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CLERK OF WISCONSIN
COURT OF APPEALS

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT 2

City of West Bend,
Plaintiff-Respondent,

vs.

Appeal No. 22-AP-98

Peter F. Parsons,
Defendant-Appellant.

*ON APPEAL FROM AN ORDER ENTERED BY THE
WASHINGTON COUNTY CIRCUIT COURT
THE HONORABLE TODD K. MARTENS, PRESIDING*

PLAINTIFF-RESPONDENT'S BRIEF

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The City 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

City of West Bend police officer Brock Bateman was on patrol after midnight on February 27, 2019. R. 33 at 6. Around 12:20 a.m., the officer checked the registration plate of the car in front of the officer. *Id.* at 7. The Department of Transportation records showed that the license plate had been expired for about three weeks. *Id.* The officer stopped the car solely on this basis; the officer did not see any moving violations. *Id.* at 8.

In addition to the officer's red and blue emergency lights, the officer also turned on a solid white LED light, or "takedown light," as part of the stop. R. 33 at 8-9. When the officer did so, the officer saw what appeared to be a temporary license plate in the car's back window. *Id.* at 8. However, the officer was not completely certain at first that it was a temporary tag, because the car's back window was partially covered with snow. *Id.*

Parsons was the only person in the car. R. 33 at 9. Parsons stated he was coming from Applebee's, and admitted to having "one beer." *Id.* at 10. Parsons also lit a cigarette, which the officer knew was a tactic that some people use to mask the odor of alcohol or illicit substances. *Id.* at 11. Further, the officer noted that the cigarette was dropping ashes into Parsons' lap and burning into Parsons' pants, but Parsons appeared to be unaware this was happening. *Id.*

The officer next asked Parsons to step out of the car and onto the sidewalk, in part to remove Parsons from the cigarette odor. R. 33 at 13. The officer told Parsons that the officer was concerned Parsons might be impaired, and asked whether Parsons was taking any medications. *Id.* at 13-14. Parsons indicated he had taken sertraline, which Parsons stated was prescribed for depression. *Id.* at 14. The

officer then told Parsons that he wanted Parsons to perform field sobriety tests, but that the officer felt an indoor environment would be more conducive to the tests. *Id.* The roads and sidewalk were snow-covered at the time. *Id.* Parsons agreed to go to a fire station, where an officer performed field sobriety tests. *Id.*

Ultimately, Parsons was arrested on suspicion of operating while under the influence. Analysis of Parsons' blood revealed Delta-9-THC, a restricted controlled substance, at a concentration of 9.2 ng/mL. R. 30. The circuit court ultimately convicted Parsons of the offense of operating with a restricted controlled substance, contrary to West Bend Municipal Code adopting Wis. Stat. § 346.63(1)(am). R. 35.

STATEMENT OF THE CASE

The procedural history of the case recited in Parsons' brief is substantially correct. App. Br. at 7-8.

ARGUMENT

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

During the officer's initial interaction with Parsons, the officer made articulable observations that Parsons might be impaired. Therefore, the officer had reasonable suspicion to extend the traffic stop to investigate the suspicion through the administration of 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. The officer had reasonable suspicion to extend the stop to investigate whether Parsons was operating while under the influence of alcohol and/or other substances

During the officer’s interaction with Parsons, the officer became aware of articulable suspicious factors which led the officer to suspect Parsons might be impaired. Because the officer had articulable reasonable suspicion of operating while impaired, it was constitutionally permissible for the officer to extend the traffic stop to administer field sobriety tests to Parsons.

A traffic stop may be extended to investigate a violation unrelated to the initial stop when the officer obtains reasonable suspicion of a different violation during the course of the ordinary inquiries attendant to the initial traffic stop. *State v. Smith*, 2018 WI

2, ¶ 28, 379 Wis. 2d 86, 905 N.W.2d 353, *see also State v. Betow*, 226 Wis. 2d 90, 94-95, 593 N.W.2d 499 (Ct. App. 1999).

First, the time of night is a factor in the reasonable suspicion analysis. *See State v. Lange*, 2009 WI 49, ¶ 32, 317 Wis. 2d 383, 766 N.W.2d 551¹. This stop occurred at 12:20 a.m. on a Wednesday morning. R. 33 at 6, 15. Second, Parsons admitted to drinking a beer, and to coming from a restaurant with a bar. R. 33 at 10. Third, the officer saw that Parsons had lit a cigarette, which the officer knew to be a tactic some people use to attempt to mask the odor of intoxicants or other substances. R. 33 at 11. Fourth, the officer saw that ashes from the cigarette were burning a hole in Parsons' pants, but that Parsons appeared not to notice this. *Id.* at 11-12. Fifth, Parsons told the officer he was taking prescription medication for depression. *Id.* at 14. As the officer alluded to in his testimony at the motion hearing, some prescription medications may have an impairing effect when taken at the same time as alcohol. *See id.* at 14. Finally, the officer noted that some of Parsons' responses to the officer's questions were simply along the lines of shaking his head and keeping his mouth closed while stating things such as "mmm-hmm" as opposed to a fully verbalized response. *Id.* at 9.

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 would lead a reasonable officer to suspect that Parsons was under the influence. The officer, at this stage, need not develop enough facts to prove the violation to a reasonable certainty, or even to have

¹ One of the unpublished cases cited by Parsons agrees. "Most cases addressing the time of day factor involve stops around midnight or later, when there is a stronger inference that a higher percentage of people driving are intoxicated." *State v. Gonzalez*, 2013AP2585-CR, unpublished slip op. at ¶ 16 (cited in App. Br. at 13.)

probable cause to arrest. The officer is simply required to reasonably suspect a violation based on articulable facts and inferences from those facts.

Parsons argues that the “record does not demonstrate that Mr. Parsons’ mentation was impaired” and that Parsons did not exhibit “any of the ‘typical’ indicia of impairment.” App. Br. at 11. To the contrary, the record shows that Parsons was unaware that his cigarette ashes were falling into his lap and burning into his pants. R. 33 at 11-12. This lack of attention to and awareness of surroundings is both concerning and suspicious as it relates to driving, which likewise requires attention to and awareness of one’s surroundings. Second, while it is undisputed that the officer observed no particular acts of unsafe driving, such acts are not required for a conviction, let alone for reasonable suspicion. *E.g.*, Wis. JI-Criminal 2663A (“It is not required that impaired ability to operate be demonstrated by particular acts of unsafe driving. What is required is that the person’s ability to safely control the vehicle be impaired.”) Finally, reasonable suspicion does not demand that an officer observe that which is “typical,” only that the cumulative effect of the officer’s articulable observations would cause a reasonable officer to suspect a violation of law. Here, the cumulative effect of the officer’s observations, particularly Parsons’ inability to recognize that he was allowing cigarette ashes to burn into his pants, indicated that Parsons was not fully aware of his surroundings, and therefore potentially impaired. The officer therefore was entitled to investigate this suspicion through field sobriety tests.

Parsons appears to respond by simply claiming it is legal and common to smoke cigarettes. App. Br. at 12. While it may be legal to smoke generally speaking, lighting up a cigarette during a traffic stop is, as the officer testified, a tactic some people use to mask odors. R. 33 at 11. Even if Parsons’ actions could simply be explained away as “nervousness,” it is well-settled that an officer need not account for innocent explanations for behavior. “[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 there was ambiguity (or, perhaps better put, incongruity) between Parsons’ admission to drinking one beer and Parsons’ apparent inability to recognize that his cigarette ashes were burning into his pants, when viewed as part of a totality with all of the other articulable facts (time of day, coming from an establishment that serves alcohol, hummed responses), it was constitutionally reasonable for the officer to investigate further by asking questions about whether Parsons was taking other substances in addition to alcohol that might cause impairment. When Parsons responded that he was taking a prescription antidepressant, it was constitutionally reasonable for the officer to investigate through field sobriety tests whether Parsons was driving while under the influence².

The officer developed articulable, reasonable suspicion that Parsons was impaired. It was appropriate for the officer to investigate that suspicion through the administration of field sobriety tests. Accordingly, this Court should affirm the circuit court’s denial of the motion to suppress and resulting conviction.

C. 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 Parsons.

² A person may be guilty for operating while under the influence of “an intoxicant” or “any combination of an intoxicant [and] a controlled substance...” or “under the combined influence of an intoxicant and any other drug...”. Wis. Stat. § 346.63(1)(a).

The Constitution prohibits 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 Parsons was impaired: the time of day, the admission of drinking, that Parsons was coming from a location that served alcohol, Parsons’ unawareness of the cigarette ashes burning into his pants, hummed responses, and Parsons’ statement they were taking a prescription antidepressant. This adds up to reasonable suspicion, not the type of “hunch” proscribed by *Terry*.

Therefore, this Court should affirm the circuit court’s denial of Parsons’ motion to suppress.

CONCLUSION

The officer had reasonable suspicion to extend the traffic stop to investigate whether Parsons was impaired. Therefore, this Court should affirm the circuit court’s denial of Parsons’ motion to suppress, and his resulting conviction for operating with a detectable amount of a restricted controlled substance.

Respectfully submitted April 27, 2022.

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FORM AND LENGTH CERTIFICATION
Wis. Stat. § 809.19(8g)(a)

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 2,163 words.

Dated April 27, 2022.

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