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STATE OF WISCONSIN
C O U R T O F A P P E A L S
D I S T R I C T I I I

Case No. 2018AP001673-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

YUNUS E. TURKMEN,

Defendant-Appellant.

On Appeal from a Judgment of Conviction
Entered in Dunn County Circuit Court,
Judge James M. Peterson, Presiding

BRIEF AND APPENDIX OF
DEFENDANT-APPELLANT

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ISSUE PRESENTED

Did the police officer who stopped Yunus Turkmen's car have reasonable suspicion to extend the traffic stop to conduct field sobriety tests?

The circuit court answered "yes." (20:21-24; App. 121-24).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is unnecessary; the sole issue presented involves application of settled law to the facts of this case and can be fully addressed by the parties' briefs.

This case is ineligible for publication. Wis. Stat. § (Rule) 809.23(1)(b)4.

STATEMENT OF THE CASE AND THE FACTS

On Saturday, August 5, 2017, at about 2:38 a.m., Menomonie Police Officer Wade Schlichting was parked in a lot adjoining Broadway Street when he saw a vehicle make a U-turn in the intersection of Broadway and 6th Avenue. (2:1; 20:5-6; App. 105-06). During the turn the vehicle's tires squealed loudly. (2:1; 20:5; App. 105). Schlichting followed the car for a few blocks and then stopped it. (20:5, 6; App. 105, 106).

Schlichting approached the passenger side window of the car and spoke to the driver, Yunus Turkmen. (2:2; 20:6, 7; App. 106, 107). Turkmen already had his wallet in his hand when Schlichting got to the car. (20:6, 16; App. 106, 116). Schlichting asked Turkmen for his driver's license, and Turkmen set his wallet on the center console and searched his pockets before handing his wallet to the officer. (20:6, 16; App. 106, 116). After removing Turkmen's driver's license from the wallet, Schlichting asked Turkmen for proof of insurance; in response, Turkmen opened the glove box, retrieved the document, and handed it to Schlichting, who noticed there was a can of air duster in the glove box. (20:7; App. 107).

Schlichting did not know Turkmen, but he had seen Turkmen about a half hour before the traffic stop "running back and forth on the sidewalk" of Broadway. (20:8; App. 108). There are "several establishments that sell alcohol" in that area. (*Id.*). When Schlichting asked Turkmen if he knew why he had been stopped, Turkmen referred to "his friend telling him do something cool" (20:8; App. 108)—an apparent reference to the U-turn and tire squealing.

Schlichting then asked Turkmen how much he had to drink that evening; Turkmen replied he had consumed one shot of alcohol about three to four hours earlier, adding something "to the effect that he had consumed alcohol but not too much that he could not drive." (20:8-9, 16; App. 108-09, 116). Schlichting had dispatch run Turkmen's license and requested a

backup unit, as he had decided to have Turkmen get out of the car and perform field sobriety tests. (20:9; App. 109).

Turkmen performed the field sobriety tests requested by Schlichting, which the officer concluded Turkmen failed. (2:2; 20:9-11; App. 109-111). Turkmen provided a preliminary breath test, which registered 0.131. (2:2; 20:11; App. 111).

Turkmen was arrested and charged with operating while intoxicated, second offense. (2; 20:12; App. 112). He filed a motion challenging the extension of the traffic stop to perform field sobriety tests and asking for the evidence collected during the unlawful extension to be suppressed. (7). The circuit court denied the motion after a hearing. (20:21-24; App. 121-124).

Turkmen then entered a guilty plea to the charge and was sentenced to pay a fine and serve jail time. (10; 20:24-30).¹ He appeals the circuit court's denial of his motion to suppress under Wis. Stat. § 971.31(10). (16).

Additional relevant facts are included in the argument section, below.

¹ The circuit court stayed execution of the sentence pending appeal. (20:31).

ARGUMENT

The police officer did not have sufficient facts to extend the traffic stop and conduct field sobriety tests.

A. Applicable legal standards.

The Fourth Amendment to the United States Constitution and Article 1, § 11 of the Wisconsin Constitution protect individuals against unreasonable searches and seizures. Whether police conduct violated this constitutional guarantee is a question of constitutional fact. *State v. Griffith*, 2000 WI 72, ¶23, 236 Wis. 2d 48, 613 N.W.2d 72. This court reviews the circuit court's findings of historical or evidentiary facts under a clearly erroneous standard, but the circuit court's determination of constitutional fact is reviewed *de novo*. *Id.*

A law enforcement officer may stop a vehicle when he or she reasonably believes the driver is violating, or has violated, a traffic law. *State v. Hogan*, 2015 WI 76, ¶34, 364 Wis. 2d 167, 868 N.W.2d 124; *State v. Betow*, 226 Wis. 2d 90, 93, 593 N.W.2d 499 (Ct. App. 1999). A law enforcement officer may extend a justifiable stop beyond what is necessary to investigate the original basis for the stop if the officer becomes aware of additional factors that give rise to a reasonable, articulable suspicion the person has committed an offense separate from the violation that prompted the officer's initial investigation. *Hogan*, 364 Wis. 2d 167, ¶35; *Betow*, 226 Wis. 2d at 94–95; *see also State v. Colstad*,

2003 WI App 25, ¶19, 260 Wis. 2d 406, 659 N.W.2d 394.

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. The validity of an extension of a traffic stop is tested using the same standard that is applied to the initial stop. *Betow*, 226 Wis. 2d at 95; *Colstad*, 260 Wis. 2d 406, ¶19. Thus, extension of the stop “must be based on more than an officer’s ‘inchoate and unparticularized suspicion or ‘hunch.’” *Post*, 301 Wis. 2d 1, ¶10 (*quoting Terry v. Ohio*, 392 U.S. 1, 27 (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”—or, with respect to an extension of a stop, the continued intrusion of the stop. *Post*, 301 Wis. 2d 1, ¶10 (*quoting Terry*, 392 U.S. at 21).

B. The extension of the traffic stop was unlawful because the officer did not have sufficient specific, articulable facts to believe Turkmen might be operating while intoxicated.

Turkmen does not dispute that Officer Schlichting had reasonable suspicion to initiate a traffic stop. While Schlichting testified the U-turn was unlawful (20:6; App. 106), he was not asked why he believed that. However, he wrote a citation for the U-turn violation, which was issued as Dunn County Case No. 17-TR-6051 and dismissed when Turkmen pleaded guilty in this case. (20:31, 32). According to the Consolidated Court Automation Programs (CCAP) records for Case No. 17-TR-6051, the citation alleged Turkmen violated Wis. Stat. § 346.33(1)(a), which prohibits a U-turn “[a]t any intersection at which traffic is being controlled by a traffic officer unless instructed by the officer to make a U-turn”.² There is no evidence the intersection where Turkmen turned was being controlled by a traffic officer.³

² The citation is not included in the record in this case, but this court may take judicial notice of CCAP records. *Kirk v. Credit Acceptance Corp.*, 2013 WI App 32, ¶5 n.1, 346 Wis. 2d 635, 829 N.W.2d 522. Turkmen requests this court to take judicial notice of the CCAP records of Dunn County Case No. 17-TR-6051. Wis. Stat. § 902.01(2)(b), (4), and (6).

³ Schlichting did not testify as to whether the intersection has traffic signals, but even if it does the applicable version of the statute (Stats. 2015-16) does not prohibit a U-turn at such an intersection. *See* 2009 Wis. Act 97,

Nonetheless, Turkmen concedes the initial stop was lawful based on his “squealing” tires during the U-turn, which suggest Turkmen, apparently goaded by a friend to do “something cool,” made the turn too fast. Accordingly, Schlichting’s testimony regarding the squealing tires supports a reasonable belief that, during the turn, Turkmen was operating at a greater than reasonable and prudent speed in violation of Wis. Stat. § 346.57(2).

The issue presented, therefore, is whether Schlichting “discovered information subsequent to the initial stop which, when combined with information already acquired, provided reasonable suspicion” that Turkmen was driving under the influence. *Colstad*, 260 Wis. 2d 406, ¶19.

At the moment Schlichting decided to request Turkmen to do field sobriety tests, he was aware of facts that support some suspicion Turkmen may have been operating while intoxicated. But other information Schlichting had undermined that

§ 12 (removing prohibition against U-turns at intersections where traffic is controlled by traffic control signals).

Further, while the circuit court referred to the U-turn being illegal because it was in a business district (20:22; App. 122), the evidence here does not support a violation of Wis. Stat. § 346.33(1)(b) because it occurred at an intersection, not mid-block. *See* Wis. Stat. § 346.33(3).

Finally, Wis. Stat. § 346.31(3)(b) requires a U-turn to be made “in that portion of the intersection immediately to the left of the center of the intersection.” Schlichting testified the turn was made in the “middle” of the intersection (20:5; App. 105), but his reliance on § 346.33(1)(a) makes this testimony unclear as to whether the turn violated § 346.31(3)(b).

suspicion, making the totality of the information equivocal at best, and therefore not enough to amount to reasonable suspicion that Turkmen was driving while intoxicated. Thus, the extension of the stop to conduct field sobriety tests was unlawful.

To begin with the information that supported suspicion, the incident occurred at 2:38 a.m. on a Saturday. That the incident occurred on a weekend and around bar closing time lends some credence to a suspicion of operating while intoxicated. *See State v. Lange*, 2009 WI 49, ¶32, 317 Wis. 2d 383, 766 N.W.2d 551 (noting people tend to drink during the weekend, and relying on traffic patterns near bar closing time). The incident also involved an apparent violation of the rules of the road—here, a U-turn executed at too fast of a speed. Further, Schlichting had seen Turkmen in the area half an hour earlier, there are bars in the area, and Turkmen admitted he had consumed alcohol. Finally, Turkmen appeared to search his pockets for his wallet, which was already sitting on the center console.

But other information shows the circumstances as a whole were quite equivocal. Despite Turkmen's admission that he had consumed alcohol and Schlichting's skepticism about Turkmen's claim regarding the amount he consumed (20:9; App. 109), Schlichting did not testify that he discerned other common physical indicators of intoxication during the approximately five-minute period of time Schlichting spoke with Turkmen while he was in the car. (20:18; App. 118). In particular, Schlichting did not say he

noticed any odor of alcohol. Nor did he say Turkmen had bloodshot or glassy eyes.⁴ And while Schlichting noticed that Turkmen's speech had a "tone" or "inflection" that fell short of a recognizable accent, Schlichting did not notice any slurred speech.

The absence of these common indicators is significant. As the standard jury instruction on operating while intoxicated points out, "Not every person who has consumed alcoholic beverages is 'under the influence' ...What must be established is that the person has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle." *Wis. J.I.—Criminal* 2663 (2006), at 2. *Cf.* Wis. Stat. § 346.63(1)(a) (operating while intoxicated requires the person to be "under the influence of an intoxicant ... to a degree which renders him or her incapable of safely driving."). Thus, there must be reasonable suspicion of consumption sufficient amount of alcohol to produce the prohibited level of impairment. The lack of any odor of alcohol and of glassy or bloodshot eyes and slurred speech bolsters Turkmen's statement that he had little to drink and therefore makes his admission of having consumed alcohol a very weak basis for concluding he has consumed enough to be intoxicated.

⁴ Schlichting noticed Turkmen had bloodshot eyes *after* he began the field sobriety tests (20:10; App. 110), so that observation cannot be used to justify the decision to extend the stop.

Further, Schlichting did not say that Turkmen had any difficulty in understanding him, and specifically said Turkmen understood his directions during the field sobriety tests. (20:18; App. 118). This is significant because it renders Turkmen's handling of his wallet equivocal. Schlichting thought it an indication of some confusion that Turkmen appeared to search his pockets for his wallet when the wallet was already on the console. But Turkmen's search for the wallet was apparently brief, and is consistent with a belief his driver's license—the item Schlichting asked for (20:6; App. 106)—was in a pocket, not his wallet, and that upon realizing that was not the case after searching his pockets he handed Schlichting his wallet. Further, Turkmen was able immediately to produce his proof of insurance. (20:7; App. 107). Thus, viewed in light of all the information available, Turkmen's quick search of his pockets is scant evidence of alcohol-induced confusion and thus offers at best a very weak indication of intoxication.

As for Turkmen's driving, as explained above it did not involve a *per se* unlawful U-turn. Further, the imprudent speed occurred only during the turn itself; Schlichting did not describe any other erratic or unsafe driving—and in particular no weaving or further speeding—while he was following Turkmen before initiating the stop. Thus, the brief episode of speeding during the U-turn is insufficient to warrant further investigation by Schlichting, even when combined with an admission of drinking, given the

absence of the common physical indicators of intoxication noted above.

In short, then, the totality of the circumstances here—the information Schlichting collected subsequent to the initial stop combined with information acquired before the stop—did not provide reasonable suspicion that Turkmen was driving under the influence of an intoxicant. While this is a close case because Schlichting had some basis for suspicion, the countervailing information undermined that basis to such an extent that all the information taken together does not rise to the level sufficient to support reasonable suspicion. Thus, the circuit court erred in finding that there was reasonable suspicion supporting Turkmen's continued detention for the administration of field sobriety tests.

CONCLUSION

For the reasons stated above, this court should reverse the order of the circuit court denying Yunus Turkmen's motion to suppress and remand the case for further proceedings.

Dated this 5th day of November, 2018.

Respectfully submitted,

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CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,333 words.

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

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 § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) 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 one or more initials or other appropriate pseudonym or designation instead of full names of persons,

specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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 5th day of November, 2018.

Signed:

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APPENDIX

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