STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT 2

Village of Grafton,
Plaintiff-Respondent,

vs. Appeal No. 20-AP-1416

Elizabeth A. Wesela,
Defendant-Appellant.

ON APPEAL FROM AN ORDER ENTERED BY THE OZAUKEE COUNTY CIRCUIT COURT THE HONORABLE SANDY A. WILLIAMS, PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Village does not request oral argument. This will be a one-judge opinion that will not qualify for publication. Wis. Stats. §§ 809.23(1)(b)(4), 752.31(2)(c). A three-judge panel is not necessary as this appeal involves the application of well-settled legal principles.

STATEMENT OF FACTS

Village of Grafton Police Officer James Menger was on patrol in the early morning hours of June 27, 2019. R. 35 at 6. This was during Summerfest, when the Target parking lot serves as a park & ride for bus service to and from the festival. *Id.* Around 1:20 a.m., the officer followed a car leaving the parking lot; a computer check showed that the car's registered owner had an expired driver's license. *Id.* The registered owner was female, and it appeared to the officer that the driver was female. *Id.* The officer stopped the car solely on this basis; the officer did not see any moving violations. *Id.*

Wesela, age 23, was the only person in the car. R. 35 at 7 (sole occupant), R. 6 (date of birth). The officer determined Wesela's mother was the registered owner with the expired license. R. 35 at 7-8. The officer explained the reason for the stop and asked Wesela for her own license and proof of car insurance. R. 20, file beginning with "qja" at 1:21:50-1:22:25. While talking with Wesela, the officer could smell the odor of alcohol coming from inside the car. R. 35 at 8. The officer also noticed that Wesela's eyes were somewhat bloodshot. *Id.* He asked Wesela if she was coming from Summerfest; she stated she was. *Id.* He asked Wesela if she had been drinking; she replied "earlier but not anymore" and said her last drink was "like, way before we left." R. 20, file beginning with "qja" at 1:22:35-1:22:55.

After checking Wesela's license and waiting about five minutes for a backup officer, the officer asked Wesela to step out of the car and onto the sidewalk. R. 35 at 10-11. The officer asked Wesela to provide more specifics about how much she had to drink; she clarified that she had four alcoholic seltzers at a bar before going to Summerfest, and then two or three beers while at Summerfest. R. 35 at 11, R. 20, file beginning with "qja" at 1:28:58-1:30:01.

The officer then conducted field sobriety tests. R. 35 at 11. The officer saw sufficient clues to indicate intoxication on two of the three standardized field sobriety tests. *Id.* at 12-14. On the remaining standardized test, and on two non-standardized tests, the officer did not see any clues of intoxication. *Id.* at 14.

The officer then administered a preliminary breath test, which showed a result of .12. R. 35 at 15.

The officer arrested Wesela for operating while under the influence of an intoxicant. R. 35 at 15. Wesela agreed to provide an evidentiary breath sample, which provided a breath alcohol concentration of .12. R. 27 at 3, 5-7. The officer issued municipal citations alleging Operating while Under the Influence ("OWI") and Operating with a Prohibited Alcohol Concentration ("PAC"). R. 6, 7.

STATEMENT OF THE CASE

Wesela filed a motion to suppress evidence in the municipal court. R. 10. The municipal court denied Wesela's motion and found Wesela guilty of the OWI and PAC citations. R. 4 at 1. Wesela filed a de novo appeal to the circuit court. R. 1. Wesela later filed a suppression motion that was similar, but not identical, to the motion she filed in the municipal court. R. 13, 14. The circuit court heard and denied Wesela's suppression motion. R. 35. Wesela waived her jury

trial request and agreed that the circuit court trial would be on the basis of stipulated facts. R. 35 at 44, R. 22, R. 36 at 2. On the basis of the stipulated facts, the circuit court found Wesela guilty of both citations at trial. R. 36 at 15-19.

ARGUMENT

I. The officer had reasonable suspicion to extend the traffic stop to conduct field sobriety tests on Wesela

During the officer's initial interaction with Wesela, the officer obtained articulable suspicion that Wesela might be intoxicated. The officer had reasonable suspicion to extend the traffic stop to investigate by administering field sobriety tests.

A. Standard of review and Fourth Amendment reasonable suspicion principles

Whether evidence is to be suppressed under the Fourth Amendment is a question of constitutional fact. *E.g.*, *State v. Brown*, 2020 WI 63, ¶ 8, 392 Wis. 2d 454, 945 Wis. 2d 584. In this analysis, the appellate court reviews the circuit court's factual findings under the clearly erroneous standard, but reviews *de novo* whether those facts satisfy constitutional requirements. *Id.*

Whether an officer had reasonable suspicion "is a common sense test: under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience[?]" *State v. Young*, 212 Wis. 2d 417, 423-24, 569 N.W.2d 84 (Ct. App. 1997).

In order to demonstrate reasonable suspicion, an officer must have a "particularized and objective basis" that is grounded in "specific and articulable facts" for believing the person has violated

the law. *E.g.*, *State v. Walli*, 2011 WI App 86, ¶ 9, 334 Wis. 2d 402, 799 N.W.2d 898. An officer may also rely on objectively reasonable inferences from the specific and articulable facts. *State v. Post*, 2007 WI 60, ¶¶ 10, 28, 301 Wis. 2d 1, 733 N.W.2d 634. The court is to apply an objective standard when reviewing law enforcement actions; "it is the circumstances that govern, not the officer's subjective belief." *State v. Buchanan*, 178 Wis. 2d 441, 448 n.2, 504 N.W.2d 400 (Ct. App. 1993).

B. There was no Fourth Amendment violation in taking Wesela's driver's license to run a computer check

Wesela was not arrested or unreasonably detained by the officer returning to his squad car to check Wesela's driver's license.

The facts here echo those of *State v. Smith*, 2018 WI 2, 379 Wis. 2d 86, 905 N.W.2d 353. In *Smith*, an officer noted that a car's registered owner, a woman, had a suspended driver's license. *Id.*, ¶ 4. The officer stopped the car. *Id.* As the officer walked up to the car, the officer realized the driver was a man. *Id.* The officer proceeded to talk to the driver, and noted that the driver had "red, bloodshot eyes and smelled of alcohol." *Id.*, ¶ 6. The officer continued the stop to investigate whether the driver was impaired. *Id.* Because the officer developed reasonable suspicion of driving while intoxicated before completing the "ordinary inquiries," *Smith* held the continuation of the stop did not violate the Fourth Amendment. *Id.*, ¶ 21.

Although Wesela argues the stop became unreasonable once Wesela gave the officer a facially valid driver's license, *Smith* instructs that an officer is always entitled to perform a routine check of the license. "[W]hen an officer conducts a valid traffic stop, part of that stop includes checking identification, even if the reasonable

suspicion that formed the basis for the stop in the first place has dissipated...Asking for a driver's license does not impermissibly extend a stop because it is part of the original mission of the traffic stop." *Smith*, 379 Wis. 2d 86, ¶ 2. A driver's license document that appears valid on its face might actually be suspended, revoked, or canceled according to DOT records. Accordingly, the officer is also entitled to engage in the "ordinary inquiries" of a traffic stop, which include "checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." *Id.*, ¶ 19 (quoting *Rodriguez v. United States*, 575 U.S. 348, 355 (2015)). There is no requirement that an officer must immediately release a driver as soon as the officer realizes that the driver is not the registered owner. "[D]oes the Fourth Amendment require a police officer to freeze, do an about-face, and walk away? Such a reaction is neither practical nor required." *Smith*, 379 Wis. 2d 86, ¶ 15.

Because running computerized checks are part of the "ordinary inquiries" of a traffic stop, the officer did not arrest or seize Wesela by taking her driver's license back to his squad car.

C. The officer had reasonable suspicion to extend the stop to investigate whether Wesela was operating while under the influence

As in *Smith*, before the officer here had completed his ordinary inquiries – that is, before the officer checked the validity of Wesela's license, and ensured Wesela had no warrants – the officer developed reasonable suspicion that Wesela was intoxicated.

First, the officer smelled an odor of intoxicants coming from the car, which was occupied only by Wesela. R. 35 at 8. Second, the officer saw that Wesela had somewhat bloodshot eyes. *Id.* Third, the

officer was aware that Wesela was leaving the Summerfest park & ride lot at 1:20 a.m., and Wesela admitted she was coming from Summerfest. *Id.* at 6, 8. The time of night is a factor in the reasonable suspicion analysis for violations occurring near "bar time." *See State v. Lange*, 2009 WI 49, ¶ 32, 317 Wis. 2d 383, 766 N.W.2d 551. It is likewise objectively reasonable for an officer to make the same inference as to traffic that can be specifically tied to Summerfest after it ends for the evening. Finally, Wesela admitted to drinking. When asked if she had been drinking, her response was "earlier but not anymore." The officer asked when her last drink was; she replied "um, like, way before we left." R. 20, file beginning with "qja" at 1:22:35-1:22:55. Wesela said she was "the driver" and "drove everyone to Target." *Id.*

Reasonable suspicion has been likened to "building blocks" – any one fact, standing alone, might be insufficient, but the officer, and this Court, are to look at the totality of the facts taken together. *State v. Waldner*, 206 Wis. 2d 51, 58, 556 N.W.2d 681 (1996). As the facts accumulate, reasonable inferences about the cumulative effect can be drawn. *Id.* The totality of the facts and inferences here reasonably led the officer to believe Wesela was intoxicated.

In making a brief report to the backup officer prior to conducting field sobriety tests, the arresting officer stated that Wesela "didn't seem overly intoxicated" and that he "could smell a little bit [of alcohol]." But reasonable suspicion doesn't require overwhelming proof; an officer isn't required to prove his case before he is done investigating. The officer didn't suspect Wesela of being *overly* intoxicated, but he still suspected her of *being* intoxicated, and that suspicion was reasonably based on articulable facts, as the circuit court concluded. "He had already gotten an impression she was intoxicated. Maybe not…a fall down drunk, but the officer had

suspicions. And based on that, he has every reason to act on them." R. 35 at 41.

The officer developed articulable, reasonable suspicion that Wesela was intoxicated during the officer's initial contact. Accordingly, it was appropriate for the officer to extend the traffic stop to investigate whether Wesela was operating while under the influence. The circuit court correctly denied Wesela's motion to suppress, and this Court should affirm the circuit court.

D. There was no Fourth Amendment violation in asking Wesela to get out of the car

After running the "ordinary inquiries," and waiting about five minutes for a backup officer to arrive, the officer asked Wesela to get out of the car and proceed to the sidewalk. R. 20, file beginning with "qja" at 1:28:44-1:28:58. A law enforcement officer may order a driver to exit their vehicle incident to a lawful traffic stop without violating the Fourth Amendment. *State v. Johnson*, 2007 WI 32, ¶ 23, 299 Wis. 2d 675, 729 N.W.2d 182, citing *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977) ("The police have already lawfully decided that the driver shall be briefly detained; the only question is whether he shall spend that period sitting in the driver's seat of his car or standing alongside it.")

After Wesela got out of the car, but before administering field sobriety tests, the officer asked Wesela additional questions about when she had been drinking, and how much she had to drink. R. 20, file beginning with "qja" at 1:28:58-1:30:01. Wesela elaborated that she had gone to a bar before going to Summerfest, and, starting around 6:00 p.m., had four alcoholic drinks. *Id.* She stated she had three beers while at Summerfest, with her final drink being an hour before they left. *Id.*

"[S]uspicious conduct by its very nature is ambiguous, and the [principal] function of the investigative stop is to quickly resolve that ambiguity. Therefore, if any reasonable inference of wrongful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, the officers have the right to temporarily detain the individual for the purpose of inquiry." *State v. Young*, 2006 WI 98, ¶ 21, 294 Wis. 2d 1, 717 N.W.2d 729. To the extent Wesela's statements that she was drinking "earlier but not anymore" and that her last drink was "like, way before we left" are ambiguous, when viewed as part of a totality with all of the other articulable facts (odor of alcohol, bloodshot eyes, time of day, coming from Summerfest), it was constitutionally reasonable for the officer to investigate further by asking questions about the timing and quantity of Wesela's drinking that night. The officer's suspicion was confirmed when Wesela indicated she had a total of seven drinks between 6:00 p.m. and midnight. R. 35 at 42.

The officer developed articulable, reasonable suspicion that Wesela was intoxicated during the officer's initial contact. Accordingly, this Court should affirm the circuit court's denial of the motion to suppress and resulting conviction.

E. The officer did not extend the stop on the basis of an unparticularized hunch

The officer's extension of the traffic stop to conduct field sobriety tests was constitutionally sound, as it was based on reasonable suspicion built on the totality of the articulable facts known to the officer during his interaction with Wesela.

On cross examination at the motion hearing, Wesela was successful in getting the officer to agree with Wesela's characterization of the officer's suspicion as a "hunch," and Wesela

wants to cast this as an "a-ha!" moment. (App. Br. at 9, 16.) But the word "hunch" is not constitutionally determinative. What is prohibited is a stop or detention based on a suspicion that is inarticulable or "inchoate and unparticularized." *Terry v. Ohio*, 392 U.S. 1, 27 (1968). *Terry* used the word "hunch" as a synonym for an inarticulable, unparticularized "gut feeling." *See id.* That's not what happened here; the officer had articulable, specific reasons for suspecting Wesela was impaired: bloodshot eyes, the odor of alcohol, the admission of drinking, the time of day, the knowledge that Wesela was coming from Summerfest, and – prior to actually conducting field sobriety tests – more detailed information that Wesela had consumed seven alcoholic drinks over the course of the evening. This adds up to reasonable suspicion, not the type of "hunch" proscribed by *Terry*.

The officer's observations added up to reasonable suspicion that Wesela was operating while intoxicated. It was constitutionally reasonable for the officer to continue the stop to investigate that suspicion through field sobriety tests. Therefore, this Court should affirm the circuit court's denial of Wesela's motion to suppress.

II. The totality of the evidence, including what the officer saw during the field sobriety tests, provided the officer with sufficient cause to request a preliminary breath test

The officer saw clues of intoxication on some, but not all, of the field sobriety tests. The totality of the field sobriety test evidence, along with everything else the officer knew, was sufficient cause for the officer to request a preliminary breath test ("PBT") sample from Wesela.

To request a PBT of a non-commercial driver, an officer is not required to meet the threshold of probable cause to arrest, but must have more evidence than would be required for reasonable suspicion. *County of Jefferson v. Renz*, 231 Wis. 2d 293, 315-16, 603 N.W.2d 541 (1999). The standard of review here is the same two-step analysis as a Fourth Amendment issue: the circuit court's factual findings are upheld unless clearly erroneous; this court decides *de novo* whether those facts meet the *Renz* standard. *Id.* at 316.

The bar for disturbing a circuit court's factual findings is justifiably high. First, the appellate court must accept all credibility determinations made and reasonable inferences drawn by the fact finder. *Noll v. Dimiceli's, Inc.*, 115 Wis. 2d 641, 643-44, 340 N.W.2d 575 (Ct. App. 1983). Only if the "great weight and preponderance of the evidence" supports a contrary finding can it possibly be said that a factual finding is clearly erroneous. *Id.*

Wesela argues the circuit court should have disregarded the two field sobriety test results that showed signs of impairment, as she contends those tests were administered incorrectly. (App. Br. at 24-26.) Disputes about whether field sobriety tests were properly administered go to the weight of the evidence, not its admissibility[1]. *City of West Bend v. Wilkens*, 2005 WI App 36, ¶ 1, 278 Wis. 2d 643, 693 N.W.2d 324. The weight to be given to testimony is up to the circuit court as factfinder, not the appellate court. *State v. Anson*, 2004 WI App 155, ¶ 24, 275 Wis. 2d 832, 686 N.W.2d 712, *Lessor v. Wangelin*, 221 Wis. 2d 659, 667, 586 N.W.2d 1 (Ct. App. 1998).

[1] Wesela's attempt to distinguish *Wilkens* by arguing it was decided before Wisconsin adopted the *Daubert* standard for admissibility of expert testimony is neither here nor there. That's because Wesela never raised an objection to the admission of the field sobriety testimony under Wis. Stat. § 907.02, thus forfeiting any argument as to admissibility.

The circuit court did not make a finding that the field sobriety tests were administered incorrectly. R. 35 at 41-42. At most, Wesela's argument boils down to whether the claimed inadequacies in the testing provide innocent explanations for the clues of impairment observed. But the existence of a possible innocent explanation for any observation does not mean that the officer, or the court, may not consider the observation as part the reasonable suspicion analysis. *State v. Hogan*, 2015 WI 76, ¶ 36, 364 Wis. 2d 167, 868 N.W.2d 124. "When evidence supports the drawing of either of two conflicting but reasonable inferences, the trial court, and not [the appellate] court, must decide which inference to draw." *Plesko v. Figgie Int'l*, 190 Wis. 2d 764, 775, 528 N.W.2d 446 (Ct. App. 1994). Wesela disagrees with how the circuit court drew inferences and found facts from the field sobriety test results; these disagreements do not support a finding that the circuit court clearly erred, or that the "great weight and clear preponderance" of the evidence is necessarily in Wesela's favor.

Wesela then argues, at some length, about her disagreements with the circuit court's credibility determinations. The trial court is the sole and ultimate arbiter of credibility. *Plesko*, 190 Wis. 2d at 775. An appellate court is not to second-guess the circuit court's credibility determinations unless they are "inherently or patently incredible or in conflict with the uniform course of nature or with fully established or conceded facts." *Global Steel Prods. Corp. v. Ecklund*, 2002 WI App 91, ¶ 10, 253 Wis. 2d 588, 644 N.W.2d 269. The circuit court was clear: "[B]ased on the Court's observations and based on the testimony of the officer, I don't question his credibility in any way." R. 35 at 40. This Court should not, and cannot, accept Wesela's invitation to second-guess the circuit court's credibility determinations.

All of the facts and inferences that formed the officer's reasonable suspicion, plus sufficient clues of intoxication on two of the three standardized field sobriety tests, was sufficient for the officer to meet the *Renz* standard and request a PBT sample from Wesela. This Court should affirm the circuit court's decision denying Wesela's motion to suppress and the resulting convictions[2].

CONCLUSION

The officer had reasonable suspicion to extend the traffic stop to investigate whether Wesela was intoxicated, and the officer met the *Renz* standard to request a PBT. Therefore, this Court should affirm the circuit court's denial of Wesela's motion to suppress, and the resulting convictions for OWI and PAC.

Respectfully submitted February 3, 2021.

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[2] The Village agrees that the trial on stipulated facts does not act to waive Wesela's ability to appeal the circuit court's denial of her motion to suppress, so long as Wesela properly raised or preserved any issue Wesela raises in this appeal.

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stats. §§ 809.19(8)(b) and (c), as modified by Order 19-02, for a brief produced with a proportional serif font. The length of this brief is 3,385 words.

Dated February 3, 2021.

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ELECTRONIC BRIEF/PILOT PROJECT CERTIFICATION

I hereby certify I am submitting only an electronic brief in compliance with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify this certificate has been served with this brief filed with the court and on all parties by electronic filing.

Dated February 3, 2021.

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