *Whren v. United States*, 517 U.S. 806, 810(1996). To that end, law enforcement officers may briefly detain an individual when, based on their training and experience, specific, articulable facts

allow them to draw a rational inference of wrongful conduct. *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968); *see also State v. Waldner*, 206 Wis. 2d 51, 60, 556 N.W. 2d 681 (1996). This test is one of common sense, meant to strike “a balance between individual privacy and the societal interest in allowing the police a reasonable scope of action in discharging their responsibility.” *Waldner*, 206 Wis. 2d at 56. Under the totality of the circumstances, factors that are innocent when considered in isolation may be taken together to constitute suspicious conduct. *Id.* at 58. Once such suspicious conduct has been observed, law enforcement officers are not required to hypothesize explanations that may dispel suspicion, as the purpose of a temporary detainment is to resolve such ambiguity. *State v. Anderson*, 155 Wis.2d 77, 454 N.W. 2d 763 (1990).” *State of Wisconsin v. Winberg*, No. 2016AP108, ¶19, unpublished slip op. (WI App January 10, 2017) cited for persuasive value pursuant to WIS. STAT. RULE 809.23(3)(b).

The court concluded that having glassy eyes at 2:30 in the morning could have an innocent explanation – “it’s common knowledge that everybody has glassy eyes at 2:30 in the morning, if they’ve been up all day.” The court concluded that “a person who has had one or two beers may emanate a moderate odor of alcohol,” which may or may not be true. The court also stated that “[t]hat’s the standard answer for anybody that is stopped, even though they may have had ten beers.” The court concluded that the fact that it’s 2:30 in the morning is not a sufficient indicator either.

The court did not consider that failure to control the speed of one's vehicle within the posted speed limit at 2:30 in the morning might be an indicator of impaired driving, as an impaired driver might be able to keep his vehicle safely within the designated lane of travel, but might be unable to divide his attention so as to keep the vehicle's speed within the legal limit. The court did not consider that Hebert might have underreported the amount of alcohol he had consumed, although the court did recognize that "everyone" when stopped says they had two beers even if they drank ten. The court did not consider that the moderate odor of intoxicants Trooper Desprez smelled may have been the result of Hebert having consumed more than two beers or that Hebert's glassy eyes might be an indicator of intoxication, such that field sobriety testing would be the prudent method of determining whether Hebert was safe to operate a motor vehicle. As the *Waldner* court noted, factors that are innocent when considered in isolation may be taken together to constitute suspicious conduct, under the totality of the circumstances.

Had Trooper Desprez discontinued his investigation, and been unable to ask Hebert to step out of the vehicle to separate him from his passenger, after having smelled the moderate odor of intoxicants and observed that Hebert's eyes were glassy, and after he heard Hebert admit to drinking alcohol, Trooper Desprez would have been placed in the difficult position of permitting Hebert to drive away, hoping that Hebert was not intoxicated to the extent that he could not operate the vehicle safely. Concerns for public safety justified the limited scope of

the extension of the stop since Trooper Desprez became aware of factors that would reasonably lead to an inference of wrongful conduct. Had Hebert passed the field sobriety tests, Trooper Desprez would have quickly satisfied himself that Hebert could safely drive away, and that the public would not be at risk from his driving.

CONCLUSION

After Trooper Desprez initially stopped Hebert's vehicle for speeding, his observations under the totality of circumstances, that a moderate odor of intoxicants was coming from the vehicle, that the odor could be identified as coming from Hebert after he was removed from the vehicle, that Hebert admitted to drinking alcohol near bar closing time, and that his eyes were glassy, permitted a continued investigation into possible intoxication of the driver. Because Trooper Desprez had reasonable suspicion to extend the traffic stop for continued investigation, the orders of the court suppressing evidence and dismissing the case should be reversed.

Dated this 22nd day of May, 2017.




Derek Dominguez
Assistant District Attorney
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cc: Attorney Sarah Harless

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is eight (8) pages and 1,841 words.

Dated this 22nd day of May, 2017.

A handwritten signature in black ink, appearing to read 'D. Dominguez', written over a horizontal line.

Derek Dominguez
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