STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,
Plaintiff-Respondent,

Case No. 2022AP162-CR

v.

Michael J. Schwersinske, Jr.,
Defendant-Appellant.

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT

APPEAL FROM AN ORDER OF JUDGMENT ENTERED IN THE COUNTY CIRCUIT COURT FOR FOND DU LAC COUNTY, BRANCH V, THE HONORABLE PAUL CZISNY, PRESIDING, TRIAL COURT CASE NO. 18-CT 495

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I. Statement of Issues Presented for Review

1) Whether there were sufficient grounds to enlarge the scope of the detention of defendant-appellant?

Trial Court Holding: Yes, the detention was permissibly extended.

II. Statement on Oral Argument and Publication

The State is requesting neither publication nor oral argument, as this matter involves only the application of well-settled law to the facts of the case.

III. Statement of the Case and Summary of Defense Argument

The defendant-appellant, Mr. Schwersinske, was charged with Operating a Motor Vehicle While Under the Influence of an Intoxicant, contrary to Wis. Stat. § 346.63(1)(a), and Operating a Motor Vehicle with a Prohibited Alcohol Concentration, contrary to Wis. Stat. § 346.63(1)(b), following an incident and arrest on November 10, 2018.

During an evidentiary hearing conducted pursuant to pretrial motions, the defense heard the testimony of the arresting officer and single witness for the state, Deputy Zach Bohlman of the Fond du Lac County Sheriff's Office. R26 beginning at 4:1. After listening to the deputy's

testimony, the defense became aware of an additional unanticipated issue, the claim that the defendant's detention had been unreasonably enlarged beyond its original purpose in violation of the defendant's 4th Amendment rights. R26 32:10 to 33:22. After supplemental briefs and oral arguments were delivered to the court, the trial court denied all of the defense's pretrial motions. R55 11:22 to 14:8. Subsequently, Mr. Schwersinske changed his plea to one of No Contest, and was found guilty. R48 and R52. He now appeals on the issue of the denied motion objecting to the alleged unconstitutional enlargement of his detention on the night of his arrest.

IV. Standard of Review

Defendant-Appellant has argued, per State v. Jahnke, 2009 WI App 4, ¶ 4, 316 Wis. 2d 324, 762 N.W.2d 696, that Constitutional questions regarding 4th Amendment rights based upon undisputed facts, merit *de novo* review. This is true. Whether a stop or detention meets statutory and constitutional standards is, as such, a question of law subject to de novo review. State v. Betow, 226 Wis. 2d 90, 93, 593 N.W.2d 499, 501, 1999. When there is review for a decision on a motion to suppress evidence, a reviewing court will uphold a circuit court's findings of historical fact

unless they are clearly erroneous. State v. Pinkard, 2010 WI 81, ¶ 12, 327 Wis.2d 346, 785 N.W.2d 592. However, the reviewing court applies constitutional principles to those facts independently, as questions of law. *Id.* In other words, whether reasonable suspicion exists is a question of constitutional fact. State v. Popke, 2009 WI 37, ¶ 25, 317 Wis.2d 118, 765 N.W.2d 569.

V. Argument

1) Enlarging a Traffic Stop

A brief investigatory stop is a seizure and is subject to the requirement of the Fourth Amendment to the United States Constitution that all searches and seizures be reasonable. Terry v. Ohio, 392 U.S. 1, 20-22, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968). To execute a valid investigatory stop consistent with the Fourth Amendment, a law enforcement officer must reasonably suspect, in light of his or her experience, that some kind of criminal activity has taken or is taking place. State v. Richardson, 156 Wis. 2d 128, 139, 456 N.W.2d 830, 834 (1990). The Wisconsin Legislature codified the *Terry* constitutional standard in Wis. Stat. § 968.24. When we interpret § 968.24, we rely on *Terry* and the

cases following it. State v. Jackson, 147 Wis.2d 824, 830–31, 434 N.W.2d 386 (1989).

The Court of Appeals of Wisconsin provided further explanation in State v. Young, 212 Wis. 2d 417, 423-424, 569 N.W.2d 84, 88:

> The officer must be able to point to specific and articulable facts that, taken together with rational inferences from those facts, reasonably warrant the intrusion. Terry, 392 U.S. at 21. The standard is the same under Article I, Section 11 of the Wisconsin Constitution. State v. Harris, 206 Wis. 2d 242, 258, 557 N.W.2d 245, 252 (1996). The question of what constitutes 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. Jackson, 147 Wis. 2d 824, 834, 434 N.W.2d 386, 390 (1989). An officer may rely on information received from another officer in making a stop. See Johnson v. State, 75 Wis. 2d 344, 349-50, 249 N.W.2d 593, 596 (1977). The inquiry in such a situation is whether the collective information among the officers is adequate to sustain the stop. Id. at 350, 249 N.W.2d at 596.

Id.

If during a valid traffic stop, the officer becomes aware of additional suspicious factors which are sufficient to give rise to an articulable suspicion that the person has committed or is committing an offense or offenses separate and distinct from the acts that prompted the officer's intervention in the first place, the stop may be extended and a new investigation begun. The validity of the extension is tested in the same manner, and under the same criteria, as the initial stop. State v. Betow.

There are limits placed on any extension. “[T]he police [may not] seek to verify their suspicions by means that approach the conditions of

arrest." Fla. v. Royer, 460 U.S. at 499, 103 S.Ct. 1319. Consequently, the detention "must be temporary and last no longer than is necessary to effectuate the purpose of the stop." *Id*. at 500. In determining whether the length of a stop is permissible, it is "appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the [person]." United States v. Sharpe, 470 U.S. 675, 686, 105 S.Ct. 1568, 84 L.Ed.2d 605 (1985). "In making this assessment, courts should not indulge in unrealistic second-guessing. In assessing a detention's validity, courts must consider the totality of the circumstances—the whole picture, because the concept of reasonable suspicion is not readily, or even usefully, reduced to a neat set of legal rules." State v. Wilkens, 159 Wis.2d 618, 626, 465 N.W.2d 206 (Ct.App.1990).

The dispute in the Trial Court as to reasonable suspicion is one of legal definition or interpretation, not a dispute over what factually happened. And the trial court properly considered the full totality of the evidence and inferred from it to find reasonable suspicion was satisfied to extend the traffic stop to request field sobriety tests. The State would note

that field sobriety tests are the fastest way to "confirm or dispel" the suspicion of driving while intoxicated.

The defendant-appellant's brief characterizes the facts of this case as "undisputed." We agree, clarifying that it is what may be inferred from the facts, namely reasonable suspicion, where we disagree.

2) The Trial Court Correct on Reasonable Suspicion

In their brief, the Defendant-Appellant asserts that there were only two additional factors the Trial Court used to find reasonable suspicion of driving over the legal limit – that the defendant had admitted to drinking two or three beers, and that there was an "odor of intoxicants coming from the vehicle." But this ignores the third reason the trial court cites – the defendant had been driving on the "wrong side of the road." Now the defense likely ignores this third reason as it seems like it is not additional after the traffic stop. After all, it was the reason for the car being pulled over, prior to Deputy Bohlman becoming suspicious of drunk driving. But the trial court nevertheless cited this as one of the reasons for finding reasonable suspicion after the initial traffic stop. R55 12:1-25 to 13:1-10. This would mean that they treated it as an additional fact. This is a

legitimate conclusion—before, it was only evidence of bad driving. But after an admission to drinking and a smell of intoxicants, it becomes a new piece of evidence for an issue separate from the original traffic stop: its highly suggestive of drunk driving.

In looking at these three factors, we can see that Deputy Bohlman did not have a mere hunch of drunk driving, but a reasonable suspicion of it. The driver admitted to drinking, the car smelled of intoxicants, and the car had just been driving on the wrong side of the highway. There was good reason to expand the detention to include field sobriety tests, as there was a very high probability of the defendant having been driving over the legal limit or while intoxicated.

As our supreme court stated in County of Jefferson v. Renz, 231 Wis.2d 293, 310, 603 N.W.2d 541 (1999):

> First, an officer may make an investigative stop if the officer "reasonably suspects" that a person has committed or is about to commit a crime ... or reasonably suspects that a person is violating the non-criminal traffic laws.... After stopping the car and contacting the driver, the officer's observations of the driver may cause the officer to suspect the driver of operating the vehicle while intoxicated. If his observations of the driver are not sufficient to establish probable cause for arrest for an OWI violation, the officer may request the driver to perform various field sobriety tests. The driver's performance on these tests may not produce enough evidence to establish probable cause for arrest. The legislature has authorized the use of the PBT to assist an officer in such circumstances.

Id. (emphasis added). Renz establishes that it is not simply the officer's stop that allows the officer to request field sobriety tests—rather, it is specific observations of impairment that allows the officer to request the tests.[1]

The duty of law enforcement is to screen suspected drunk drivers from the roadway, and the use of field sobriety tests is one of the primary tools to do so. The purpose of the field sobriety test is to make a preliminary determination of whether the defendant is intoxicated. State v. Babbit, 188 Wis. 29 349, 359 (Wis. App. 1994). To this end, the use of field sobriety tests is designed to ensure that not everyone who is suspected of drunk driving is arrested, but rather screened to support the higher requirement for probable cause for an arrest.

Finally, the defendant-appellant attempts to argue that the absence of other possible indicators of intoxication weigh against reasonable suspicion. But absent indicators do not necessarily weigh against reasonable suspicion, especially when they offer no disproof towards clear, strong indicators of intoxication like what Deputy Bohlman encountered

[1] *See id.* at 310, 603 N.W.2d 541. *See State v. Lange*, 2009 WI 49, ¶ 32, 317 Wis.2d 383, 766 N.W.2d 551 (time of night of traffic stop is relevant factor in OWI investigation); *see also Renz*, 231 Wis.2d at 316, 603 N.W.2d 541 (indicators of intoxication include odor of intoxicants and admission of drinking); *State v. Colstad*, 2003 WI App 25, ¶ 19, 260 Wis.2d 406, 659 N.W.2d 394 (the facts that driver struck child on street combined with mild odor of alcohol amounted to reasonable suspicion to conduct field sobriety tests)

here. The defense notes that there was no noted slurred speech, bloodshot or glassy eyes, delays in responding to the officer at any time, poor parking, lack of cooperation with the officer, confusion or disorientation, presence of alcoholic beverages in the vehicle, difficulty answering questions, or poor coordination, or slow movement. App. Brief, p.14, referring to R26 in total. But the missing evidence they focus most on is the lack of noticeable impairment. The defense asserts that it is "part of the 'common stock of knowledge'" that alcohol impairs both mentation and coordination. But the State would point out that also within the "common stock of knowledge" is the truth that the degree of impaired mentation varies both by the amount drank and by person. Neither does the absence of noticeable mental impairment, nor any of the other indicators the defendant-appellant points out, disprove that the defendant had "two to three" beers, the vehicle smelled of intoxicants, and it was just being driven on the wrong side of a highway. Something like lack of noticeably impaired mentation could suggest that the defendant is someone less effected by alcohol when drunk driving – but it does nothing to disprove the reasonable suspicion that he was drunk driving.

But a full review of both the totality of the evidence and the court's diligent inquiries into the same can result in only one conclusion: that the Trial Court was correct to conclude that Deputy Bohlman had a reasonable suspicion that Mr. Schwersinske was driving with a BAC over the legal limit after observing him at the traffic stop.

VI. Conclusion

For the reasons set forth above, Deputy Bohlman had reasonable suspicion to enlarge the detention of the defendant, and the Trial Court committed no error in finding the same.

Dated at Fond du Lac, Wisconsin this 1st day of July, 2022.

ELECTRONICALLY SIGNED BY:
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CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2080 words.

I further certify pursuant to Wis. Stat. § 809.19(b)(12)(f) that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief, ***other than the appendix material is not included in the electronic version.***

I further certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents, (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written findings or decision showing the circuit court's reasoning regarding these issues.

I further certify that if this appeal is taken from a circuit court order of 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 first names and last initials instead of full names of person, 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 1st day of July, 2022 at Fond du Lac, Wisconsin by:

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