STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,
Plaintiff-Respondent,

Case No. 22AP387

v.

BRYNTON C. FOSTON,
Defendant-Appellant.

BRIEF OF PLAINTIFF-RESPONDENT

ON NOTICE OF APPEAL FROM THE JUDGMENT AND CONVICTION AND THE DECISION OF THE TRIAL COURT THAT MR. FOSTON REFUSED CHEMICAL TESTING, IN WINNEBAGO COUNTY, THE HONORABLE SCOTT C. WOLDT PRESIDING

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I. Statement of Issues Presented for Review

1) Did Officer Katsma have reasonable articulable suspicion to detain Mr. Foston and ask he perform field sobriety tests?

The circuit court answered: Yes.

II. Statement on Oral Argument and Publication

The State does not request oral argument, as this matter involves only the application of well-settled law to the facts of the case. Pursuant to Wis. Stat. 752.31(c), this matter is to be decided by one judge, and is not eligible for publication. Wis. Stat. 809.23(1)(b)4.

III. Statement of the Case

The State believes Mr. Foston's recitation of the facts of the case is sufficient, and pursuant to Wis. Stat. 809.19(3)(a)(2), omits a repetitive statement of the case.

IV. Argument

The only issue contested on review is whether Officer Katsma had reasonable articulable suspicion to ask Mr. Foston to perform field sobriety tests. Because Officer Katsma articulated he saw Mr. Foston driving at bar time without vehicle lights on, stumble out of his car, try to evade police contact, speak with slurred speech, and had bloodshot eyes, Officer Katsma's request for field sobriety tests was lawful, and the refusal finding should be affirmed.

Under the Fourth Amendment, the "seizure" of "persons" is unlawful if it is not "reasonable." Whren v. United States, 517 U.S. 806, 809–10, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). To determine whether a search or seizure is "reasonable," a reviewing court first examines whether the initial interference with an individual's liberty was justified. Terry v. Ohio, 392 U.S. 1, 19–20, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). If not, seizure was not reasonable. *Id.* If the initial interference was justified, a reviewing court then determines whether subsequent police conduct was "reasonably related" in scope to the circumstances that justified the initial interference. *Id.;* State v. Arias, 2008 WI 84, ¶ 30, 311 Wis.2d 358, 752 N.W.2d 748.

Turning to the specific context of a traffic stop, temporary detention of individuals by the police during an automobile stop constitutes a "seizure" of "persons." Whren, 517 U.S. at 810. Therefore, to determine if the temporary detention of individuals is "reasonable," a reviewing court must first examine if

the officer has "probable cause to believe" that a traffic violation has occurred, *id.,* or if the officer "reasonably suspects," based on the totality of the circumstances, that the motorist has committed, is in the process of committing, or is about to commit an unlawful act. *See* Wis. Stat. 968.24; State v. Krier, 165 Wis.2d 673, 677–78, 478 N.W.2d 63 (Ct.App.1991). "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. Colstad, 2003 WI App 25, ¶ 8, 260 Wis.2d 406, 659 N.W.2d 394(citation omitted).

To possess the requisite reasonable suspicion to conduct field sobriety tests, an officer must be able to point to "specific and articulable facts" and "*rational inferences* from those facts" to reasonably suspect that the motorist had drunk enough to impair the motorist's ability to drive. State v. Richardson, 156 Wis.2d 128, 139, 456 N.W.2d 830 (1990). Although acts and circumstances by themselves may constitute lawful behavior that falls short of "reasonable suspicion," taken together, the totality of those circumstances may constitute reasonable suspicion. State v. Popke, 317 Wis.2d 118, ¶ 25, 765 N.W.2d 569. In fact, the "building blocks of fact" may accumulate to such a degree that "the sum of the whole is greater than the sum of its individual parts." State v. Waldner, 206 Wis.2d 51, 58, 556 N.W.2d 681 (1996).

In this case Officer Katsma pointed to the following specific and articulable facts to ask the defendant perform field sobriety tests after the stop: Officer Katsma saw Mr. Foston driving at bar time without car lights on (R21:P3), Mr. Foston stumbled out of his car (R21:P5), Mr. Foston appeared to try to evade police contact (R21:P4), Mr. Foston spoke with "extreme" slurred speech (R21:P5), and had bloodshot eyes (*Id.*). A rational inference from these facts was that the defendant was on a substance impairing his ability to drive.

Mr. Foston notes that nothing in the record suggests Officer Katsma smelled the odor of intoxicants. 13 Br. of Appellant. This absence does not defeat Officer Katsma's reasonable suspicion to ask for field sobriety tests – there are many impairing substances other than alcohol, many of which are odorless.

V. Conclusion

The only issue on review is whether Officer Katsma's request for field sobriety tests was lawful. Because Officer Katsma's request was based on reasonable, articulable suspicion, the trial court's finding of an unlawful refusal should be affirmed.

Dated at Oshkosh, Wisconsin this July 18, 2022

Electronically signed by:

Adam J. Levin
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Assistant District Attorney
Winnebago County, Wisconsin
Attorney for the Respondent

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm) and (c) for a brief. The length of this brief is 790 words.

Dated at Oshkosh, Wisconsin this July 18, 2022

Electronically signed by:

Adam J. Levin
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Assistant District Attorney
Winnebago County, Wisconsin
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