STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal Case Nos. 2017AP001047, 2017AP001048

COUNTY OF MILWAUKEE,

Plaintiff-Respondent,

vs.

NICHOLAS O. MORAN,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE MICHELLE A. HAVAS PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

John Chisholm
District Attorney
Milwaukee County

William G. Davidson
Assistant District Attorney
State Bar No. 1097538
Attorneys for Plaintiff-Respondent

District Attorney's Office
821 West State Street, Room 405
Milwaukee, WI 53233-1485
(414) 278-4646

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES CITED

Page

STATE OF WISCONSIN

C O U R T OF A P P E A L S

DISTRICT I

Appeal Case Nos. 2017AP001047, 2017AP001048

COUNTY OF MILWAUKEE,

Plaintiff-Respondent,

vs.

NICHOLAS O. MORAN,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE MICHELLE A. HAVAS PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

ISSUE PRESENTED

Did Milwaukee County Sheriff's Deputy Nicholas Kellner have the requisite reasonable suspicion to enlarge the scope of his initial investigation to include inquiry into whether Moran may have operated his vehicle while under the influence of an intoxicant?

The circuit court answered, "yes."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The briefs in this matter can fully present and meet the issues on appeal and fully develop the theories and legal authorities on the issues. *See* Wis. Stat (Rule) 809.22(1)(b). Further, as a matter to be decided by one judge, this decision will not be eligible for publication. See Wis. Stat (Rule) 809.23(1)(b)4.

STATEMENT OF THE CASE

Milwaukee County Sheriff's Deputy Nicholas Kellner was dispatched to investigate a traffic accident involving the above-named Defendant-Appellant, Nicholas Moran, on Thursday, April 23, 2015. (R28:4-6)[1]. Deputy Kellner was aware that somebody on scene believed Moran either had been drinking or was drinking. (R28:10). Upon his arrival on scene, Deputy Kellner contacted the occupants of both vehicles involved in the accident before returning to speak with Moran. (R28:5-7). At first, Moran provided no more than a "vague story" when asked about the accident. (R28:7). Deputy Kellner found Moran's explanation that he planned to exit the freeway at one of two locations approximately three to four miles away "kind of weird." (R28:7-8). Moran then stated that he "was coming from the Brewer's game which had just finished." (R28:8).

Deputy Kellner also described Moran's conduct during this conversation to be "kind of weird" and observed Moran "turn his head away and start fumbling with [items within Moran's vehicle]" while they were speaking. (R28:8). Deputy Kellner noted that he could not smell anything but the mint gum Moran was chewing during their conversation. (R28:8).

As their conversation continued, Moran suggested that the accident might have occurred because "he was checking his wallet to see if he had enough money to go to a bar." (R28:8-9). Moran then admitted to consuming "four beers," stating that he began drinking around 11:00 a.m. that day and did not stop until five hours later at 4:00 p.m. (R28:9). When asked, Moran

[1] This brief cites almost exclusively to the record contained in 2017AP1047. Accordingly, such citations are referenced as "R__". Any citations to the record contained in 2017AP1048 are instead referenced as "48R__".

was also unsure of the time of day, having estimated the time to be thirty to forty minutes later than it actually was. (R28:9).

Deputy Kellner summarized that he believed "the next appropriate step would be to perform field sobriety tests" based upon his many observations. (R28:10). He further noted that his observations of Moran's conduct were "indicative of impairment or somebody who's hiding impairment." (R28:10-11).

Moran was subsequently arrested and cited for Operating While Under the Influence of an Intoxicant—First Offense, Operating with a Prohibited Alcohol Concentration—First Offense, and Inattentive Driving. (R1; 48R:1).

On January 15, 2016, Deputy Nicholas Kellner testified at an evidentiary hearing regarding Moran's Motion to Suppress Due to Unlawful Detention. (R28). Following the evidentiary hearing, the circuit court, the Honorable Michelle A. Havas presiding, issued a decision from the bench on February 18, 2016 denying Moran's motion to suppress evidence having found that Deputy Kellner testified to "additional particularized and objective suspicious factors" sufficient to extend Moran's detention for the purpose of performing field sobriety tests. (R29:7-10).

Moran then filed a Motion for Reconsideration of the circuit court's decision to deny his motion to suppress evidence which the circuit court also denied. (R9).

On April 8, 2017, Moran tried his case to the court and was found guilty on each charge. (R24). This appeal follows Moran's conviction in the circuit court. (R25).

STANDARD OF REVIEW

When reviewing the circuit court's denial of a motion to suppress evidence, this Court will uphold the circuit court's factual findings unless clearly erroneous, but reviews its application of the facts to constitutional principles de novo. *State v. Gonzalez*, 2014 WI 124, ¶ 6, 359 Wis. 2d 1, 856 N.W.2d 580 (quoting *State v. Samuel*, 2002 WI 34, ¶ 15, 252 Wis. 2d 26, 643 N.W.2d 423).

ARGUMENT

The circuit court appropriately denied Moran's motion to suppress evidence because specific and articulable facts warranted a reasonable belief that Moran operated his vehicle while under the influence of an intoxicant.

Defendant-Appellant Nicholas O. Moran was found guilty of Operating While Under the Influence of an Intoxicant – First Offense, Operating With a Prohibited Alcohol Concentration – First Offense, and Inattentive Driving on April 18, 2017. (R24). He now appeals from the judgments of conviction asserting that the circuit court erred in denying his pre-trial motion to suppress evidence. (Brief of Defendant-Appellant, p. 1). Moran argues that Deputy Kellner "lacked sufficient objective, specific, and articulable facts upon which to extend [Moran's] detention to include field sobriety testing." (Brief of Defendant-Appellant, p. 12).

Moran's argument fails because it disregards pertinent facts and law. The circuit court appropriately denied Moran's motion to suppress evidence and this court should affirm the judgments of conviction.

A. An investigatory stop or seizure requires only reasonable suspicion.

The Fourth Amendment to the United States Constitution protects individuals from unreasonable searches and seizures. *State v. Young*, 2006 WI 98, ¶ 18, 294 Wis. 2d 1, 717 N.W.2d 729. A seizure within the meaning of that constitutional provision "does not occur simply because a police officer approaches an individual and asks a few questions." *Florida v. Bostick*, 501 U.S. 429, 434 (1991); *see also State v. Williams*, 2002 WI 94, ¶ 20, 255 Wis. 2d 1, 646 N.W.2d 834 ("Not all encounters with law enforcement officers are 'seizures' within the meaning of the Fourth Amendment.").

An investigatory or *Terry* stop typically involves temporary questioning of an individual. *See Terry v. Ohio*, 392 U.S. 1 (1968); *Young* at ¶ 20. Such a stop is constitutional if the officer has reasonable suspicion to believe that a crime has

been, is being, or is about to be committed. *Young* at ¶ 21 (citation omitted). Accordingly, an investigatory stop permits police to briefly detain a person in order to ascertain the presence of possible criminal behavior, even though there is no probable cause supporting an arrest. *Id.* Investigatory stops are appropriate even where a driver is reasonably suspected of violating a non-criminal traffic ordinance. *See County of Jefferson v. Renz*, 2006 WI App 31, ¶ 7, 289 Wis. 2d 551, 710 N.W.2d 551.

Reasonable suspicion means that the police officer "possess[es] specific and articulable facts that warrant a reasonable belief that criminal activity is afoot." *Id.* at ¶ 21 (citation omitted). "A mere hunch that a person has been, is, or will be involved in criminal activity is insufficient." *Id.* (citing *Terry*, 392 U.S. at 27). However, officers need not eliminate the possibility of innocent behavior before initiating an investigatory stop. *Id.* The scope of such detentions may be enlarged beyond the purpose justifying the initial stop so long as 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 officers' [initial stop]." *State v. Betow*, 226 Wis. 2d 90, 94, 593 N.W.2d 499, 502 (Ct. App. 1999).

In determining whether an investigatory stop is constitutionally reasonable, Wisconsin courts employ a common sense test based on the totality of the facts and circumstances. *State v. Post*, 2007 WI 60, ¶ 13-14, 301 Wis. 2d 1, 733 N.W.2d 634. (citation omitted). In *Batt*, the Wisconsin Court of Appeals emphasized "that the test for reasonable suspicion—***anonymous tipster or not***—is based on the totality of the circumstances, which is a fact-dependent test." *State v. Batt*, 2010 WI App 155, ¶ 23, 330 Wis. 2d 159, 793 N.W.2d 104 (emphasis added) (citation omitted).

B. Deputy Kellner had reasonable suspicion to believe Moran operated his vehicle while intoxicated.

Moran claims that Deputy Kellner lacked the requisite reasonable suspicion to further detain and investigate "Mr.

Moran's condition without additional facts coming to light." (Brief of Defendant-Appellant, p. 12). Moran rests his conclusion on his argument that Deputy Kellner's observations of Moran that he was (1) chewing minty gum; (2) looking away while speaking; and (3) lacking detail in his answers are insufficient grounds to enlarge the scope of Moran's detention. *Id*.

Moran's argument, however, is fatally flawed because it fails to fully consider the facts—facts that include an admission that he consumed "four beers." (R28:9). Even if the fact that a person on scene believed Moran may have been drinking is set aside, a complete review of the record reveals one replete with facts sufficient to permit a law enforcement officer such as Deputy Kellner to reasonably suspect Moran had operated his vehicle while under the influence of an intoxicant.

When Deputy Kellner decided that it would be appropriate for Moran to perform field sobriety tests, he was personally aware that Moran (1) was involved in a traffic accident; (2) had just left a Milwaukee Brewers baseball game; (3) provided a "weird" explanation for where it was he intended to exit the freeway; (4) would turn his head away and fumble with other items in his vehicle as he spoke; (5) was chewing minty gum; (6) may have caused the accident because he was "checking his wallet to see if he had enough money to go to a bar"; (7) admitted to consuming "four beers"; (8) had been drinking for approximately five hours prior to the accident; and (9) following the accident, was unsure of the time of day. (R28:5-9). Deputy Kellner also knew that somebody on scene had reported his or her own belief that Moran may have been drinking. (R28:10).

Reasonable suspicion means that the police officer "possess[es] specific and articulable facts that warrant a reasonable belief that criminal activity is afoot." *Young* at ¶ 21 (citation omitted).

When he considered the totality of the circumstances then before him, Deputy Kellner did possess an abundance of "specific and articulable facts that warrant[ed] [his] reasonable belief" that Moran may have committed the offense of operating while intoxicated. Courts have recognized that

reasonable suspicion is not a particularly high threshold. *See Young* at ¶ 59; *State v. Larson*, 215 Wis. 2d 155, 162, 572 N.W.2d 127 (Ct. App. 1997) (observing that reasonable suspicion standard set forth in *Terry* "is not high").

Even where the arresting officer in *State v. Lange* did not observe common indicia of impairment—such as the odor of intoxicants, slurred speech, difficulty balancing, recent visits to a bar, inconsistent stories or explanations, empty cans or bottles, suggestive field sobriety tests, or an admission to consuming alcohol, the Wisconsin Supreme Court found that the officer had ***probable cause*** to believe Lange was operating while intoxicated. 2009 WI 49, ¶ 23, 317 Wis. 2d 383, 766 N.W. 551. There, the Court held that, under the totality of the circumstances then present—circumstances that lacked many common indicia of impairment, but included the presence of poor driving, an automobile accident, a veteran police officer's involvement in the investigation, the day and time of the offense being such that common knowledge suggests individuals are more likely to consume alcohol, as well as the discovery of a prior conviction for operating while intoxicated—a reasonable police officer would believe that Lange probably operated his vehicle while intoxicated. *Id*. at ¶ 25-38.

The question here is not one of probable cause as it was in *Lange*, but rather, it is one of mere reasonable suspicion: Did Deputy Kellner have the requisite reasonable suspicion to enlarge the scope of his investigation to include inquiry into whether Moran had operated his vehicle while under the influence of an intoxicant? He most certainly did.

Akin to the officer in *Lange*, Deputy Kellner was aware that Moran was involved in an automobile accident after leaving a Milwaukee Brewers baseball game—an event commonly associated with the consumption of alcohol. (R28:8). Deputy Kellner also learned through Moran's own admission that he may have caused the accident as he checked his wallet to determine whether he had enough money to continue drinking at a bar. (R28:8-9). Moreover, Deputy Kellner was a veteran law enforcement officer who had performed thirty-five to forty intoxicated driving investigations during his fifteen years serving as a Deputy Sheriff. (R28:10).

Though Deputy Kellner did not know of any prior intoxicated driving offenses involving Moran as did the officer in *Lange*, he was instead aware of myriad other indicia that would lead an officer to reasonably suspect that Moran had operated his vehicle while intoxicated. Notably, these indicia included Moran's own admissions that he had been drinking for several hours and had consumed four beers. (R28:9).

Deputy Kellner had reasonable suspicion to enlarge the scope of his investigation and prolong Moran's temporary detention so that he could perform field sobriety tests. Accordingly, the circuit court correctly denied Moran's motion to suppress evidence.

CONCLUSION

For the foregoing reasons, the County respectfully requests that this court affirm the judgments of conviction.

Dated this _____ day of September, 2017.

Respectfully submitted,

JOHN CHISHOLM
District Attorney
Milwaukee County

_____
William G. Davidson
Assistant District Attorney
State Bar No. 1097538

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19 (8) (b) and (c) for a brief produced with a proportional serif font. The word count of this brief is 2,177.

_____ _____

Date William G. Davidson
Assistant District Attorney
State Bar No. 1097538

CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 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.

_____ _____

Date William G. Davidson
Assistant District Attorney
State Bar No. 1097538

P.O. Address:
Milwaukee County District Attorney's Office
821 West State Street- Room 405
Milwaukee, Wisconsin 53233-1485
(414) 278-4646
Attorneys for Plaintiff-Respondent.