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STATE OF WISCONSIN
C O U R T O F A P P E A L S
DISTRICT IV

Case No. 2019AP002174 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHRISTOPHER J. VAALER,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION
ENTERED IN LA CROSSE COUNTY CIRCUIT COURT,
THE HONORABLE RAMONA A. GONZALEZ, PRESIDING

**BRIEF AND SUPPLEMENTAL APPENDIX OF THE
PLAINTIFF-RESPONDENT**

JESSICA SKEMP
Deputy District Attorney
State Bar #1025642

Attorney for Plaintiff-Respondent

La Crosse County District Attorney's Office
333 Vine Street, Room 1100
La Crosse, WI 54601
(608) 785-9604
(608) 789-4853 (Fax)
jessica.skemp@da.wi.gov

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STATEMENT OF THE ISSUE

At the time he asked Defendant-Appellant Christopher J. Vaaler to exit his vehicle and perform standardized field sobriety testing, did Deputy Anderson have reasonable suspicion that Vaaler was operating a motor vehicle while intoxicated?

The circuit court answered: Yes. (R. 59: 20.)

This Court should answer: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. This case can be resolved by applying the facts to well-established precedent.

STATEMENT OF THE CASE

This is an appeal of a Judgment of Conviction against Vaaler for Operating While Intoxicated, 3rd Offense, entered following a guilty verdict at a jury trial. (R. 48.) Before trial, Vaaler moved to suppress the evidence gained following his traffic stop, alleging an unlawful seizure and expansion of a traffic stop. (R. 21.)

STATEMENT OF FACTS

The following is a summary of the evidence presented at the hearing on Vaaler's suppression motion; it is not meant to be an exhaustive recitation of the evidence:

La Crosse County Sheriff's Deputy Joseph Anderson was on patrol on January 7, 2017 at about 2:43 a.m., when he saw a vehicle travelling on County Road HD without headlights lit, but with its fog lamps on. (R. 59: 8-9.) Deputy Anderson identified the driver as Christopher Vaaler. (R. 59: 9.) Deputy Anderson told Vaaler the reason for the traffic

stop, and Vaaler then turned on his headlights. (R. 59: 9.) Vaaler told Deputy Anderson that he had been coming from Brices [sic] Prairie, travelling about five minutes through a largely rural area to the location where the stop occurred. (R. 59: 10, 19.) There were streetlights where the traffic stop occurred. (R. 59: 16.)

There were two occupants of the vehicle, the driver, Vaaler, and a passenger, a female who was visibly impaired by alcohol consumption. (R. 59: 8, 17.) Vaaler did not have slurred speech or bloodshot eyes. (R. 59: 16-17.) Deputy Anderson smelled the odor of intoxicants coming from the vehicle and saw an open can of Miller Lite beer in the center console. (R. 59: 10.) The passenger stated the beer belonged to her, only after being asked twice. (R. 59: 11, 17.) The defendant denied drinking, but Deputy Anderson noted that some of Vaaler's responses to questions were delayed, which indicated to Deputy Anderson that Vaaler may be lying, in particular about where he was coming from. (R. 59: 10-11.) Deputy Anderson asked Vaaler to perform field sobriety tests based on the time of day, driving without headlights on, the odor of intoxicants coming from the vehicle and the open intoxicant in the vehicle. (R. 59: 18.)

After hearing testimony and viewing portions of a squad video, the circuit court denied the motion to suppress, finding there was reasonable suspicion to expand the nature of the stop and request that Vaaler to submit to field sobriety testing. (R. 59: 20.)

STANDARD OF REVIEW

Whether evidence should be suppressed is a question of constitutional fact. The circuit court's findings of fact are reviewed under the clearly erroneous standard. But the circuit court's application of the historical facts to

constitutional principles is reviewed de novo. *State v. Floyd*, 2017 WI 78 at ¶ 11, 377 Wis. 2d 394, 898 N.W.2d 560.

ARGUMENT

Deputy Anderson did not extend Vaaler's traffic stop for operating without headlamps illuminated until he had reasonable suspicion that Vaaler was committing the crime of OWI

A. Controlling legal principles.

This case implicates two Fourth Amendment issues: (1) whether the traffic stop was improperly extended before the police administered the field sobriety tests, and (2) whether the police had sufficient reasonable suspicion for the administration of the field tests. It is the State's burden to show by the totality of the circumstances that Deputy Anderson's request field sobriety testing was supported by reasonable suspicion. *State v. Waldner*, 206 Wis. 2d 51, 58, 556 N.W.2d 691 (1996).

1. Law on the length of a traffic stop.

A seizure that is justified by a traffic violation can become unlawful if it is prolonged beyond the time reasonably required to complete the traffic stop mission. *Illinois v. Caballes*, 543 U.S. 405, 407, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005). Beyond determining whether to issue a traffic ticket, an officer's traffic stop mission includes ordinary inquiries incident to the traffic stop. *Rodriguez v. United States*, 575 U.S. 348, 355, 135 S. Ct. 1609, 1615, 191 L.Ed.2d 492 (2015). These normal inquiries include checking on the subject's driving record, determining whether the subject has outstanding warrants, and inspecting the automobile registration and proof of insurance. *Id.*

Once the police make a lawful traffic stop, they can order the motorist to exit the vehicle incident to the stop. *Floyd*, 2017 WI at ¶ 24, 377 Wis. 2d, 898 N.W.2d. The commanding of a motorist to exit a vehicle incident to a traffic stop does not implicate Fourth Amendment concerns and does not unlawfully extend a traffic stop. *Id.* at ¶¶ 23–24.

2. Law on reasonable suspicion for field sobriety tests.

An officer may request a driver to perform field sobriety tests when the officer has reasonable suspicion that the driver is impaired. *Cty. of Jefferson v. Renz*, 231 Wis. 2d 293, 310, 603 N.W.2d 541 (1999). An officer has reasonable suspicion that a driver is impaired if the officer is able to point to specific and articulable facts which, taken together with rational inferences from the facts, reasonably warrant the intrusion. *State v. Post*, 2007 WI 60, ¶ 10, 301 Wis. 2d 1, 733 N.W.2d 634.

The question of what constitutes reasonable suspicion is a common-sense one; under the facts and circumstances what a reasonable police officer, in light of his training and experience, would suspect. *State v. Colstad*, 2003 WI App 25, ¶ 8, 260 Wis. 2d 406, 659 N.W.2d 394. The police are not required to rule out the possibility of innocent behavior in their reasonable suspicion calculus. *Waldner*, 206 Wis. 2d at 59, 556 N.W.2d.

Some factors that point to reasonable suspicion of impairment are: (1) the defendant's driving, (2) the officer's experience, (3) the time of night, and (4) the defendant's prior record of drunk driving. *State v. Lange*, 2009 WI 49, ¶¶ 24–33, 317 Wis. 2d 383, 766 N.W.2d 551.

There is no requirement that an officer detect every possible factor pointing to OWI to establish reasonable suspicion for field sobriety tests. *Town of Freedom v.*

Fellinger, No. 2013AP614, 2013 WL 3984400, at ¶ 24 (Wis. Ct. App. Aug. 6, 2013) (unpublished).

B. The police had reasonable suspicion to deviate from the original purpose of the traffic stop and launch an OWI investigation.

There is no dispute that the police properly stopped Vaaler for failing to have his headlights illuminated. And there is no dispute that the police had probable cause to arrest Vaaler for OWI. The dispute in this case is whether the police had the requisite reasonable suspicion to conduct an OWI investigation. Here, Deputy Anderson had reasonable suspicion to conduct an OWI investigation when he requested Vaaler to perform field sobriety tests, and this Court should therefore affirm.

Five factors present in this case support reasonable suspicion: (1) Vaaler's operation of his vehicle without headlights illuminated, which resulted in the traffic stop in the first place; (2) the time of day, (3) Vaaler's apparent dishonesty when answering Deputy Anderson's questions; (4) the presence of an open can of Miller Lite in the center console of the vehicle; and (5) the odor of intoxicants coming from Vaaler's vehicle.

Although the trial court did not rely on factors other than the time of night and the odor of intoxicants in finding that Deputy Anderson had reasonable suspicion to request that Vaaler submit to field sobriety testing, this Court is concerned with the correctness of the circuit court's decision and will affirm that decision even if the court was right for the wrong reason. *See, State v. Holt*, 128 Wis. 2d 110, 124, 382 N.W.2d 679 (Ct. App. 1985). In conducting this assessment, this Court can look at all facts in the record in reviewing the trial court's decision. *Floyd*, 2017 WI at ¶ 11, 377 Wis. 2d, 898 N.W.2d.

Operating without headlights illuminated at 2:43 in the morning, a time of darkness, in an unlighted, mostly rural area reveals a lack of awareness that could indicate impairment. Fog lights illuminate only the ground immediately in front of a vehicle, not the road further ahead; that is the purpose of headlights. The fact that Vaaler was travelling approximately five minutes in dark conditions and did not realize that the road ahead was not illuminated by his headlights can indicate impaired judgement due to alcohol consumption.

The time of the stop was 2:43 am, a time after bars are closed. (R. 59: 8). In *Gonzalez*, a case cited by Vaaler, the Court observed that there is a “stronger inference that a higher percentage of people driving are intoxicated” after midnight. *State v. Gonzalez*, No. 2013AP2585-CR, 2014 WL 1810115, ¶16 (Wis. Ct. App. May 8, 2014) (unpublished). That certainly is a factor that can be considered when looking at the totality of the circumstances.

Deputy Anderson also observed that Vaaler was slow in responding to his questions. (R. 59: 10). This indicated to Deputy Anderson that Vaaler was trying to formulate a lie. (R.59: 11). In his testimony, Deputy Anderson specifically stated Vaaler was slow to respond to the question of where he was coming from. (R. 59: 11). The fact that Deputy Anderson believed that Vaaler may have lied about where he was coming from and also lied about drinking, given the open intoxicant in the vehicle and the odor of intoxicants, would appropriately rouse suspicion about what Vaaler was trying to hide, and given the other observations the deputy had made.

The can of Miller Lite, that was open and in the console between the driver and passenger (R. 59: 11), is another fact that adds to the totality of the circumstances giving rise to reasonable suspicion to request Vaaler to perform field

sobriety tests. The passenger ultimately claimed responsibility for it (R. 59: 11), but only after being asked twice (R. 59: 17), which may indicate dishonesty. The deputy is not required to take the passenger's statement at face value. *Waldner*, 206 Wis. 2d at 58, 556 N.W. 2d. Further, the can was in the console of the vehicle, which is within reach of both the driver and the passenger, further supporting Deputy Anderson's suspicion that Vaaler may be driving under the influence of an intoxicant.

Deputy Anderson smelled the odor of intoxicants when he made contact with Vaaler. (R. 59: 10). Although, the passenger was clearly intoxicated (R. 59: 17), that alone does not exclude Vaaler as a potential other source of the odor. Although Vaaler denied drinking alcohol (R. 59: 10), Deputy Anderson noted that Vaaler appeared to be lying about what he had been doing prior to the stop (R. 59: 11), and the deputy saw the open intoxicant accessible to Vaaler. (R. 59: 11). Again, law enforcement is not required to eliminate all innocent explanations prior to establishing reasonable suspicion. *Id.*

Any one of the above described factors might not by itself constitute reasonable suspicion, but in the aggregate they paint a compelling picture justifying Deputy Anderson's decision to initiate an OWI investigation. *See, Id.* And the deputy gleaned all of these factors during a time period entirely justified by the traffic stop.¹

Similar to the police officer in *Fellinger*, Deputy Anderson did not observe that the defendant had blood shot eyes or slurred speech. (R. 59: 16-17). As the Court in

¹ Vaaler is not contesting the length of time of the stop as much as the expansion into an OWI investigation, therefore it can be inferred that the length of time between the stop of the vehicle and Vaaler exiting the vehicle to perform field sobriety tests is reasonable.

Fellinger observed, “there is no requirement that officers make these observations before requesting field sobriety tests.” *Fellinger*, No. 2013AP614, 2013 WL 3984400 at ¶24.

Deputy Anderson did not unlawfully extend the traffic stop to discover the relevant factors that formulated the reasonable suspicion for an OWI investigation. And the factors he did observe — driving without headlights, time of night, Vaaler’s dishonesty, the presence of open intoxicants, and the odor of intoxicants coming from inside Vaaler’s vehicle — point conclusively to a reasonable suspicion that Vaaler was violating an OWI law.

CONCLUSION

For all the foregoing reasons, the State asks this Court to affirm the trial court’s denial of Vaaler’s motion to suppress evidence and subsequent judgment of conviction.

Dated this 30th day of April, 2020.

Respectfully submitted,

JESSICA SKEMP
Deputy District Attorney
State Bar #1025642

Attorney for Plaintiff-Respondent

La Crosse County District Attorney’s Office
333 Vine Street, Room 1100
La Crosse, WI 54601
(608) 785-9604
(608) 789-4853 (Fax)
jessica.skemp@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 2,056 words.

Dated this 30th day of April, 2020.

JESSICA SKEMP
Deputy District Attorney

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 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 30th day of April, 2020.

JESSICA SKEMP
Deputy District Attorney

SUPPLEMENTAL APPENDIX TO
BRIEF OF PLAINTIFF-RESPONDENT

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix that complies with the content requirements of Wis. Stat. § (Rule) 809.19(2)(a); that is, the record documents contained in the respondent's supplemental appendix fall into one of the categories specified in sub. (2)(a).

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 30th day of April, 2020.

JESSICA SKEMP
Deputy District Attorney

**CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(13)**

I hereby certify that I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. § (Rule) 809.19(13).

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JESSICA SKEMP
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