

RECEIVED

STATE OF WISCONSIN

11-19-2018

COURT OF APPEALS

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

DISTRICT III

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 OF PLAINTIFF - RESPONDENT

RENEE M. TABER
Assistant District Attorney
State Bar #1103475

Attorney for Plaintiff-Respondent
Dunn County
District Attorney's Office
615 Stokke Pkwy, Ste 1700
Menomonie, Wisconsin 54751
(715) 232-1687
(715) 232-6886 (Fax)
renee.taber@da.wi.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES	2
STATEMENT ON ORAL ARGUMENT AND PUBLICATION ...	4
STATEMENT OF THE FACTS	4
ARGUMENT	4
I. The circuit court correctly denied Turkmen’s motion to suppress evidence when it held Officer Schlichting had reasonable suspicion to extend the traffic stop to administer field sobriety tests.....	
A. Relevant Law and Standard of Review	5
B. The circuit court correctly held that there was specific, articulable facts to believe Turkmen might be operating while intoxicated	6
CONCLUSION.....	9
CERTIFICATIONS	10

TABLE OF AUTHORITIES

Constitution

U.S. Const. amend. IV	4
Wis. Const. art. I, § 11	4

Wisconsin Statutes

Sec. 968.24.....	5
Sec. 340.24(25d)	8

Cases

<i>Berkemer v. McCarty</i> , 468 U.S. 420 (1984).....	5
<i>State v. Colstad</i> , 2003 WI App 25, 260 Wis. 2d 406, 421, 659 N.W.2d 394.....	7
<i>Dane Cty. v. Weber</i> No. 2017AP1024, unpublished slip op., (WI App Jan. 11, 2018)	7
<i>State v. Gaudesi</i> , 112 Wis.2d 213, 332 N.W.2d 302 (1983).....	6
<i>State v. Glover</i> , No. 2010AP1844, unpublished slip op., (WI App March 24, 2011)	6
<i>State v. Grimh</i> , No. 2015AP1401, unpublished slip op. (WI App Feb. 25, 2016)	8

State v. Hogan,
2015 WI 76, 364 Wis. 2d 167, 868 N.W.2d 1248

State v. Lange, 2009 WI 49, 317 Wis. 2d 383,
766 N.W.2d 5516

State v. Post,
2007 WI 60, 301 Wis. 2d 1, 733 N.W.2d 6345

State v. Powers,
2004 WI App 143, 275 Wis. 2d 456,
685 N.W.2d 869 5, 6

State v. Williams,
2002 WI App 306, 258 Wis. 2d 395,
655 N.W.2d 4625

Terry v. Ohio,
392 U.S. 1 (1968) 5, 9

STATEMENT OF THE ISSUE

Did Menomonie Police Officer Wade Schlichting have reasonable suspicion to extend a traffic stop and administer field sobriety tests when he stopped Yurkmen at 2:38 a.m. after an illegal U-turn in the bar district and after he admitted to consuming alcohol and had confusion with his wallet?

The circuit court correctly ruled “Yes.”

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request either oral argument or publication. The issue may be resolved by applying well-established legal principles to the facts of this case.

STATEMENT OF THE FACTS

The State stipulates to the facts set forth in the defendant-appellant’s brief.

ARGUMENT

- I. **The circuit court correctly denied Turkmen’s motion to suppress evidence because Officer Schlichting had reasonable suspicion to extend the traffic stop and administer field sobriety tests.**

A. Relevant Law and Standard of Review

The Fourth Amendment of the United States Constitution and Article I, section 11 of the Wisconsin Constitution protect against unreasonable searches and

seizures. An investigatory stop is a seizure that is permitted when the officer has reasonable suspicion, based on the totality of the circumstances, that the person stopped has committed, is committing, or is about to commit a crime or violation. *Terry v. Ohio*, 392 U.S. 1, 21 (1968). The Court later extended the reasoning in *Terry* to include investigatory traffic stops. *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984). Wisconsin has similarly codified *Terry* and permits law enforcement to temporarily detain and question a person with adequate reasonable suspicion. Wis. Stat. § 968.24.

The essential inquiry is whether law enforcement's actions were reasonable under all the facts and circumstances present. *State v. Williams*, 2002 WI App 306, ¶ 12, 258 Wis. 2d 395, 655 N.W.2d 462 (citation omitted). "It is a common sense inquiry, which strikes a balance between the interests of society in solving crime and the members of that society to be free from unreasonable intrusions." *Id.* (quotations and citations omitted).

Whether law enforcement violated a defendant's constitutional protection against unreasonable searches and seizures is an issue of constitutional fact subject to a mixed standard of review. *State v. Powers*, 2004 WI App 143, ¶ 6, 275 Wis. 2d 456, 685 N.W.2d 869. The trial court's findings of fact will be upheld unless they are clearly erroneous. *State v. Post*, 2007 WI 60, ¶ 8, 301 Wis. 2d 1, 733 N.W.2d 634. The court reviews independently the application of those facts to constitutional principles. *Id.*

B. The circuit court correctly found Officer Schlichting had articulable facts to extend the traffic stop and administer field sobriety tests.

Here, the articulable facts were the following: driving illegally during bar closing time at 2:38 a.m., coming from the

bar district, admitting to consuming alcohol, possessing an air duster can, and being confused over where his driver license was located and handing his entire wallet to the officer.

1. Illegal Driving

Well-established case law does not require erratic driving behavior as a pre-condition to extending a traffic stop to administer field sobriety tests. “Although erratic driving may be evidence that the defendant is under the influence of an intoxicant, the statute ‘does not require proof of an appreciable interference in the management of a motor vehicle.’” *State v. Gaudesi*, 112 Wis.2d 213, 221, 332 N.W.2d 302 (1983). Therefore, “[p]roof of erratic driving is obviously not required for purposes of a reasonable suspicion.” *Powers*, 2004 WI App at n.2.

Here, the defendant-appellant attempts to minimize Yurkmen’s driving behavior prior to the traffic stop. However, the circuit court noted that the illegal U-turn by Turkmen was “frankly, in that place at that time [] a fairly dangerous driving maneuver.” (22:9-10 App. 122) Thus, Yurkmen’s driving was a credible factor the circuit court relied on when making its ruling.

2. Time of Night: Bar Time

As the defendant-appellant correctly states, an incident occurring on a weekend around bar closing time lends credence to a suspicion of operating while intoxicated. *State v. Lange*, 2009 WI 49, ¶32, 317 Wis. 2d 383, 766 N.W.2d 551. In *State v. Glover*, No. 2010AP1844–CR unpublished slip op., (WI App March 24, 2011), the defendant was stopped for traveling thirty-four miles per hour in a twenty-five-mile-per-hour zone. The slight odor of intoxicants coming from the

vehicle, admission to drinking, and an admission of leaving a bar around “bar time” were enough for the officer to reasonably suspect Glover was operating his vehicle while under the influence of alcohol at 1:19 a.m. *Id.* at ¶ 18.

Here, not only did this incident take place around bar close by the downtown bar district, Schlichting observed Turkmen “running back and forth” on the sidewalk in front of the bars approximately thirty minutes prior to initiating the traffic stop. (8:13-15; App. 108) Thus, the factors that he was coming from the bar district, at 2:38 a.m., give credence to the totality of the circumstances that Schlichting had reasonable suspicion to extend the traffic stop and administer field sobriety tests.

3. Admission to Alcohol Consumption

The defendant-appellant argues Turkmen’s statement that he consumed alcohol is a very weak factor. In *Dane Cty. v. Weber*, the deputy had reasonable suspicion to extend the traffic stop to administer field sobriety tests based on the medium odor of intoxicants, the statement that Weber had been at a bar, her admission of consuming one beer, traveling sixty miles-per-hour in a forty-five mile-per-hour zone, and the time of night, which was just after 3:00 a.m. No. 2017AP1024, unpublished slip op., at ¶ 4 (WI App Jan. 11, 2018).

Here, Turkmen admitted he had “one shot” of alcohol. (8:23-24; App. 108) The circuit court noted that officers are “not certainly foreclosed by what somebody says in terms of how much, but there was an admission to have them drinking.” (22:24-25; 23:1) *See also State v. Colstad*, 2003 WI App 25, ¶ 21, 260 Wis. 2d 406, 421, 659 N.W.2d 394, 401 (officer was not obliged to accept the defendant’s assertions as true during a traffic stop). Therefore, an admission of

consuming alcohol in this case is a credible factor that the circuit court considered before making its ruling.

4. Possession of an Air Duster Can

Although officers sometimes will be confronted with behavior that has a possible innocent explanation, a combination of behaviors—all of which may provide the possibility of innocent explanation—can give rise to reasonable suspicion. *State v. Hogan*, 2015 WI 76, ¶ 36, 364 Wis. 2d 167, 183, 868 N.W.2d 124, 131 (citations omitted).

Here, the officer testified that in his training and experience, air dusters may be used for “huffing,” which is an intoxicant. See Wis. Stat. § 340.01(25d). Schlichting testified that based on his training and experience, an “air duster can be abused as a drug and can impair your ability to operate a motor vehicle.” (7:11-13; App. 107) An air duster can by itself may be innocent, but combined with the other factors, it can be used to support that Schlichting had reasonable suspicion to extend the traffic stop.

5. Confusion over Driver’s License and Wallet

Although Yurkmen was not necessarily “fumbling” through his wallet, he did look in his pockets presumably for his license and then hand his entire wallet to the officer, which lends credence to his confusion. (20:6; App. 106, 116) *State v. Grimh*, No. 2015AP1401-CRNM, unpublished slip op. at *2 (WI App Feb. 25, 2016) (fumbling with his driver's license, smelling faintly of beer, and admitting to drinking were probably sufficient to extend the stop that was initiated due to a seatbelt violation). Confusion over where a driver’s license is located can be an additional factor to combine into the totality of the circumstances to support reasonable suspicion for an extended traffic stop.

CONCLUSION

Ultimately, would the facts available to Schlichting permit a person of reasonable caution in the belief that the action taken was appropriate? *Terry*, 392 U.S. at 21-22. The circuit court correctly held “yes.” For the reasons set forth above, the State respectfully requests that this Court uphold the circuit court’s denial of Turkmen’s motion to suppress the evidence, thus, upholding his conviction.

Dated this __ day of November, 2018

Respectfully submitted,

RENEE M. TABER
Assistant District Attorney
State Bar #1103475

Attorney for Plaintiff-Respondent
Dunn County District Attorney’s Office
615 Stokke Pkwy, Ste 1700
Menomonie, Wisconsin 54751
(715) 232-1687
(715) 232-6886 (Fax)
renee.taber@da.wi.gov

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 length of this brief is 1,348 words.

//s//

RENEE M. TABER
Assistant District Attorney

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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 Wis. Stat. § 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 15th day of November, 2018.

//s//

RENEE M. TABER
Assistant District Attorney