

STATE OF WISCONSIN
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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appeal Case No. 2017AP002000-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

MISTY DAWN DONOUGH,

Defendant-Appellant.

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

BRIEF OF PLAINTIFF-RESPONDENT

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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal Case No. 2017AP002000-CR

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Plaintiff-Respondent,

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ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE
COUNTY, THE HONORABLE MICHELLE ACKERMAN
HAVAS, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

ISSUE PRESENTED

Did Milwaukee County Sheriff's Deputy Jennifer Moldenhauer have the requisite reasonable suspicion to extend Donough's seizure to include inquiry into whether Donough may have operated her 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

While on routine patrol on Monday, February 15, 2016, Milwaukee County Deputy Sheriff Jennifer Moldenhauer and her training officer came upon a disabled vehicle in traffic on an off-ramp near Howard Avenue at approximately 1:35 p.m. (R24:8). Two individuals occupied the vehicle with the driver having been identified as Misty Donough. (R24:10). After some brief interaction with Donough, Deputy Moldenhauer decided to push Donough's disabled vehicle to the side of the road out of traffic. (R24:11). Just before pushing Donough's vehicle out of traffic, Deputy Moldenhauer observed Donough's passenger to be unsteady on her feet and stumbling as she exited Donough's vehicle. (R24:12).

Soon after pushing Donough's vehicle out of traffic, Deputy Moldenhauer smelled the odor of alcoholic beverage and observed Donough to have glassy eyes. (R24:15). After making her observations, Deputy Moldenhauer then informed her training officer that she believed Donough was intoxicated. (R24:15). Deputy Moldenhauer then asked Donough to perform field sobriety tests. (R24:16).

Donough was then cited for Operating While Under the Influence and Operating With a Prohibited Alcohol Concentration Second Offense in violation of Wisconsin Statutes Section 346.63(1)(a)-(b). (R2). On March 10, 2016, a criminal complaint was issued charging Donough with the offenses for which she had been cited.

On June 2, 2016, Donough filed a motion to suppress alleging that Deputy Moldenhauer illegally extended her detention without reasonable suspicion to have done so. (R4).

On September 16, 2016, Deputy Moldenhauer testified at an evidentiary hearing regarding Donough's motion to suppress evidence. (R24). Following the evidentiary hearing, the circuit court, the Honorable Michael J. Hanrahan presiding, issued a decision from the bench denying Donough's motion to suppress evidence having concluded that Deputy Moldenhauer was permitted to ask Donough to complete field sobriety tests after having observed her eyes to have been glassy and the odor of alcohol on her breath. (R24:60). Among its findings, the circuit court found that Deputy Moldenhauer "collected the evidence that led her to believe the defendant had been drinking and may be under the influence while she was still executing her community caretaker function." (R24:56).

Donough entered a plea of no contest to Operating While Intoxicated on January 4, 2016 with the circuit court sentencing Donough, in part, to incarceration of fifty days. (R17). This appeal follows Donough's conviction in the circuit court. (R19).

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

I. The circuit court correctly denied Donough's motion to suppress evidence because specific and articulable facts warranted a reasonable belief that Donough operated her vehicle while intoxicated.

Defendant-Appellant Misty Dawn Donough was convicted of Operating While Intoxicated Second Offense in violation of Section 346.63(1)(a) of the Wisconsin Statutes on January 4, 2017. (R14). She now appeals from the judgment of conviction asserting that the circuit court erred in denying her pre-trial

motion to suppress evidence. (Brief of Defendant-Appellant, p. 18). Donough argues that she was unreasonably seized in violation of the Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution because Deputy Jennifer Moldenhauer lacked the requisite reasonable suspicion to extend Donough's initial lawful seizure. (Brief of Defendant-Appellant, p. 18).

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

A. Officers are permitted to extend an otherwise lawful seizure when reasonable suspicion exists independent of that which formed the basis for the initial intrusion.

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. Warrantless seizures are presumptively unreasonable. *State v. Asboth*, 2017 WI 76, ¶ 12, 376 Wis. 2d 644, 898 N.W.2d 541 (quoting *State v. Brereton*, 2013 WI 17, ¶ 24, 345 Wis. 2d 563, 826 N.W.2d 369). Certain warrantless seizures may be reasonable—and thus lawful, however, “where a law enforcement officer is ‘serving as a community caretaker to protect persons and property.’” *Id.* (quoting *State v. Pinkard*, 2010 WI 81, ¶ 14, 327 Wis. 2d 346, 785 N.W.2d 592).

Donough has not challenged the initial seizure and the parties agree that Deputy Moldenhauer acted in a community caretaker function when she seized Donough on Monday, February 15, 2016. (Brief of Defendant-Appellant, p. 10).

An officer may extend a lawful seizure and begin a new investigation if, during that lawful seizure, she “becomes aware of additional suspicious factors which are sufficient to give rise to [reasonable suspicion that is] separate and distinct from [] that [which] prompted the officer's intervention in the first place.” *State v. Betow*, 226 Wis. 2d 90, 94-95, 593 N.W.2d 499, 502 (Ct. App. 1999).

Reasonable suspicion means that the officer “possess[es] specific and articulable facts that warrant a reasonable belief that criminal activity is afoot.” *Young* 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 v. Ohio*, 392 U.S. 1, 27, 88 S.Ct. 1868, 1883 (1968)). However, reasonable suspicion does not require that officers first “rule out the possibility of innocent behavior” before seizing an individual. *Id.* (quoting *State v. Anderson*, 155 Wis. 2d 77, 84, 454 N.W.2d 763, 766 (1990)). Wisconsin courts have defined “reasonable suspicion” as follows:

Although it is not possible to state precisely what the term reasonable suspicion means, it is a “commonsense nontechnical conception(s) that deal[s] with ‘the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.’” What is certain is that reasonable suspicion is “a less demanding standard than probable cause.” The information necessary to establish reasonable suspicion can be less in both content and reliability than the information needed to establish probable cause. In other words, the required showing of reasonable suspicion is low, and depends upon the facts and circumstances of each case.

State v. Buchanan, 2011 WI 49 ¶ 9, 334 Wis. 2d 379, 389, 799 N.W.2d 775, 780-81 (quoting *State v. Eason*, 2001 WI 98 ¶ 19, 245 Wis. 2d 206, 226-27, 629 N.W.2d 625, 633).

The test for reasonable suspicion “is based on the totality of the circumstances, which is a fact-dependent test.” *State v. Post*, 2010 WI App 155, ¶ 23, 330 Wis. 2d 159, 793 N.W.2d 104 (emphasis added) (citation omitted).

B. Deputy Moldenhauer reasonably believed Donough had operated her vehicle while intoxicated.

Donough appears to claim that Deputy Moldenhauer lacked reasonable suspicion to believe that Donough had operated her vehicle while intoxicated. (Brief of Defendant-Appellant, p. 17). Donough concludes, in part, that “an odor of alcohol in the interior of the vehicle, and later reporting after prompting that

Ms. Donough's eyes were glassy, is simply not sufficient for reasonable suspicion of being 'under the influence.'"

Donough's argument, however, is fatally flawed because it fails to fully consider the facts here. Indeed, a complete review of the record does reveal facts sufficient to reach the nondemanding standard of reasonable suspicion required to justify an investigatory stop or seizure—or the extension thereof.

The circuit court made the following factual findings:

- 1) Deputy Moldenhauer and her training officer came upon a vehicle stopped in traffic and inquired with the driver, Donough, as to what might have been wrong with the vehicle;
- 2) Deputy Moldenhauer was not in a closed environment, nor did she come face-to-face with Donough at any time prior to pushing Donough's car out of traffic;
- 3) While speaking on her phone, Donough was turning away from Deputy Moldenhauer;
- 4) After pushing Donough's car out of traffic, Deputy Moldenhauer returned to request Donough's driver license and insurance information;
- 5) Only after requesting her driver license and insurance information did Deputy Moldenhauer first notice the odor of alcohol *on Donough's breath*;
- 6) After noticing the odor of alcohol on Donough's breath, Deputy Moldenhauer indicated to her training officer that she believed Donough had been drinking;
- 7) Not until speaking with Donough about her driver license and insurance information was Deputy Moldenhauer ever in very close proximity to Donough; and
- 8) Deputy Moldenhauer noticed Donough to have glassy eyes.

(R24:54-59).

Importantly, the circuit court found credible Deputy Moldenhauer's testimony. (R24:55). In Wisconsin, the trial court is the "ultimate arbiter of both the credibility of the witnesses and the weight to be given to each witness'

testimony.” *State v. Anson*, 2005 WI 96 ¶ 32, 282 Wis. 2d 629, 650, 698 N.W.2d 776, 787 (quoting *Pindel v. Czerniejewski*, 185 Wis. 2d 892, 898, 519 N.W.2d 702 (Ct. App. 1994) (citations omitted)).

Despite Donough’s frequent attempts to impugn her credibility (e.g., “It simply is not credible . . . to then claim an odor of intoxicant is present”; “If this Deputy truly smelled an intoxicant coming from Donough’s breath and saw glassy eyes”; “Furthermore, if any of that really existed as claimed by the officer” (R24:15).), Deputy Moldenhauer’s testimony is wholly consistent with the circuit court’s factual findings. (R24:8-17).

During direct examination, Deputy Moldenhauer testified that she was “probably about five feet away” when she first began her contact with Donough. (R24:11). She also testified that “[Donough] was more into her phone than me, so I didn’t really make a lot of contact with her. I was just asking her questions about the vehicle.” (R24:11). Only after pushing Donough’s vehicle out of traffic did Deputy Moldenhauer have “close contact” with Donough. (R24:15). It was during that close contact with Donough that Deputy Moldenhauer was able to observe the odor of alcoholic beverages and glassy eyes. (R24:15).

Similarly, Deputy Moldenhauer testified during cross examination that she not have Donough’s full attention during their initial contact. (R24:24). She also testified that in speaking with her training officer, Deputy Moldenhauer indicated that she “wanted to talk to [Donough] some more because I could smell what I believed to be alcohol.” (R24:39).

Later, Deputy Moldenhauer testified during re-direct examination that in approaching Donough to ask for her phone number, she “wanted to confirm that what I did indeed smell *coming from the defendant* was an alcoholic beverage.” (R24:46) (emphasis added). Deputy Moldenhauer then testified that she did confirm that odor and subsequently asked Donough to exit her vehicle for the purpose of completing field sobriety testing. (R24:46).

Notably, Deputy Moldenhauer also testified that she observed Donough's passenger stumbling outside the vehicle before she and her training officer then pushed Donough's vehicle out of traffic. (R24:12). Though Deputy Moldenhauer never testified that this particular observation factored in her belief that Donough may have been impermissibly intoxicated, "the legal determination of reasonable suspicion is an objective test." *In re Refusal of Anagnos*, 2012 WI 64, ¶ 60, 341 Wis. 2d 576, 815 N.W.2d 675. Because "reasonable suspicion is by no means dependent upon the subjective belief of the officer", this Court should include Deputy Moldenhauer's observations as they relate to Donough's stumbling passenger in its analysis here. *See Id.*

When Deputy Moldenhauer decided that it would be appropriate for Donough to perform field sobriety tests, she was personally aware that (1) Donough was "more into her phone than me"; (2) Donough's passenger was unsteady and stumbling; (3) an odor of alcoholic beverage was emanating from Donough's person; and (4) Donough's eyes were glassy. (R24:12-17).

Wisconsin courts have long considered the odor of intoxicants and other physical indicia of intoxication (e.g., bloodshot eyes, slurred speech, etc.) appropriate factors to be considered by law enforcement officers when investigating individuals suspected of operating while intoxicated. *See State v. Kennedy*, 2014 WI 132 ¶ 22, 359 Wis. 2d 454, 856 N.W.2d 834. Similarly, courts have found that evasive conduct may contribute to reasonable suspicion. *See State v. Nesbit*, 2017 WI App 58 ¶ 12, 378 Wis. 2d 65, 902 N.W.2d 266 (citing *United States v. Simpson*, 609 F.3d 1140, 1149 (10th Cir. 2010)). Moreover, officers' observations of intoxicated passengers associated with suspects' vehicles have also contributed to reasonable suspicion. *See Byrnes v. City of Manchester, NH*, 848 F. Supp. 2d 146, 161-62 (D.N.H. 2012).

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.

When she considered the totality of circumstances then before her, Deputy Moldenhauer did possess "specific and

articulable facts that warrant[ed] [her] reasonable belief” that Donough may have committed the offense of operating while intoxicated. Courts have consistently 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 the reasonable suspicion standard set forth in *Terry* “is not high”).

Donough suggests that the question here is “whether after concluding [the community caretaker function] *and based only on an odor of alcohol*- is that sufficient reasonable suspicion to further detain Ms. Donough.” (Brief of Defendant-Appellant, p. 17) (emphasis added).

Though Donough argues inaccurately that reasonable suspicion here was “based only on an odor of alcohol”, she is correct that the question before this Court is one of mere reasonable suspicion: Did Deputy Moldenhauer have the requisite reasonable suspicion to extend Donough’s seizure to include inquiry into whether she had operated while intoxicated? She most certainly did. Accordingly, the circuit court correctly denied Moran’s motion to suppress evidence.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm the judgment of conviction.

Dated this _____ day of April, 2018.

Respectfully submitted,

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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 2,412.

Date

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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.

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