STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2017 AP 000866-CR
Green County Circuit Court Case 2015 CT 000137

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

BRADLY E. AMMANN,

Defendant-Appellant.

ON APPEAL FROM AN ORDER DENYING SUPPRESSION AND A JUDGMENT OF CONVICTION ENTERED IN THE GREEN COUNTY CIRCUIT COURT, THE HONORABLE THOMAS J. VALE PRESIDING.

BRIEF AND APPENDIX OF THE PLAINTIFF-RESPONDENT

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STATEMENT OF THE ISSUE

Whether in Green County Case 15 CT 137 the trooper had the requisite reasonable suspicion to extend the traffic stop to investigate Ammann's impairment and request that he perform field sobriety tests.

The trial court said: Yes.

STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The State does not request oral argument. Oral argument is not necessary because "the briefs fully present and meet the issues on appeal and fully develop the theories and legal authorities on each side so that oral argument would be of such marginal value that it does not justify the additional expenditure of court time or cost." Wis. Stat. § 809.22 (2) (b) (2005-06). Publication is not necessary.

STATEMENT OF THE CASE

Bradly Ammann was charged in Green County Case 15 CT 137 with Operating While Intoxicated (OWI) as a 4th Offense, contrary to Wis. Stat. 346.63 (1)(a) and Operating with Prohibited Alcohol Concentration (PAC) as a 4th Offense, contrary to Wis. Stat. 346.63(1)(b). (R.03.) Ammann filed a motion to suppress, alleging: (a) the arresting officer did not have the necessary reasonable suspicion to extend the traffic stop; and(b) the arresting officer did not have probable cause to believe that Ammann was intoxicated from the field sobriety tests and therefore the preliminary breath test results must be suppressed. (R.14.)

A hearing was held on the motion on April 21, 2016. (R.49:1.) The State filed a brief in Opposition to the Motion to Suppress on April 29, 2016.(R.16.) Ammann filed a "post-trial" brief on May 23, 2016 and supporting affidavit on May 24, 2016.(R.17,18.) The trial court found that the trooper was justified in extending the stop and could request the pbt, and therefore denied Ammann's motion to suppress via oral ruling on May 25, 2016. (R.50:9.)

Ammann filed a brief in support of motion for reconsideration and two supporting affidavits on November

1, 2016 (R.19,20,21.) The trial court denied Ammann's motion for reconsideration on December 19, 2016. (R.51:22.)

Ammann then entered a plea of no contest to operating a motor vehicle while intoxicated as a 4th offense on December 19, 2016. (R.51:26.) The second count of operating with a prohibited alcohol concentration was dismissed, and the court withheld sentencing. (R.51:26,30-31.) Ammann filed an appeal (2017AP000255) which was dismissed by the Court of Appeals because the trial court had not yet entered the final judgment of conviction. (R.45.) The trial court sentenced Ammann on April 28, 2017 and stayed sentence pending appeal. (R.40:1-2; 52:1-9.) Ammann again filed a notice of appeal. (R.41.)

STATEMENT OF THE FACTS

On Saturday, September 5, 2015, at approximately 5:00 p.m., State Trooper Jeffrey Hill, a trooper for 31 years, was on duty in an unmarked squad car heading eastbound on Highway 11 in Green County, Wisconsin (R.49:2-3.) He observed an oncoming westbound vehicle which he believed to be speeding and used his properly-operating radar device to determine that the vehicle was travelling 74 mph on a roadway with a 55 mph speed limit. (R.49:4-6.) He conducted a traffic stop on the vehicle, which quickly stopped. (R.49:8).

The trooper approached the vehicle on the passenger side and observed Ammann in the driver's seat and a female in the front passenger seat. (R.49:9-10.) The trooper told Ammann about his speed, and Ammann stated that he didn't realize it until he looked down. (R.49:11.) Amman stated that they were on their way home from a wedding reception. (R.49:11.) The trooper could smell an odor of intoxicants coming from the vehicle, although at that time he could not tell exactly who it was coming from.(R.49:11.) The trooper asked if they had been drinking, and Ammann responded that he had had one just before they left, the passenger said

that she had been drinking, and Ammann said that the passenger had more to drink than he did. (R.49:11.)

The trooper told Ammann that he would be issued a citation for speeding; the trooper went to the driver's side and made contact with Ammann. (R.49:11-12.) The trooper asked Ammann to get out of the vehicle and stand toward the front of the trooper's vehicle. (R.49:12.) The trooper wanted to see if he could smell the odor of intoxicants coming from Ammann, which he did. (R.49:12.) His purpose for originally getting Ammann out of the vehicle was to see if the odor was coming from Ammann. (R.49:32.) Outside the vehicle, Ammann stated that he had the one drink, and it may have been a stiff one or a double. (R.49:14).

The trooper was trained and experienced in conducting National Highway Traffic Safety Administration standardized field sobriety tests and alternative potential field sobriety tests. (R.49:13). The trooper conducted field sobriety tests with Ammann. (R.49:14-16.) Ammann had some difficulty stating the alphabet twice, pausing the first time and the second time stating A,B,C,D,L,M,N,O,P and finishing to the end. (R.49:15.) The trooper saw four of six possible clues on the horizontal gaze nystagmus test.

(R.49:15.) The trooper saw two out of eight clues on the walk and turn test, including that he missed heel to toe and took ten steps instead of nine. (R.49:16.) The trooper did not observe any clues on the one leg stand test. (R.49:16.) Based upon his training and experience and observations of four clues on the HGN test and two clues on the walk and turn test, the trooper believed indications were that Ammann was impaired and that he was under the influence of intoxicants and would likely be arrested for that. (R.49:15-16,18). The trooper then administered a preliminary breath test with Ammann and received a reading of .068. (R.49:16.) The trooper told Ammann that he could tell that Ammann had more than one drink, and Ammann responded that he had a drink prior and then had one just before he left. (R.49:53.) The trooper decided to issue a speeding citation and did not intend to arrest Ammann for impaired operating at that time. (R.49:17.)

The trooper then went to his vehicle and ran Ammann's driving record, as was his standard procedure. (R.49:19-20.) The trooper then learned that Ammann had three prior convictions for operating under the influence and that his prohibited alcohol concentration was .02.(R.49:20.) Based

upon this prohibited alcohol concentration, the trooper placed Ammann under arrest. (R.49:20-21.)

ARGUMENT

I. THE TRIAL COURT CORRECTLY DENIED AMMANN'S MOTION TO SUPPRESS WHEN THE TROOPER PROPERLY EXTENDED THE STOP TO INVESTIGATE ADDITIONAL SUSPICIOUS FACTORS INDICATING POSSIBLE IMPAIRED DRIVING.

During a traffic offense stop the driver may be asked questions reasonably related to the nature of the stop, including his or her destination and purpose. *State v. Betow*, 226 Wis.2d 90, 93, 593 N.W.2d 499 (Ct. App. 1999). The police may order the driver to exit the vehicle *(without any specific reason*) without violating the Fourth Amendment once a vehicle has been lawfully stopped for a traffic violation. *State v. Johnson*, 2007 WI 32, ¶ 23, 299 Wis.2d 675, 692, 729 N.W.2d 182; *State v. Richardson*, 156 Wis.2d 128, 143, 456 N.W.2d 830 (1990); *Arizona v. Johnson*, 555 U.S. 323, 331, 129 S.Ct. 781, 786 (2009); *Brendlin v. California*, 551 U.S. 249, 258, 127 S.Ct. 2400, 2407 (2007); *United States v. Tinnie*, 629 F.3d 749, 751 (7th Cir. 2011).

An officer may extend a traffic stop for further investigation if, during the stop, the officer becomes aware of additional suspicious circumstances that give rise to a reasonable suspicion that the driver has committed or is committing an offense distinct from that prompting the initial stop. The validity of the extension is tested in the

same manner and under the same criteria as the initial stop. *State v. Bons,* 2007 WI App 124, at ¶ 13, 301 Wis.2d 227, 731 N.W.2d 367, *Betow,* 226 Wis.2d 94-95, 98. “Under the Fourth Amendment, we have held, a policeman who lacks probable cause but whose "observations lead him reasonably to suspect" that a particular person has committed, is committing, or is about to commit a crime, may detain that person briefly in order to "investigate the circumstances that provoke suspicion." *United States v. Brignoni-Ponce*, 422 U.S. 873, 881, 95 S.Ct. 2574, 45 L.Ed.2d 607(1975).

The issue is the reasonableness of the police actions-the reasonableness of the continuation - extension of the seizure of the defendant that was lawful at its inception. *State v. Arias*, 2008 WI 84, at ¶¶ 45, 47, 311 Wis.2d 358, at 387-89, 752 N.W. 2d 748.

The required level of information/evidence needed to request field sobriety tests is reasonable suspicion, not probable cause. See *County of Dane v. Campshure*, 204 Wis.2d 27, at 34, 552 N.W.2d 876 (Ct. App. 1996). It is a totality of the circumstances test. *State v. Waldner,* 206 Wis. 2d 51, 58, 556 N.W.2d 681 (1996).

Reasonable suspicion can be formed from "a series of acts, each of which are innocent in themselves." *State v.*

Young, 212 Wis. 2d 417, 430, 569 N.W.2d 84 (Ct. App. 1997). Also, *State v. Waldner*, 206 Wis. 2d 51, 556 N.W.2d 681 (1996).

The existence of alternative innocent explanations do not invalidate reasonable suspicion:

> Suspicious conduct by its very nature is ambiguous, and the principal function of the investigative stop is to quickly resolve that ambiguity. Thus, when a police officer observes lawful but suspicious conduct, if a reasonable inference of unlawful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, police officers have the right to temporarily detain the individual for the purpose of inquiry. Police officers are not required to rule out the possibility of innocent behavior[.]

Waldner, 206 Wis. 2d at 60 (citation omitted).

The Supreme Court has made clear that it is the court's judgment of the objective value of the facts, rather than the officer's subjective assessment, which is relevant to the determination of whether the intrusion is reasonable:

> [I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate?

Terry v. Ohio, 392 U.S. 1, 21-22, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

A “moderate to strong odor of intoxicants” and bloodshot and glassy eyes, where no driving behavior was observed and the defendant admitted drinking an hour before, has been found to be sufficient. *Dane County v. Judd*, 2012 Wi App 97, 344 Wis.2d 125, 820 N.W.2d 156.

There was reasonable suspicion to justify administering field sobriety tests when there was a strong odor of intoxicants coming from a vehicle parked late at night in a business parking lot exit with the lights off, in which defendant was driver and sole occupant, and defendant admitted to drinking "a little." *State v. Resch,* 2001 WI App 75, ¶¶17-18, 334 Wis. 2d 147, 799 N.W. 2d 929.

In an unpublished case, cited for persuasive value, the District III Court of Appeals found reasonable suspicion for field sobriety tests under very similar facts to these:

> We conclude that, even before Nechodom requested Fellinger to recite the alphabet and count backward, Nechodom had reasonable suspicion to believe that Fellinger was operating while intoxicated. Although Nechodom did not observe glassy eyes or slurred speech before requesting Fellinger perform field sobriety tests, there is no requirement that officers make these observations before requesting field sobriety tests. Instead, the speeding, which showed Fellinger's nonconformance with the law, combined with the odor of intoxicants, the admission of drinking, and the time of night, 1:50 a.m., around "bar time," amounts to

> reasonable suspicion that Fellinger was operating his vehicle while intoxicated.

Town of Freedom v. Fellinger, 2013 WI App 115, ¶24, 350 Wis. 2d 507, 838 N.W.2d 137, unpublished, No.2013AP614 (August 6, 2013).

In another unpublished case just decided September 26, 2017, cited for persuasive value, the District I Court of Appeals held that when a driver was stopped at 2:20 a.m. for travelling approximately 65 miles per hour in an area with a speed limit of fifty miles per hour, the deputy smelled the odor of alcoholic beverage from the vehicle, and the driver admitted she had consumed alcohol before dinner at about nine or nine-thirty, the deputy properly requested that the driver perform field sobriety tests. *State v. Wallk*, No. 2017AP61, ¶¶2-4,16 (WI App. September 26, 2017)

> Wallk misunderstands the limited demands of reasonable suspicion. As noted above, where specific articulable facts give rise to suspicion, an officer has the right to investigate "notwithstanding the existence of other innocent inferences that could be drawn." That is the case here. The odor of intoxicants and the admission from the driver of drinking earlier in the evening was "information [discovered] subsequent to the initial

stop[.]" This information, "[c]ombined with information already acquired"—namely, the fact that the driver was speeding at 2:22 a.m.—created "a reasonable inference of unlawful conduct [that] can be objectively discerned." *See id.* Therefore reasonable suspicion existed to continue the detention of Wallk for field sobriety tests.

State v. Wallk, No. 2017AP61, ¶16 (WI App. September 26, 2017)

In another unpublished case, cited for persuasive value, the District II Court of Appeals also found sufficient basis under similar circumstances:

> We disagree with Valenti's assertion that the odor of intoxicants was the only fact supporting Hlinak's suspicion that Valenti was under the influence. Valenti was speeding—going 17 mph over the posted speed limit—and driving in a manner that Hlinak considered unsafe when Valenti passed the farm vehicle. Both observations, one illegal and one unsafe, demonstrate suspicion of impaired judgment on Valenti's part, sufficient to warrant further investigation by Hlinak when combined with the odor of intoxicants. *Cf. Post,* 301 Wis.2d 1, ¶ 24, 733 N.W.2d 634 (“We therefore determine that a

> driver's actions need not be erratic, unsafe, or illegal to give rise to reasonable suspicion."); *County of Sauk v. Leon,* No.2010AP1593, unpublished slip op. ¶ 20 (WI App Nov. 24, 2010) (suggesting that speeding at bar time may support reasonable suspicion). We conclude that the odor of intoxicants, unsafe driving, and speeding create reasonable suspicion under the totality of the circumstances that Valenti was under the influence. *See Town of Grand Chute v. Thomas,* No.2011AP2702, unpublished slip op. ¶ 9 (WI App May 30, 2012) (finding reasonable suspicion where defendant was speeding, weaving within his lane, and the officer smelled an odor of intoxicants). Hlinak properly extended the traffic stop to investigate further and administer field sobriety and breathalyzer tests.

State v. Valenti, 2016 WI App 80, ¶ 10, 372 Wis. 2d 186, 888 N.W.2d 23, unpublished, No. 2016AP662 (September 7, 2016).

In each of these three unpublished cases, the driver is stopped for speeding, and an odor of intoxicants is detected. In two cases there is an admission of drinking, and the time of night is around 'bar time,' and these factors are found to be sufficient to extend the stop to investigate further. In the third case there is no admission of drinking, and it is

not ‘bar time,’ but the officer observed some unsafe but not illegal passing of a farm vehicle.

In the case before the court, Ammann was stopped for speeding, an odor of intoxicants is detected, there is an admission of drinking, and although it is not ‘bar time,’ Ammann admitted that he was coming from a wedding reception. This is all information that the trooper had before even asking Ammann to exit the vehicle. These are all appropriate considerations in the totality of the circumstances, which the trooper observed and articulated to the trial court, and upon which the trial court could properly base its ruling. As in the cases cited, they are sufficient to support the trooper’s attempts at additional investigation.

The issue before this Court is the trial court’s decision denying Ammann’s motion to suppress. The court made findings of fact in its original oral ruling and again at the motion for reconsideration. These findings of fact are not clearly erroneous.

Ammann was properly stopped for speeding. Common sense, the courts above, and the trial court all found the speeding may be considered in the totality of the circumstances analysis of whether the trooper could extend the stop. The trooper’s failure to cite it on cross

examination or what defense counsel ‘presumes’ about what NHTSA studies might show is irrelevant. (Defense brief at 16).

The trial court heard testimony that Ammann stated he was coming from a wedding and that both he and his passenger had been drinking, although Ammann initially stated he only had one drink and his passenger had more. The trooper could initially detect the odor of intoxicants coming from the vehicle, but could not determine whether any of it was coming from the driver.

Each step the trooper took was a reasonable extension of the stop to further investigate. Before any complained of behavior occurred at all, the unpublished cases support requesting field sobriety tests, but the trooper first gets Ammann out to ensure the odor is coming from him. It was reasonable for the trooper to further investigate whether the odor was coming from Ammann, and he asked him out of the vehicle in order to do so.

It was then reasonable for the trooper to inquire further, at which point Ammann’s estimate of his alcohol consumption became a bit higher. It was reasonable for the trooper to engage in additional field testing to see if Ammann’s alcohol consumption was at a level where he was

impaired and his continuing on his way might be dangerous to the public.

II. THE TRIAL COURT DID NOT ERRONEOUSLY EXERCISE ITS DISCRETION IN MAKING ITS RULING REGARDING THE REQUEST THAT AMMANN SUBMIT TO A PRELIMINARY BREATH TEST, AND THERE IS NO MEANINGFUL REMEDY.

After extensive discussion of the trooper's reasonable suspicion to extend the stop, the trial court does state:

> To continue that investigation you need reasonable suspicion again, articulable facts, totality of the circumstances. We have got a speeding violation, an admission of drinking, odor of intoxicants, and then asking for the field sobriety test I think at that point the officer did have reason to continue that stop, and because of the clues that were given during the field sobriety test I think that gave him reasonable suspicion that he could then ask for the PBT. PBT by itself was under the limit, but then again he discovered the lower standard because of the prior convictions.
>
> I think under these circumstances every case is different factually here when we get into these issues

that he was justified in extending that stop and investigation.

(R.50:9.)

The trial court is in the midst of ruling about the reasons that provided the trooper with reasonable suspicion to extend the traffic stop. This was a simple misstatement in the midst of the ruling on the germane issue. The trial court had consistently and clearly been briefed on the standard for administration of a preliminary breath test by both parties and there was no dispute on the issue. (R.14:5;16:5.)

There appears to be no purpose to this portion of the motion and no clear meaningful remedy.

"…when the driver is known to be subject to a .02 PAC standard, the officer knows it would take very little alcohol for the driver to exceed that limit, and the officer smells alcohol on the driver. We now hold that under these circumstances, there is probable cause to request a PBT breath sample." *State v. Goss*, 2011 WI 104, ¶2, 338 Wis.2d 72, 75-76, 806 N.W.2d 918, 920.

Frankly, the admission of the preliminary breath test did nothing but help Ammann, and for a short time, delay his arrest. If the continuation of the traffic stop for

further investigation was appropriate, which the trial court found that it was, and if the trooper was going to run Ammann's driving record no matter what, which the testimony universally supports and which the trial court also found, this preliminary breath test result is almost entirely irrelevant.

The trooper observed Ammann driving, and speeding, and had an admission of drinking from Ammann, and smelled the odor of intoxicants in the vehicle prior to any behavior remotely complained of by Ammann. The trooper ran his driving record and determined he had three prior offenses and was a .02 standard applied to him. That, in and of itself, supports an arrest for operating with a prohibited alcohol concentration. Additionally, the trooper had all of his observations on the field sobriety tests. Despite the Defense Attorney's attempts to attack the standardized field sobriety tests, the trooper did not agree, and the court did not find, that they were compromised or could not be considered. (R.49:45-49,50:9.)If the trooper had given no pbt at all, there would have been sufficient basis and Ammann would have been arrested for OWI.

Even if the trial court erroneously believed that the standard for administration of the pbt was simple

reasonable suspicion, and even if the trooper did not have probable cause to believe that he was impaired in order to administer the pbt, and even if the pbt result was suppressed, the trooper still clearly had a basis to arrest Ammann for operating with a prohibited alcohol concentration, likely without even Ammann’s performance on standardized field sobriety tests, given that the purpose of the standardized field sobriety tests is to assist officers in determining if drivers are impaired and would not be expected to provide much information regarding individuals with alcohol levels in the .02-.04 range. The pbt result cannot be used at trial. Any possible error would be entirely harmless, as nothing supporting the State relies upon the pbt result.

CONCLUSION

Based on the above analysis, this court should uphold the trial court's denial of Ammann's motion.

Dated this 20th day of October, 2017, at Monroe, WI.

Respectfully submitted:

_____

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CERTIFICATION OF FORM AND LENGTH

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 margin on left side and 1 inch margins on the other 3 sides. The length of this brief is _____ pages.

Signed,

_____
Attorney Laura M. Kohl
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CERTIFICATION OF MAILING

I certify that on this 20th day of October, 2017, pursuant to sec. 809.80(3)(b) and (4), the original and nine copies of the Brief of Plaintiff-Respondent were served upon the Wisconsin Court of Appeals via United States first-class mail in properly addressed, postage paid envelopes. Three copies of the same were served upon counsel of record for Defendant-Appellant via United States first-class mail in properly addressed, postage paid envelopes.

Signed,

_____
Attorney Laura M. Kohl
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CERTIFICATION OF ELECTRONIC BRIEF

I certify that on this 20th day of October, 2017, I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of sec. 809.19(12) of the Wisconsin Statutes. I further certify that this electronic brief is identical in content and in 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.

Signed,

_____

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CERTIFICATION OF SUPPLEMENTAL APPENDIX CONTENT

I hereby certify that filed with this brief, either as a separate document or as part of this brief, is a supplemental appendix that complies with the confidentiality requirements under 809.19(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 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.

Signed,

_____

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