STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2017AP000866

STATE OF WISCONSIN,

Plaintiff-Respondent

v.

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.

REPLY BRIEF AND APPENDIX OF DEFENDANT-APPELLANT, BRADLY E. AMMANN

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ARGUMENT

I. There was insufficient reasonable suspicion to extend the traffic stop of Mr. Ammann.

A seizure justified only by a police-observed traffic violation becomes unlawful if it is prolonged beyond the time reasonably required to complete the mission of issuing a ticket for the violation. ***Rodriguez v. United States***, 135 S. Ct. 1609, 1612, 191 L. Ed. 2d 492 (2015). An officer's inquiries into matters unrelated to the justification for the traffic stop are not permitted if they measurably extend the duration of the stop. ***Arizona v. Johnson***, 555 U.S. 323, 333, 129 S. Ct. 781, 788, 172 L. Ed. 2d 694 (2009)

In this case, Trooper Hill extended the original traffic stop into a separate and distinct OWI investigation when he left the passenger window. At that point, all tasks related to the initial traffic had been completed and Trooper Hill testified that he would normally have returned directly to his cruiser to write the traffic citation. (49:31) However, in this case, he testified that he decided to extend the traffic stop to conduct further OWI investigation. (Id.) Trooper Hill proceeded to the driver's side of the vehicle, had Mr. Ammann exit his vehicle, and then repositioned his own cruiser to capture in-squad video of the field sobriety testing. (54:17:06:55-17:08:25[1]) These actions measurably extended the original traffic stop and were conducted before Trooper Hill observed any odor of intoxicants coming from Mr. Ammann.

[1] Trooper Hill's in-squad video is "time-stamped" and this is used for the citation to the video evidence.

Trooper Hill's extension of the initial traffic stop may have been permissible if he had evidence supporting a reasonable suspicion of a new and separate offense. During a valid traffic stop, if an officer becomes aware of additional suspicious factors or additional information that would give rise to a reasonable suspicion that further criminal activity was afoot, the initial stop may be extended and a new investigation begun. ***State v. Malone***, 2004 WI 108, ¶ 24, 274 Wis.2d 540, 683 N.W.2d 1.

The validity of the extension is tested in the same manner, and under the same criteria, as the initial stop. ***State v. Colstad***, 2003 WI App 25, ¶ 19, 260 Wis.2d 406, 659 N.W.2d 394. Thus, to extend a traffic stop to continue an OWI investigation, an officer must have a reasonable suspicion, grounded in specific articulable facts and reasonable inferences from those facts that the driver has consumed enough alcohol to impair his or her ability to drive. ***Id.***, ¶¶ 8, 19 (citation omitted).

In this case, Trooper Hill testified to observing the following "specific facts" prior to extending the traffic stop:

- At 5:00 p.m. on a clear and sunny day, Mr. Ammann and his wife were *stopped for speeding* while *returning home from a wedding* to let their dogs out. (*See* 54; 49:11)

- While conducting the traffic stop investigation at the passenger window, Trooper Hill testified that he noticed the *odor of intoxicants*. (49:11) He also testified it was *likely coming from Mr. Ammann's wife*, who had admitted she had been drinking and was sitting in the passenger seat. (49:11, 29) *Trooper Hill did not notice any odor of intoxicants coming from Mr. Ammann*.

- Trooper Hill testified that *Mr. Ammann stated he had one drink*. He also testified he had no reason to believe Mr. Ammann was not telling the truth. Finally, Trooper Hill testified that, based on his 31 years of law enforcement experience, consumption of one drink would not impair a person to the degree where it safely affects their driving.

Mr. Ammann's admission that he had one drink is, as Trooper Hill noted in his testimony, not evidence of impairment. In order to extend the initial traffic stop, Trooper Hill needed to have specific and articulable facts that Mr. Ammann had consumed enough alcohol to impair his ability to safely drive. Trooper Hill did stop Mr. Ammann for speeding. However, simply exceeding the speed limit is not evidence of intoxication or impairment.

In ***State v. Betow***, 226 Wis. 2d 90, 593 N.W.2d 499, (Ct. App. 1999), one of the published cases cited by the State, the reviewing court had to decide whether the officer had reasonable suspicion to extend a traffic stop. In that case: 1) it was late at night; 2) the defendant had been stopped for speeding; 3) the defendant appeared nervous; and 4) the defendant told an implausible and suspicious story about driving a friend to Madison. ***Id***. at 96-98. After reviewing these facts the ***Betow*** Court concluded the officer had "absolutely no evidence" that the defendant was intoxicated or using drugs on the evening in question. ***Id***. at 95. In other words, the ***Betow*** court did not find exceeding the speed limit was relevant evidence of intoxication.

There does not appear to be any Wisconsin published cases where a court has found reasonable suspicion of impairment under facts similar to those in this case.

Accordingly, the State attempts to compare the facts of this case to those in five unpublished cases[2]. Those cases, and the relevant facts, are outlined below:

Dane Cty. v. Judd, 2012 WI App 97, 344 Wis. 2d 125, 820 N.W.2d 156 (unpublished) Facts:

- *deputy dispatched* to *a rural house to investigate a disturbance;*
- *approximately 2:45 a.m.*;
- *defendant's eyes were bloodshot and glassy*;
- *"moderate to fairly strong" odor of intoxicants coming from the defendant*;
- *defendant stated she had consumed her "last drink" approximately one hour before, i.e. she had more than one drink.*

State v. Resch, 2011 WI App 75, 334 Wis. 2d 147, 799 N.W.2d 929 (unpublished). Facts:

- *approximately 2:26 a.m.*;
- *deputy observed the defendant's vehicle parked in a private business parking lot with the engine running at a stop sign facing a pubic road with the headlights off;*
- *vehicle appeared suspicious;*
- *deputy believed the occupants of the vehicle might be involved in criminal activity (i.e. burglary).*
- *"strong odor of intoxicants" coming from the defendant;*
- *When asked if he had anything to drink, the defendant replied "a little";*
- *trial court noted the "nonsensical" character of Resch's statements that he was following friends but had lost them, Resch's failure to provide the deputy with a clear explanation as to exactly why he was in the*

[2] The State lists ***Dane Cty. v. Judd***, 2012 WI App 97, 344 Wis. 2d 125, 820 N.W.2d 156 and ***State v. Resch***, 2011 WI App 75, 334 Wis. 2d 147, 799 N.W.2d 929 as published cases in its "Table of Authorities". It appears both are unpublished. *See* Wis. Stat. § 809.23(3).

parking lot, and the fact that Resch was stopped a considerable distance from where he initially indicated he had come from.

Town of Freedom v. Fellinger, 2013 WI App 115, 350 Wis. 2d 507, 838 N.W.2d 137 (unpublished). Facts:

- *approximately 1:50 a.m. or around "bar time";*
- *defendant's vehicle changing speed and exceeding speed limits;*
- *odor of alcohol coming from defendant or inside the vehicle;*
- *defendant admitted he had been drinking, i.e. more than one drink;*
- *defendant could not recite the alphabet and count backwards.*

State v. Wallk, No. 2017AP61, (WI App. Sept. 26, 2017) (publication decision pending). Facts:

- *approximately 2:20 a.m.;*
- *defendant's vehicle exceeded speed limit, pulling away from deputy's vehicle and other traffic;*
- *odor of alcohol coming from defendant;*
- *admission of consuming more than one drink.*

State v. Valenti, 2016 WI App 80, 372 Wis. 2d 186, 888 N.W.2d 23 (unpublished). Facts:

- *Defendant's vehicle exceeded the speed limit;*
- *Officer observed the defendant execute an illegal and unsafe pass of a farm vehicle and then speed up, passing several other vehicles including the officer's vehicle;*
- *Strong odor of alcohol coming from inside the vehicle.*

The last case, ***Valenti***, is immediately distinguishable from this case. In that case, the defendant's illegal, reckless and unsafe driving present clear evidence of impairment not comparable to the simple speeding stop in this case.

The facts in the other four cases, ***Judd***, ***Resch***, ***Fellinger***, and ***Wallk*** are also distinguishable from the facts in this case. Those cases all occurred after midnight, at or near "bar time"[3]. Furthermore, in each of those four cases, the officer observed the odor of intoxicants coming from the defendants. Finally, the defendants in each of those cases admitted having multiple drinks or gave an evasive answer regarding how much they had to drink. In this case, the stop occurred at 5:00 p.m., the officer did not observe the odor of alcohol coming from the driver, and Mr. Ammann stated he had only one drink.

There are other case-specific distinctions for those four cases, as well. In ***Judd***, the deputy was dispatched to investigate a "disturbance" at 2:45 a.m. This is a more uncertain and suspicious scenario than a simple day-time traffic stop. Similarly in ***Resch***, the defendant's behavior was suspicious and his statements were "nonsensical". In ***Fellinger***, the officer followed the defendant and observed him changing his speed and exceeding the speed limit several times and in ***Wallk***, the officer observed the defendant pull away from his squad and other traffic. No similar observations were made by Trooper Hill in this case.

In this case, the speeding violation, Mr. Ammann's admission of consuming one drink, and odor of intoxicants likely coming from the passenger, do not create a reasonable suspicion Mr. Ammann had consumed enough alcohol to impair his or her ability to drive.

[3] The stop in this case did not occur anywhere close to "bar time." The State points out Mr. Ammann and his wife were returning home from a wedding. However, neither Trooper Hill or the trial court found this fact relevant. The State fails to cite any case law or provide any evidence suggesting what relevance or weight, if any, this fact adds to the totality of circumstances.

II. The trial court erroneously exercised its discretion when it did not use the correct legal standard and did not properly explain its decision when it determined Trooper Hill had sufficient evidence to request Mr. Ammann take a preliminary breath test.

A circuit court erroneously exercises its discretion when it fails to examine relevant facts, applies the wrong legal standard, or when the circuit court fails to use a demonstrated rational process to reach a reasonable conclusion. ***State v. Schmidt***, 2016 WI App 45, ¶ 70, 370 Wis. 2d 139, 176, 884 N.W.2d 510, 528, *review denied*, 2016 WI 98, ¶ 70, 372 Wis. 2d 279, 891 N.W.2d 410.

In this case, Mr. Ammann's suppression motion alleged that Trooper Hill did not have "probable cause to believe" he was operating while intoxicated when he administered the PBT test. (14:5) In its oral decision denying Mr. Ammann's suppression motion, the trial court utilized the wrong legal standard, stating "…because of the clues that were given during the field sobriety test I think that gave [Trooper Hill] *reasonable suspicion* that he could ask for the PBT." (50:9)(emphasis added) The trial court did not explain which facts or clues were relevant nor did it explain the process or reasoning used to arrive at its conclusion.

The State does not dispute the fact that the Court stated the wrong legal standard or failed to adequately explain its decision. Instead, the State's only argument is that the Court's statement "was a simple misstatement in the midst of the ruling…"

It is impossible to know if the trial court made "a simple misstatement" because the trial court did not explain which facts or clues it found relevant nor did it explain the process or reasoning used to arrive at its conclusion. Trooper Hill's administration and interpretation of all of the FSTs were challenged at the evidentiary hearing. There was evidence showing the FSTs were not administered correctly and reliably and were therefore compromised. The trial court did not discuss the tests, nor did it explain which facts or clues it found relevant. The trial court did not use the correct legal standard, and did not rationally explain the process it used to reach its conclusion. This is an erroneous exercise of its discretion.

The State argues there "appears to be no purpose to this portion of the motion and no clear meaningful remedy." This is not correct. In his suppression motion, Mr. Ammann requested the trial court suppress the results of the PBT because Trooper Hill improperly administered the field sobriety tests and did not have the "probable cause to believe" Mr. Ammann was operating while intoxicated.

If the results of the PBT were properly suppressed, Trooper Hill did not have probable cause to arrest Mr. Ammann. This is true even after Trooper Hill discovered Mr. Ammann was subject to a .02 standard. The State correctly points out in its brief that "standardized field sobriety tests…would not be expected to provide much information regarding individuals with alcohol levels in the .02-.04 range." Furthermore, the trial court did not make any detailed findings regarding the validity of Trooper Hill's administration of the field sobriety tests.

This leaves Mr. Ammann's speeding ticket, admission of consuming one drink and the odor of alcohol. The State is unable to cite any cases where a speeding ticket, admission of consuming one drink and the odor of intoxicants alone constituted probable cause for an arrest for OWI or PAC.

The State did point to ***State v. Goss***, 2011 WI 104, ¶ 26, 338 Wis. 2d 72, 90, 806 N.W.2d 918, 927, which indicates an officer may request a PBT breath sample when the driver is known to be subject to a .02 standard and there is odor of intoxicants coming from the driver. However, the ***Goss*** Court did not indicate such facts gave the officer probable cause to arrest the driver in absence of the results from the PBT test.

The decision in ***Goss*** suggests it might have been permissible for Trooper Hill, even without the results of the FSTs, to have requested a PBT once he discovered Mr. Ammann was subject to a .02 standard. However, this does not lead to a reasonable conclusion of inevitable discovery.

There was no testimony taken or given as to Trooper Hill's standard procedure, or his department's standard procedure regarding PBTs and .02 standards. It would be pure speculation as to what Trooper Hill would have done in absence of the FSTs and the PBT administered before he discovered the .02 standard. "Proof of inevitable discovery turns upon demonstrated historical facts, not conjecture." ***State v. Jackson***, 2016 WI 56, ¶ 72, 369 Wis. 2d 673, 711, 882 N.W.2d 422, 441.

CONCLUSION

For the foregoing reasons, Mr. Ammann respectfully asks this Court to reverse the trial court's decision and remand with directions to suppress the evidence and allow Mr. Amman to withdraw his plea.

Submitted this 6th day of November, 2017.

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CERTIFICATION

I certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c) for a brief produced using a 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, maximum of 60 characters per full line of body text. The length of this brief is 2654 words, as counted by the commercially available word processor Microsoft Word.

I further certify that I have submitted an electronic copy of this brief, with the appendix, which complies with the requirements of Section 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 6th day of November, 2017.

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CERTIFICATION OF MAILING

I certify that this brief was submitted to the United States Postal Service for overnight delivery to the Clerk of the Court of Appeals on November 6, 2017. I further certify that the brief and appendix were correctly addressed and postage was pre-paid.

Dated this 6th day of November, 2017.

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CERTIFICATION OF APPENDIX CONTENT

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 Section 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) 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 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 6th day of November, 2017.

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TABLE OF APPENDICES

344 Wis.2d 125
Unpublished Disposition
See Rules of Appellate Procedure, Rule 809.23(3), regarding citation of unpublished opinions. Unpublished opinions issued before July 1, 2009, are of no precedential value and may not be cited except in limited instances. Unpublished opinions issued on or after July 1, 2009 may be cited for persuasive value.
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.
Court of Appeals of Wisconsin.

DANE COUNTY, Plaintiff–Respondent,
v.
Amy Jolene JUDD, Defendant–Appellant.

No. 2011AP2106.
|
July 19, 2012.

Appeal from a judgment of the circuit court for Dane County: William E. Hanrahan, Judge. *Affirmed.*

Opinion

¶ 1 Sherman, J.[1]

***1** Amy Judd appeals a judgment of conviction for operating a motor vehicle under the influence of an intoxicant, first offense. Judd contends that the arresting officer lacked reasonable suspicion to believe that Judd had been driving while intoxicated, and that the court should have suppressed evidence obtained from her detention. I affirm.

BACKGROUND

¶ 2 At approximately 2:45 a.m. on December 12, 2010, Dane County Deputy Sheriff Richard Larson was dispatched to a rural house regarding a disturbance. When Deputy Larson was walking back to his vehicle after speaking with an individual in the house, he met Judd who was walking up toward the house. Deputy Larson testified that he observed that Judd's eyes were bloodshot and glassy, and that he observed a "moderate to fairly strong" odor of intoxicants coming from her. Deputy Larson testified that Judd informed him that she had driven to the house in order to pick up a friend, and that she had consumed her last drink approximately one hour before. Deputy Larson also testified that he observed a van parked in the house's driveway, which had not been there when he arrived at the residence. Deputy Larson testified that based upon these observations, he detained Judd and asked her to undergo field sobriety tests.

¶ 3 Judd was later arrested and charged with OWI, first offense. Judd moved to suppress evidence obtained as a result of her detention on the basis that Larson lacked reasonable suspicion to believe that she had been operating a motor vehicle under the influence of an intoxicant. The court denied Judd's motion and Judd subsequently entered a plea of no contest to the charge. Judd appeals.

DISCUSSION

¶ 4 On review of a circuit court's decision on a motion to suppress, an appellate court will uphold the circuit court's factual findings unless those findings are clearly erroneous. *State v. Popke*, 2009 WI 37, ¶ 10, 317 Wis.2d 118, 765 N.W.2d 569. We review de novo whether the facts lead to reasonable suspicion. *Id.*

¶ 5 To support reasonable suspicion, an officer must have an objectively reasonable suspicion of wrongful conduct. *See State v. Anderson*, 155 Wis.2d 77, 84, 454 N.W.2d 763 (1990). Reasonable suspicion sufficient to make an investigatory stop is based on a common sense test: what would a reasonable police officer reasonably suspect in light of his or her training and experience under all of the facts and circumstances present. *State v. Jackson*, 147 Wis.2d 824, 834, 434 N.W.2d 386 (1989). The officer's suspicion must be "grounded in specific articulable facts and reasonable inferences from those facts" that the driver consumed enough alcohol to impair his or her ability to drive. *State v. Colstad*, 2003 WI App 25, ¶¶ 8, 19, 260 Wis.2d 406, 659 N.W.2d 394.

¶ 6 Judd contends that Larson's observations were not sufficient to give rise to reasonable suspicion for an investigatory stop. Judd seems to argue that Larson could not reasonably believe that she had been operating a motor vehicle under the influence of an intoxicant because "[s]he acted, spoke and thought clearly, [spoke] coherently and articulately and she carried herself without stumbling or swaying or any physiological impairment." Judd also argues that an unpublished opinion, *State v.*

Meye, 2010AP336–CR, unpublished slip op. , 2010 WL 2757312 (WI App July 14, 2010), supports a conclusion that Larson's observations in this case did not give rise to reasonable suspicion. In *Meye*, this court held that the odor of intoxicants *alone* "on a person who has alighted from a vehicle after it has stopped" did not give rise to reasonable suspicion to make an investigatory stop. *Id.*, ¶¶ 5–6. Judd argues that the only difference between *Meye* and the present case is that Larson testified that in addition to the smell of intoxicants, he also observed that Judd's eyes were bloodshot and glassy, an observation which Judd asserts is not indicative of impairment.

***2** ¶ 7 I disagree that *Meye* is analogous to the present case. In *Meye*, the officer smelled the odor of intoxicants, but was unable to identify whether that odor was emanating from Meye or her companion. *Id.*, ¶ 2. Here, there was no ambiguity as to whom the odor was coming from. In addition, unlike *Meye*, Judd admitted that she had driven her car to the residence; Judd admitted to having consumed alcohol earlier; Larson observed that Judd's eyes were bloodshot and glassy; and it was 2:45 a.m. The odor of alcohol, admission of drinking earlier, bloodshot glassy eyes, and time of day, in conjunction with Larson's awareness that Judd had driven her car, were sufficient to provide Larson with reasonable suspicion to believe that Judd had driven her vehicle while under the influence of an intoxicant. *See, e.g.*, *State v. Lange*, 2009 WI 49, ¶ 32, 317 Wis.2d 383, 766 N.W.2d 551 (time of night is a relevant consideration for suspicion of impaired driving); *State v. Hughes*, No.2011AP647, unpublished slip op. ¶ 21 (WI App Aug. 25, 2011) (odor of alcohol, admission of drinking, and glassy eyes sufficient to give rise to reasonable suspicion that defendant was driving while intoxicated); *In re Wendt*, No.2010AP2416, unpublished slip op. ¶ 19 (WI App June 23, 2011) (bloodshot and glassy eyes and the odor of alcohol are "obvious and classic" indications of intoxication). Judd has not cited this court to any authority which supports her claim that a defendant's ability to walk and speak without apparent impairment is definitive in a reasonable suspicion analysis, negating all other observations of impairment. Thus, the fact that Judd was able to walk and speak without apparent impairment does not alter my conclusion that there was other evidence before Larson which was sufficient to support a reasonable suspicion that Judd was impaired.

¶ 8 Accordingly, I conclude that the circuit court did not err in denying Judd's motion to suppress and affirm the judgment of conviction.

***3** Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULEE 809.23(1)(b)4.

All Citations

344 Wis.2d 125, 820 N.W.2d 156 (Table), 2012 WL 2924065, 2012 WI App 97

Footnotes

1 This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2009–10). All references to the Wisconsin Statutes are to the 2009–10 version unless otherwise noted.

334 Wis.2d 147
Unpublished Disposition
See Rules of Appellate Procedure, Rule 809.23(3), regarding citation of unpublished opinions. Unpublished opinions issued before July 1, 2009, are of no precedential value and may not be cited except in limited instances. Unpublished opinions issued on or after July 1, 2009 may be cited for persuasive value.
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.
Court of Appeals of Wisconsin.

STATE of Wisconsin, Plaintiff–Respondent,
v.
Allen L. RESCH, Defendant–Appellant.

No. 2010AP2321–CR.
|
April 27, 2011.

Appeal from a judgment of the circuit court for Waukesha County: William Domina, Judge. *Affirmed.*

Opinion

¶ 1 ANDERSON, J.[1]

***1** Allen L. Resch appeals from his third offense conviction of operating a motor vehicle while intoxicated in violation of WIS. STAT. §§ 346.63(1)(a) and 346.65(2)(am)3. Specifically, Resch appeals the trial court's order denying his motion to suppress the initial stop and the imposition of field sobriety tests. The issues on appeal are (1) whether the trial court erred when it found the deputy had reasonable suspicion to justify his investigatory stop of Resch and (2) whether the trial court erred when it found the deputy had reasonable suspicion to justify imposing field sobriety tests upon Resch. We affirm, because the arresting deputy's suspicions were grounded in specific, articulable facts, which taken together with rational inferences from those facts, led to a reasonable belief that Resch was engaged in suspicious activity to justify the stop and, subsequently, that he was operating a vehicle while intoxicated to justify the field sobriety tests.

I. *Facts*

¶ 2 On December 17, 2009, at approximately 2:26 a.m., a Waukesha county sheriff's deputy observed Resch's vehicle parked in a private business parking lot at a stop sign facing a public road. Resch had left his vehicle running and its headlights off. According to the deputy, the vehicle appeared suspicious for a variety of reasons: the time of day, the unusual location of the vehicle (in the exit lane of a business' parking lot), the fact that the vehicle had its headlights off, and the possibility that the occupants of the vehicle were engaged in criminal activity (i.e., burglary). As a result, the deputy approached the vehicle and made contact with Resch, the sole occupant.

¶ 3 Upon speaking to Resch, the deputy detected a strong odor of intoxicants emanating from the vehicle. At that point, the deputy asked Resch whether he had been drinking that night, to which Resch responded "a little." Resch indicated that he had driven from Brookfield and was following some friends home but had lost them. Due to the circumstances surrounding the encounter, the deputy believed Resch was operating his vehicle under the influence of intoxicants and had Resch undergo three field sobriety tests and a preliminary breath test (PBT). The deputy noted that he conducted the tests because Resch smelled of intoxicants and was the sole occupant of a running vehicle—which had been left idling at a stop sign of a private lot with its headlights off.

¶ 4 Subsequently, Resch failed the field sobriety tests and the PBT revealed that he had an impermissible alcohol concentration on his breath. The deputy placed Resch under arrest and issued him a citation for a third offense violation of operating while intoxicated.

¶ 5 Resch challenged the citation at trial, and on April 14, 2010, he filed a motion to suppress the traffic stop and imposition of field sobriety tests, arguing that the deputy lacked reasonable suspicion to perform the stop and the tests. The trial court denied the motion, concluding that the evidence was "sufficient on totality to allow a reasonable officer to detain for interrogation a vehicle which is parked at a stop sign with its headlights off at 2:30 in the morning running in an area of closed businesses" and that there were "sufficient additional facts following the additional stop to allow the officer to progress to ask for additional demonstrations of capacity through ... field sobriety tests." Resch was ultimately convicted of operating while intoxicated, his third offense, in violation of WIS. STAT. § 346.63(1)(a); however, the conviction was subsequently stayed pending

the outcome of this appeal.

¶ 6 Resch appeals his conviction and the trial court's denial of his motion to suppress the investigatory stop and imposition of the field sobriety tests.

II. *Reasonable Suspicion to Stop*

***2** ¶ 7 "A trial court's determination of whether undisputed facts establish reasonable suspicion justifying police to perform an investigative stop presents a question of constitutional fact." *State v. Sisk*, 2001 WI App 182, ¶ 7, 247 Wis.2d 443, 634 N.W.2d 877. When reviewing questions of constitutional fact, we apply a two-step standard of review. *State v. Powers*, 2004 WI App 143, ¶ 6, 275 Wis.2d 456, 685 N.W.2d 869. First, we will uphold a trial court's findings of historical fact unless they are clearly erroneous. *Id.* Second, based on the historical facts, we review de novo whether a reasonable suspicion justified the stop. *Id.*

¶ 8 "A traffic stop is a form of seizure triggering Fourth Amendment protections from unreasonable searches and seizures." *State v. Gammons*, 2001 WI App 36, ¶ 6, 241 Wis.2d 296, 625 N.W.2d 623. For a traffic stop to comport with the Fourth Amendment, "[t]he police must have a reasonable suspicion, grounded in specific articulable facts and reasonable inferences from those facts, that an individual is violating the law." *Id.* "Determining whether there was reasonable suspicion requires [this court] to consider the totality of the circumstances." *State v. Allen*, 226 Wis.2d 66, 74, 593 N.W.2d 504 (Ct.App.1999).

¶ 9 The law of reasonable suspicion and investigative stops was summarized in *State v. Washington*, 2005 WI App 123, ¶ 16, 284 Wis.2d 456, 700 N.W.2d 305:

> Thus, the standard for a valid investigatory stop is less than that for an arrest; an investigatory stop requires only "reasonable suspicion." The reasonable suspicion standard requires the officer to have ' "a particularized and objective basis' for suspecting the person stopped of criminal activity" [;] reasonable suspicion cannot be based merely on an "inchoate and unparticularized suspicion or 'hunch[.]' " When determining if the standard of reasonable suspicion was met, those facts known to the officer at the time of the stop must be taken together with any rational inferences, and considered under the totality of the circumstances. Stated otherwise, to justify an investigatory stop, "[t]he police must have a reasonable suspicion, grounded in specific articulable facts and reasonable inferences from those facts, that an individual is [or was] violating the law." However, an officer is not required to rule out the possibility of innocent behavior before initiating a brief investigatory stop. (Citations omitted.)

¶ 10 Further, in regards to a defendant's potential for innocent behavior, *State v. Waldner*, 206 Wis.2d 51, 60, 556 N.W.2d 681 (1996), instructs:

> [W]hen 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 before initiating a brief stop. If a reasonable inference of unlawful 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. (Citations omitted.)

***3** ¶ 11 Resch argues that the deputy did not have a reasonable suspicion to conduct the investigatory stop. Specifically, Resch contends that neither together nor by itself, did the time of day or the legal act of parking a running vehicle with its headlights off at a stop sign in a private lot indicate that criminal activity may have been afoot.

¶ 12 Resch's challenge fails because the trial court did not consider any of those factors in isolation. Instead, the trial court considered the totality of the circumstances to conclude that the deputy had a reasonable suspicion to conduct the investigatory stop. Additionally, although Resch's actions leading up to the investigatory stop could be construed as innocent, the deputy was not required to rule out the possibility of innocent behavior before initiating the stop. *See id.*

¶ 13 Specifically, as the trial court indicated, the time of day is an important factor in determining whether a law enforcement officer had a reasonable suspicion. *See Allen*,

226 Wis.2d at 74–75, 593 N.W.2d 504 ("[T]he time of day is another factor in the totality of the circumstances equation."). Here, the fact that it was near 2:30 a.m. when the deputy noticed Resch's vehicle in the parking lot helped create a reasonable suspicion for the deputy to believe there was potential for criminal activity (i.e., burglary).

¶ 14 In addition to the factors surrounding the investigatory stop, the deputy's experience is also part of a totality of circumstances consideration. *See State v. Lange*, 2009 WI 49, ¶¶ 30–31, 317 Wis.2d 383, 766 N.W.2d 551. In the instant case, the deputy considered that in his experience as a sheriff's deputy, it is rare to see a vehicle parked at that particular location of the parking lot, running and with its headlights off, especially at that time of day when the businesses in the area were closed.

¶ 15 Thus, the totality of the circumstances surrounding the stop—the location, time of day, and state of Resch's vehicle—could reasonably lead an experienced police officer to suspect that criminal activity may be afoot. These are specific and articulable facts to objectively discern a reasonable inference of unlawful conduct to justify the stop. The deputy had a reasonable suspicion to conduct the investigatory stop.

III. *Reasonable Suspicion to Extend a Traffic Stop to Impose a Field Sobriety Test*

***4** ¶ 16 The standard for determining the legality of a field sobriety test is based on the same reasonable suspicion standard as the initial stop. *State v. Colstad*, 2003 WI App 25, ¶ 19, 260 Wis.2d 406, 659 N.W.2d 394 (2003) (citing *State v. Betow*, 226 Wis.2d 90, 94–95, 593 N.W.2d 499 (Ct.App.1999)). If, during a valid traffic stop, a law enforcement officer "becomes 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" independent from those that prompted the initial stop, "the stop may be extended and a new investigation begun." *Colstad*, 260 Wis.2d 406, ¶ 19, 659 N.W.2d 394. Thus, for the deputy to have had a reasonable suspicion to perform the field sobriety tests on Resch, he must have obtained new, specific, and articulable information following the initial stop, which combined with the reasonable inferences from both the new and preexisting information, led him to believe that Resch was operating a vehicle while under the influence of intoxicants. *See id.*

¶ 17 Resch argues that the deputy lacked a reasonable suspicion to extend the initial traffic stop for the purposes of imposing field sobriety tests. Resch contends that the deputy never observed Resch driving to indicate he was impaired and impermissibly conducted the field sobriety tests based on insufficient observations, specifically: (1) the odor of intoxicants emanating from Resch's vehicle; (2) Resch's admission that he had been drinking earlier that evening; (3) Resch's statement that he was following his friends but had lost them; and (4) Resch was the sole occupant of a parked, running vehicle, sitting at a stop sign with its headlights off. We disagree that these are insufficient observations.

¶ 18 Instead we agree with the trial court that the deputy's observations, taken as part of the totality of the circumstances surrounding the deputy's stop and encounter with Resch, gave the deputy reasonable suspicion to conduct the field sobriety tests. Resch first argues that the " 'strong odor' of intoxicants, among other factors, does not give rise to a reasonable inference that such an odor results from the consumption of alcohol in an amount sufficient to impair a person's ability to drive."[2] Additionally, Resch argues that the odor of intoxicants alone is insufficient to support a reasonable inference that his ability to drive was impaired as a result of intoxication. In support of his argument, Resch cites to *State v. Meye*, No.2010AP336, unpublished slip op. (WI App July 14, 2010). Pursuant to WIS. STAT. RULEE 809.23(3)(b), unpublished cases issued after 2009 may be cited as persuasive authority, thus, though not controlling, we will address the legal propositions of *Meye.*

¶ 19 In *Meye*, this court held that the mere odor of intoxicants does not constitute reasonable suspicion that a driver is intoxicated to allow a law enforcement officer to make an investigatory stop. *Meye*, No.2010AP336, unpublished slip op. ¶¶ 1, 6. There, a police officer made an investigatory stop and subsequent OWI arrest after he smelled a strong odor of intoxicants emanating from the defendant or her passenger as they walked past him in a gas station parking lot. *Id.*, ¶ 1. The officer neither saw the defendant's driving behavior nor determined which person the odor of intoxicants was coming from. *Id.*, ¶¶ 6, 9. We ultimately rejected the State's argument that the officer had the requisite reasonable suspicion to conduct a stop based merely on the odor of intoxicants emanating from two people and by observing the defendant enter the driver's side of her car. *Id.*, ¶¶ 7–9.

***5** ¶ 20 Though we agree with the holding of *Meye*, its application to Resch's case does not lead this court to conclude that the deputy lacked a reasonable suspicion to administer the field sobriety tests. In *Meye*, the police officer relied solely on the odor of intoxicants to conduct

an investigatory stop. *Id.*, ¶ 1. That is not what happened in Resch's case. Here, the odor of intoxicants was only one of several relevant factors in the reasonable suspicion determination. In addition to the odor of intoxicants, the trial court considered the totality of the circumstances surrounding the deputy's imposition of the field sobriety tests.

¶ 21 Resch next argues that by itself his admission to consuming alcohol is insufficient to support a reasonable inference that his ability to drive was impaired as a result of intoxication and, as a result, the deputy impermissibly conducted the field sobriety tests.[3] However, like its consideration of the odor of intoxicants, the trial court did not consider Resch's admission to consuming alcohol in a vacuum. Instead, the court considered Resch's admission as a factor among the totality of circumstances.

¶ 22 As part of the totality of its circumstances consideration, the trial court noted the "nonsensical" character of Resch's statements that he was following friends but had lost them, Resch's failure to provide the deputy with a clear explanation as to exactly why he was in the parking lot, and the fact that Resch was stopped a considerable distance from where he initially indicated he had come from. The trial court also considered the nature in which the deputy had found Resch—sitting alone in a parked vehicle, which was left running and with its headlights off at a stop sign of a gas station parking lot around 2:30 in the morning.[4]

¶ 23 Based on the trial court's findings of fact and evidence presented at trial, the officer knew several articulable facts about Resch prior to administering the field sobriety tests: he smelled of intoxicants; consumed at least "a little" alcohol; was sitting by himself in a vehicle, which was idling at the stop sign of a private parking lot with its headlights off; had lost the friends whom he allegedly had been following; gave no clear explanation as to what he was doing in the parking lot; and was stopped around 2:30 in the morning. We conclude these facts and the reasonable inferences from them give rise to a reasonable suspicion that Resch had consumed enough alcohol to impair his ability to drive and to justify the deputy's imposition of the field sobriety tests.

IV. *Conclusion*

***6** ¶ 24 We affirm the trial court's denial of Resch's motion to suppress the investigatory stop and field sobriety tests and conclude that, based on the totality of the circumstances, the court correctly concluded that the deputy had a reasonable suspicion to conduct both the investigatory stop and the field sobriety tests.

Judgment affirmed.

This opinion will not published. *See* WIS. STAT. RULEE 809.23(1)(b) 4.

All Citations

334 Wis.2d 147, 799 N.W.2d 929 (Table), 2011 WL 1564008, 2011 WI App 75

Footnotes

1 This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2009–10). All references to the Wisconsin Statutes are to the 2009–10 version unless otherwise noted.

2 To support this proposition in their brief, Resch's attorneys cite to an unpublished decision, *State v. Schutz,* No.2008AP729, unpublished slip op. (WI App July 31, 2008), a case which is ineligible for consideration as persuasive authority. *See* WIS. STAT. RULEE 809.23(3)(b) (created by S.Ct. Order 08–02, 2009 WI 2 (eff. July 1, 2009)) (establishing a prohibition on citing unpublished cases issued prior to July 1, 2009). After the State pointed out the error in its brief, Resch's attorneys acknowledged their disregard of § 809.23(3)(b). Nonetheless, Resch's attorneys have committed a procedural violation. We strongly admonish counsel for their lack of due diligence, an omission this court does not take lightly. When an attorney violates procedural rules in this manner, this court has the authority to impose a fine. *See Roy v. St. Lukes Med. Ctr.,* 2007 WI App 218, ¶ 12 n. 3, 305 Wis.2d 658, 741 N.W.2d 256.

3 Resch's attorneys again cite the unpublished decision of *State v. Schutz,* No.2008AP729, unpublished slip op., to support this proposition in their brief, a case which is ineligible for consideration. *See* WIS. STAT. RULEE 809.23(3)(b). We again admonish Resch's counsel for their procedural violation and lack of due diligence.

4 Additionally, the time of day (i.e., at or around bar time) also supports the deputys imposition of the field sobriety tests.

See State v. Lange, 2009 WI 49, 32, 317 Wis.2d 383, 766 N.W.2d 551; *State v. Post,* 2007 WI 60, 36, 301 Wis.2d 1, 733 N.W.2d 634.

350 Wis.2d 507
Unpublished Disposition
See Rules of Appellate Procedure, Rule 809.23(3), regarding citation of unpublished opinions. Unpublished opinions issued before July 1, 2009, are of no precedential value and may not be cited except in limited instances. Unpublished opinions issued on or after July 1, 2009 may be cited for persuasive value.
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.
Court of Appeals of Wisconsin.

TOWN OF FREEDOM, Plaintiff–Respondent,
v.
Matthew W. FELLINGER, Defendant–Appellant.

No. 2013AP614.
|
Aug. 6, 2013.

Appeal from a judgment of the circuit court for Outagamie County: Nancy J. Krueger, Judge. *Affirmed.*

Opinion

¶ 1 STARK, J.[1]

***1** Matthew Fellinger appeals a judgment of conviction for operating while intoxicated, first offense. Fellinger asserts field sobriety tests constitute a "search" within the meaning of the Fourth Amendment, and, therefore, he argues the quantum of evidence necessary to request a field sobriety test should be probable cause. He also argues the circuit court erred by denying his suppression motion because the officer unlawfully requested he perform field sobriety tests. We affirm.

BACKGROUND

¶ 2 At the suppression hearing, officer Christopher Nechodom testified that, on June 23, 2012, at approximately 1:50 a.m., he was running radar near the Town of Freedom high school. Nechodom observed a vehicle traveling thirty-five miles-per-hour in a twenty-five-mile-per-hour zone. Nechodom began following the vehicle. The vehicle then entered a forty-five-mile-per-hour zone, and increased its speed to sixty miles-per-hour.

¶ 3 Nechodom stopped the vehicle for speeding. When Nechodom made contact with Fellinger, Nechodom "could smell an odor of intoxicant[s] coming from either [Fellinger's] person or from inside the vehicle." Nechodom asked Fellinger whether he had been drinking, and Fellinger responded that he had. Nechodom could not specifically recall how much Fellinger told him he had to drink, but believed it was "two beers."

¶ 4 Nechodom asked Fellinger, while he was still seated inside his vehicle, to say the alphabet backward and to count backward from sixty-four to forty-nine. Fellinger was unable to complete either task satisfactorily. Nechodom then asked Fellinger to exit his vehicle so he could administer standardized field sobriety tests.

¶ 5 At the suppression hearing, Fellinger argued field sobriety tests constitute a search within the meaning of the Fourth Amendment. He contended that, because the tests are a search, the officer needed probable cause before he could request that an individual participate in the tests. Fellinger also asserted that, even if the correct standard was reasonable suspicion, the officer did not have enough objective evidence of intoxication before asking Fellinger to say the alphabet backward and count backward.

¶ 6 The Town argued the standard necessary to request field sobriety tests is reasonable suspicion, and Nechodom reasonably suspected Fellinger was operating while impaired because of Fellinger's driving, the odor of intoxicants, the admission of drinking, and the time of night.

¶ 7 The circuit court denied Fellinger's suppression motion. It first determined field sobriety tests were not a "search" within the meaning of the Fourth Amendment, and the quantum of evidence an officer needed to request a field sobriety test was reasonable suspicion. The court then concluded the officer's requests that Fellinger say the alphabet backward and count backward while in his vehicle were simply questions to determine Fellinger's ability to respond—not field sobriety tests. Finally, the circuit court found that, based on the totality of the circumstances, Fellinger's driving, the odor of alcohol, the admission of drinking, the time of night, and Fellinger's unsatisfactory ability to say the alphabet backward or count backward gave Nechodom reasonable suspicion to request standardized field sobriety tests.

¶ 8 Following a court trial, the circuit court found Fellinger guilty of operating while intoxicated, first offense. He appeals.

DISCUSSION

I. Fourth Amendment and Field Sobriety Tests

***2** ¶ 9 Fellinger challenges the quantum of evidence needed to request a field sobriety test. He asserts officers should have probable cause before they may lawfully administer a field sobriety test. To support his argument, Fellinger first argues field sobriety tests constitute a "search" within the meaning of the Fourth Amendment. He contends that, because field sobriety tests are searches, the quantum of evidence needed to request a field sobriety test should be "*more* than reasonable suspicion, but *less* than probable cause to arrest."

¶ 10 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...." U.S. CONST. AMEND. IV. Whether a search has occurred is a question of law subject to independent review. *State v. Richardson*, 156 Wis.2d 128, 137–38, 456 N.W.2d 830 (1990). A "search" under the Fourth Amendment occurs when the police infringe on an expectation of privacy that society considers reasonable. *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984).

¶ 11 "The [F]ourth [A]mendment does not proscribe all searches, only unreasonable searches." *State v. Guy*, 172 Wis.2d 86, 93, 492 N.W.2d 311 (1992) (citing *Terry v. Ohio*, 392 U.S. 1, 9, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). "In order to determine whether a search is reasonable, we balance the need for the search against the invasion the search entails." *Id.* (citing *Terry*, 392 U.S. at 21).

¶ 12 Fellinger argues field sobriety tests are searches because "[a]n inherent right as a human being is to control and coordinate the actions of [his or her] own body[,]" and, therefore "a fundamental expectation of privacy is implicated when a person is subject to the performance of [field sobriety tests]." After asserting that no Wisconsin case has addressed whether a field sobriety test is a search within the meaning of the Fourth Amendment, Fellinger cites several cases from other jurisdictions that have discussed this issue. Every case cited by Fellinger has held field sobriety tests are searches and Fellinger argues that, based on this persuasive authority, we too must conclude field sobriety tests constitute searches.

¶ 13 The Town does not respond to Fellinger's assertion that field sobriety tests are searches under the Fourth Amendment. It simply argues our jurisprudence establishes that an officer may request a field sobriety test if the officer has reasonable suspicion to believe the driver is operating while impaired. Because we decline to abandon our neutrality to develop arguments for the Town as to whether field sobriety tests constitute a search, we therefore conclude that, for purposes of this appeal, Fellinger's argument is conceded. *See State v. Gulrud*, 140 Wis.2d 721, 730, 412 N.W.2d 139 (Ct.App.1987) (court need not develop argument for parties); *Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis.2d 97, 108–09, 279 N.W.2d 493 (Ct.App.1979) (unrefuted arguments are deemed conceded).

¶ 14 However, a concession that a field sobriety test is a search has little impact on the quantum of evidence needed before an officer may request field sobriety tests. Though Fellinger advances a probable cause standard on appeal, he acknowledges that, of the cases he cited in support of his assertion that field sobriety tests are searches, only two—a Colorado case and a federal case applying Colorado law—required probable cause before requesting field sobriety tests. The remainder of the cases Fellinger cites as authority required only reasonable suspicion.

***3** ¶ 15 Fellinger, however, maintains that some level of probable cause is necessary before an officer may lawfully request a field sobriety test. He argues Wisconsin courts have never explicitly addressed the quantum of evidence needed for a field sobriety test, but he contends "prior decisions by Wisconsin courts clearly indicate that the quantum of evidence ... should be higher than mere reasonable suspicion." Specifically, he notes that our jurisprudence has determined an officer needs reasonable suspicion of impairment before lawfully detaining an individual for field sobriety tests,[2] and he asserts that, "[i]f the field sobriety test's invasion of liberty is greater than that of the initial stop[,] then reasonably the requisite quantum of evidence [for field sobriety tests] would be at least equal to that of the initial stop." Finally, Fellinger urges us to rely on Colorado case law and conclude some level of probable cause is needed before an officer can request that an individual perform field sobriety tests.

¶ 16 We conclude Fellinger's proposed probable cause standard is nothing more than a "reasonable suspicion of impairment" standard. First, we agree with Fellinger that an officer may not conduct field sobriety tests merely

because the officer's traffic stop was supported by reasonable suspicion. To lawfully request a driver perform field sobriety tests, an officer must have some evidence of *impairment.* As our supreme court stated in *County of Jefferson v. Renz,* 231 Wis.2d 293, 310, 603 N.W.2d 541 (1999):

> First, an officer may make an investigative stop if the officer "reasonably suspects" that a person has committed or is about to commit a crime ... or reasonably suspects that a person is violating the non-criminal traffic laws.... 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 arrest for an OWI violation, the officer may request the driver to perform various field sobriety tests. The driver's performance on these tests may not produce enough evidence to establish probable cause for arrest. The legislature has authorized the use of the PBT to assist an officer in such circumstances.

Id. (emphasis added). *Renz* establishes that it is not simply the officer's stop that allows the officer to request field sobriety tests—rather, it is specific observations of impairment that allows the officer to request the tests. *See id.* at 310, 603 N.W.2d 541.

¶ 17 Second, we agree with Fellinger that the requisite quantum of evidence for field sobriety testing should be at least equal to that of the initial stop's reasonable suspicion requirement. Because *Renz* states that an officer must make specific observations that cause the officer to "suspect" the individual is operating while intoxicated, we conclude that, to justify the intrusion of a field sobriety test, an officer must have reasonable suspicion that the driver is impaired before requesting field sobriety tests.

***4** ¶ 18 An officer has reasonable suspicion that an individual is impaired if he or she is " 'able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant' the intrusion." *See State v. Post,* 2007 WI 60, ¶ 10, 301 Wis.2d 1, 733 N.W.2d 634 (quoted source omitted). "[W]hat 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). An "officer's inchoate and unparticularized suspicion or hunch," however, will not give rise to reasonable suspicion. *See Post,* 301 Wis.2d 1, ¶ 10, 733 N.W.2d 634.

¶ 19 Finally, we decline to give any persuasive value to the Colorado case cited by Fellinger. In *People v. Carlson,* 677 P.2d 310, 317–18 (Colo.1984), the Colorado Supreme Court determined, "To satisfy constitutional guarantees against unlawful searches and seizures a roadside sobriety test can be administered only when there is *probable cause to arrest* the driver for driving under the influence ... or when the driver voluntarily consents to perform the test." (Emphasis added.) However, as established in *Renz,* 231 Wis.2d at 310, 603 N.W.2d 541, our supreme court has determined field sobriety tests may be administered before the officer has probable cause to arrest. *Carlson* is inconsistent with our jurisprudence.

II. Reasonable Suspicion for Field Sobriety Tests

¶ 20 Fellinger next argues, if the correct standard is reasonable suspicion, Nechodom did not reasonably suspect he was operating while intoxicated so as to lawfully administer the field sobriety tests. As previously stated, to possess the requisite reasonable suspicion, an officer must be able to point to "specific and articulable facts" and "rational inferences from those facts" to reasonably suspect the driver was impaired. *See Post,* 301 Wis.2d 1, ¶ 10, 733 N.W.2d 634.

¶ 21 Whether reasonable suspicion exists is a question of constitutional fact. *State v. Popke,* 2009 WI 37, ¶ 25, 317 Wis.2d 118, 765 N.W.2d 569. We will uphold the circuit court's findings of fact unless they are against the great weight and clear preponderance of the evidence. *Id.* However, whether those facts amount to reasonable suspicion is a question of law we review independently. *Id.*

¶ 22 Fellinger argues the only factors suggesting that he might be impaired were an odor of intoxicants emanating from the vehicle, an admission of drinking, and the "time of night." He asserts these facts are not enough to establish reasonable suspicion that he was operating while intoxicated. He emphasizes Nechodom did not observe any erratic driving or other typical indications of

intoxication, such as glassy eyes or slurred speech. Fellinger also contends the alphabet test and counting test, which were administered before Nechodom requested he exit his vehicle to perform standardized field sobriety tests, may not be included in the reasonable suspicion determination because, contrary to the circuit court's characterization, they are field sobriety tests, not questions.

***5** ¶ 23 The Town responds that Nechodom had the requisite reasonable suspicion to request Fellinger perform field sobriety tests. The Town asserts the odor of intoxicants coming from the vehicle, Fellinger's admission to drinking, the speeding, the 1:50 a.m. time of night, and Fellinger's inability to satisfactorily recite the alphabet backward and count backward gave Nechodom reasonable suspicion to request Fellinger exit the vehicle to perform standardized field sobriety tests.

¶ 24 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.[3] 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. *See State v. Lange,* 2009 WI 49, ¶ 32, 317 Wis.2d 383, 766 N.W.2d 551 (time of night of traffic stop is relevant factor in OWI investigation); *see also Renz,* 231 Wis.2d at 316, 603 N.W.2d 541 (indicators of intoxication include odor of intoxicants and admission of drinking); *State v. Colstad,* 2003 WI App 25, ¶ 19, 260 Wis.2d 406, 659 N.W.2d 394 (the facts that driver struck child on street combined with mild odor of alcohol amounted to reasonable suspicion to conduct field sobriety tests). Accordingly, Nechodom lawfully requested Fellinger to perform field sobriety tests, and the circuit court properly denied Fellinger's suppression motion.

Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULEE 809.23(1)(b)4.

All Citations

350 Wis.2d 507, 838 N.W.2d 137 (Table), 2013 WL 3984400, 2013 WI App 115

Footnotes

1 This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2011–12 version unless otherwise noted.

2 *See, e.g., State v. Colstad,* 2003 WI App 25, ¶ 19, 260 Wis.2d 406, 659 N.W.2d 394 (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. Betow,* 226 Wis.2d 90, 94–95, 593 N.W.2d 499 (Ct.App.1999) ("If, during a valid traffic stop, the officer becomes 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, the stop may be extended and a new investigation begun. The validity of the extension is tested in the same manner, and under the same criteria, as the initial stop.").

3 Because we conclude the officer had the requisite reasonable suspicion before administering the alphabet and counting tests, we need not determine whether those tests are field sobriety tests. *See State v. Blalock,* 150 Wis.2d 688, 703, 442 N.W.2d 514 (Ct.App.1989) (cases should be decided on the "narrowest possible ground").

2017 WL 4287860

NOTICE: FINAL PUBLICATION DECISION PENDING. SEE W.S.A. 809.23.

Court of Appeals of Wisconsin.

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT,
v.
SARAH ANN WALLK,
DEFENDANT-APPELLANT.

Appeal No. 2017AP61
|
September 26, 2017

APPEAL from an order of the circuit court for Milwaukee County: JEAN M. KIES, Judge. *Affirmed*., Cir. Ct. No. 2016TR9717

Opinion

BRENNAN, P.J.[1]

1** ¶1 Sarah Ann Wallk appeals an order finding her refusal to submit to an evidentiary chemical test of her blood unreasonable. Wallk argues that the odor of alcohol from inside the vehicle and a driver's admission of drinking several hours earlier does not constitute "information [discovered] subsequent to the initial stop [that], when combined with information already acquired, provided reasonable suspicion" sufficient to continue a traffic stop for the purpose of performing field sobriety tests. *See* ***State v. Colstad, 2003 WI App 25, ¶¶11, 19, 260 Wis. 2d 406, 659 N.W.2d 394. We disagree and affirm.

BACKGROUND

¶2 This case concerns a routine traffic stop conducted at approximately 2:20 a.m. on April 16, 2016. A sheriff's deputy on patrol on I-94 in Milwaukee was driving westbound behind a group of vehicles traveling near each other in an area with a speed limit of fifty miles per hour. He observed one light-colored vehicle speed up and "pull away" from his vehicle and the other cars. He estimated his own speed prior to that moment as "55, 60." He followed the light-colored vehicle, and he accelerated to "between 65 and 70." He did not use a radar gun or pace the car with his vehicle.[2] He testified that he would instead "match the speed" as he followed a vehicle, and that in this case he matched the speed of the vehicle at "approximately 65 miles per hour."

¶3 The deputy pulled the vehicle over. He approached the vehicle on the passenger side. He did not speak to the two passengers. He requested a driver's license from the driver and identified her as Wallk. He informed her that he had pulled her over for exceeding the speed limit, and she answered that she was sorry.

¶4 His testimony was that "when she said that, when she gave [him] that response," that was the moment that he "detected the odor of alcoholic beverage from that side of the vehicle." He then "left the passenger side and walked to the driver's side." He told Wallk that he "smelled alcoholic beverage emitting from inside the vehicle" and asked if she had been drinking. She said that she had consumed alcohol "before dinner," which she said was "about nine, nine-thirty." The deputy then asked Wallk to perform field sobriety tests. Based on her performance on the field sobriety tests, the deputy believed she had had "more than two apple beers" and was impaired. When Wallk was then asked to do a preliminary breath test, she refused. She was arrested.

¶5 Wallk filed a timely request for a refusal hearing, which was held December 21, 2016. At the refusal hearing, Wallk stipulated that she was read the informing the accused form and that she refused; the sole basis for the challenge to the refusal was whether reasonable suspicion existed to support the stop and continued detention. Wallk argued that the refusal was reasonable because her stop and continued detention were unlawful—specifically, that there was not reasonable suspicion for the traffic stop and that the evidence was not sufficient to continue to detain her for field sobriety tests. The circuit court concluded that the deputy had reasonable suspicion for the stop based on his observation of his own vehicle's speed as he followed Wallk's vehicle. The circuit court also concluded that the odor of alcohol the deputy noticed when he spoke to Wallk from the passenger side of the car and Wallk's admission of drinking alcohol earlier in the evening provided a sufficient legal basis to continue the detention. The circuit court therefore concluded that Wallk's refusal was unreasonable.

***2** ¶6 Wallk timely appealed. On appeal, Wallk focuses solely on whether the deputy had the reasonable suspicion necessary to "continue the detention" for field sobriety

testing.

DISCUSSION

I. The odor of alcohol from the vehicle and the driver's admission of drinking earlier in the evening provided additional information that supported the continued detention.

A. Standard of review and relevant legal principles.

¶7 "[A]n officer may perform an investigatory stop of a vehicle based on a reasonable suspicion of a non-criminal traffic violation." ***Colstad***, 260 Wis. 2d 406, ¶11 (citation omitted). "If, during a valid traffic stop, the officer becomes 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, the stop may be extended and a new investigation begun." ***State v. Betow***, 226 Wis. 2d 90, 94–95, 593 N.W.2d 499 (Ct. App. 1999). "The validity of the extension is tested in the same manner, and under the same criteria, as the initial stop." ***Id.***

¶8 When presented with a challenge to a continued detention following a traffic stop, "[w]e must determine whether 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." ***Colstad***, 260 Wis. 2d 406, ¶19.

¶9 The question of whether a traffic stop is reasonable is a question of constitutional fact. ***State v. Knapp***, 2005 WI 127, ¶19, 285 Wis. 2d 86, 700 N.W.2d 899. A question of constitutional fact is a mixed question of law and fact to which we apply a two-step standard of review. ***State v. Martwick***, 2000 WI 5, ¶16, 231 Wis. 2d 801, 604 N.W.2d 552. We review the circuit court's findings of historical fact under the clearly erroneous standard, and we review independently the application of those facts to constitutional principles. ***State v. Payano-Roman***, 2006 WI 47, ¶16, 290 Wis. 2d 380, 714 N.W.2d 548.

B. The circuit court's factual finding is not clearly erroneous.

¶10 Wallk asserts that the circuit court made a clearly erroneous factual finding when it stated the following:

> As the deputy was talking to Ms. Wallk he indicated that she was speeding and she said oh, I'm sorry. At that point in time [the Deputy] again smelled the odor of intoxicants now on the driver was his testimony. While Ms. Wallk was calm and cooperative, he asked her whether or not she had been drinking and she said yes, I had been drinking around dinner at 9 to 9:30 p.m. So she admitted having some drinks.
>
> Based upon that conversation I think it was appropriate for him to ask Ms. Wallk to actually get out of the vehicle and perform the field sobriety tests.

¶11 Wallk argues that the circuit court's finding that the deputy smelled an odor "on the driver" is inconsistent with the deputy's testimony that he could not determine from whom the odor was coming. We disagree. The deputy's testimony on direct was as follows:

> I made the passenger side approach .... I asked for her driver's license. She gave me her I.D.... She said oh, I'm sorry....[W]hen she said that, when she gave me that response, that's when I detected the odor of alcoholic beverages from *that side of the vehicle*. So then I just left the passenger side and walked *to the driver side*. (Emphasis added.)

***3** On cross-examination, the deputy was asked about the point at which he walked up to the passenger door:

> [Trial counsel]: And you observed an odor of intoxicants emitting from inside the vehicle, correct?
>
> [Deputy]: Yes, that's correct.
>
> [Trial counsel]: Would you agree that from the odor of intoxicants you can't tell first off which person in the vehicle was drinking at that point, correct?
>
> [Deputy]: That's correct.

¶12 Wallk mischaracterizes the deputy's testimony. The deputy testified first that from his vantage point on the passenger side of the car, he spoke to the driver and that when she answered him, he noticed an odor of alcohol from "that side of the vehicle." He specifically testified that he did not speak to the passengers. Although he conceded on cross-examination that smelling the odor from that side of the vehicle did not necessarily tell him which person was drinking, he did not back off from his prior testimony. The choice of words on cross-examination regarding the location of the odor—generally "inside the vehicle"—was defense

counsel's, not the deputy's.

¶13 Based on this review of the deputy's testimony, we reject Wallk's argument that the circuit court's finding was clearly erroneous.

C. The circuit court correctly found that reasonable suspicion supported the continuation of the stop for field sobriety tests.

¶14 The question presented is whether the continued detention of Wallk was supported by reasonable suspicion, and that depends on whether "the officer [became] 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 ... separate and distinct from the acts that prompted the officer's intervention in the first place[.]" *See* ***Betow***, 226 Wis. 2d at 94-95. The test for reasonable suspicion is a totality of the circumstances test. ***State v. Waldner***, 206 Wis. 2d 51, 58, 556 N.W.2d 681 (1996). It is well established that 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).

¶15 Wallk argues that "the information acquired after the stop would not have led a reasonable officer to conclude that [she] was driving her vehicle while under the influence of an intoxicant." Wallk contends that the "only specific fact that [the deputy] possessed regarding [her] alcohol consumption was that she had consumed two drinks with dinner hours earlier." Wallk contends that because the odor of alcohol from inside the car might not have come from her but rather from her passengers, it cannot be the basis of reasonable suspicion.

4** ¶16 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. We therefore affirm the circuit court's order finding Wallk's refusal unreasonable.

By the Court.—Order affirmed.

All Citations

Slip Copy, 2017 WL 4287860

Footnotes

1 This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

2 The deputy testified that the reason he did not pace the vehicle was that his vehicle did not have a certified speedometer.

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Unpublished Disposition
See Rules of Appellate Procedure, Rule 809.23(3), regarding citation of unpublished opinions. Unpublished opinions issued before July 1, 2009, are of no precedential value and may not be cited except in limited instances. Unpublished opinions issued on or after July 1, 2009 may be cited for persuasive value.
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER.
Court of Appeals of Wisconsin.

STATE of Wisconsin, Plaintiff–Respondent,
v.
John J. VALENTI, Defendant–Appellant.

No. 2016AP662.
|
Sept. 7, 2016.

Appeal from a judgment of the circuit court for Winnebago County: Thomas J. Gritton, Judge. *Affirmed.*

Opinion

¶ 1 REILLY, P.J.[1]

***1** John J. Valenti appeals the circuit court's denial of his motion to suppress evidence and subsequent conviction for operating under the influence, first offense, contrary to Wis. Stat. § 346.63(1)(a). Valenti argues that the officer lacked reasonable suspicion to extend the traffic stop in order to investigate whether he was under the influence. We affirm.

¶ 2 The facts of this case are not in dispute. On May 31, 2015, at approximately 5:00 p.m., Inspector Scott Hlinak of the Wisconsin State Patrol was traveling southbound on Highway 41 in an unmarked squad car. Highway 41 has two lanes for southbound travel. After moving into the left-hand lane to pass a slow moving farm vehicle that was driving on the shoulder and in a large portion of the right-hand lane, Hlinak observed another vehicle pass the farm vehicle by trying to "squeeze past or use the right-hand lane only ... while there was also a [vehicle in the left-hand lane]." Hlinak stated that this vehicle, driven by Valenti, "caught [his] attention" because "moving to the left-hand lane [was] probably the only safe option." Valenti's vehicle then sped up and passed several vehicles, including Hlinak's vehicle, in the right lane "at a rate higher than the speed limit."[2]

¶ 3 Hlinak stopped Valenti for traveling 82 miles per hour (mph), which was 17 mph over the posted speed limit of 65 mph. Hlinak approached Valenti's vehicle on the passenger side, where Valenti's wife was seated. As soon as Hlinak made contact with the vehicle he "could smell a strong odor of intoxicants coming from inside of the vehicle" through the open window. At the time, Hlinak was unable to ascertain which occupant the odor was coming from, but it was strong enough that he asked whether there were any open intoxicants inside the vehicle, which Valenti and his wife denied. Hlinak testified that Valenti's wife "stated she had been drinking wine earlier in the day."

¶ 4 Hlinak returned to his vehicle and wrote Valenti a citation for speeding.[3] When he returned with the citation, Hlinak asked Valenti to move his vehicle further toward the right shoulder for safety due to the heavy traffic. Hlinak then requested that Valenti get out of the vehicle to help him discover who the odor of intoxicants was coming from and "to verify that ... Valenti was okay to drive." Hlinak "smell[ed] a strong odor of intoxicants on [Valenti's] breath." Hlinak performed field sobriety tests on Valenti and subsequently issued him a first offense OWI citation.[4]

¶ 5 Valenti filed a motion to suppress. At the motion hearing, Hlinak admitted that up to the time of the field sobriety tests, apart from the odor of intoxicants, he noted no other signs of impairment based on Valenti's demeanor or appearance. The circuit court determined that Hlinak had reasonable suspicion to extend the traffic stop to administer field sobriety tests and denied Valenti's motion to suppress evidence. Following a stipulated court trial, Valenti was convicted under WIS. STAT. § 346.63(1)(a) for operating a motor vehicle with a prohibited alcohol concentration. Valenti appeals.

¶ 6 Valenti does not dispute that Hlinak had probable cause to stop him for speeding. He argues instead that Hlinak lacked specific, articulable facts which would justify expanding the purpose of the stop from speeding to suspicion of operating while under the influence.

***2** ¶ 7 Once a justifiable stop has been made, if additional suspicious factors come to the officer's attention "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, the stop may

be extended and a new investigation begun." *State v. Betow*, 226 Wis.2d 90, 94–95, 593 N.W.2d 499 (Ct.App.1999). We must, therefore, determine whether Hlinak "discovered information subsequent to the initial stop which, when combined with information already acquired, provided reasonable suspicion" that Valenti was driving while under the influence. *State v. Colstad*, 2003 WI App 25, ¶ 19, 260 Wis.2d 406, 659 N.W.2d 394.

¶ 8 The test for reasonable suspicion is whether, under the totality of the circumstances, "the facts of the case would warrant a reasonable police officer, in light of his or her training and experience, to suspect that the individual has committed, was committing, or is about to commit a crime." *State v. Post*, 2007 WI 60, ¶ 13, 301 Wis.2d 1, 733 N.W.2d 634; *see also* WIS. STAT. § 968.24. Extension of the stop, however, "must be based on more than an officer's 'inchoate and unparticularized suspicion or 'hunch.'" " *Post*, 301 Wis.2d 1, ¶ 10, 733 N.W.2d 634 (quoting *Terry v. Ohio*, 392 U.S. 1, 27, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). "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." *Post*, 301 Wis.2d 1, ¶ 10, 733 N.W.2d 634 (quoting *Terry*, 392 U.S. at 21).

¶ 9 In this case, Valenti argues that Hlinak lacked reasonable suspicion because the only fact supporting Hlinak's belief was the general odor of intoxicants. Relying on similarities to the facts in *State v. Meye*, No.2010AP336, unpublished slip op. ¶¶ 2–3 (WI App July 14, 2010), Valenti contends that the odor of intoxicants alone cannot establish reasonable suspicion.

¶ 10 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.

Judgment affirmed.

***3** This opinion will not be published. *See* Wis. Stat. Rule 809.23(1)(b)4.

All Citations

372 Wis.2d 186, 888 N.W.2d 23 (Table), 2016 WL 4626503, 2016 WI App 80

Footnotes

1 This appeal is decided by one judge pursuant to Wis. Stat. § 752.31(2)(g) (2013–14). All references to the Wisconsin Statutes are to the 2013–14 version unless otherwise noted.

2 Hlinak testified that his vehicle was "equipped with an Applied Concepts same direction moving radar" and he received readings from Valenti's vehicle of 81 and 82 mph.

3 Valenti does not challenge his speeding conviction on appeal.

4 The record on appeal does not indicate whether Valenti failed any or all of the field sobriety tests. We will assume for the purpose of this decision that he failed some or all of the tests. We will also assume that Hlinak performed a breathalyzer test on Valenti as the record notes that Valenti had a BAC of .18 percent.

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