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COURT OF APPEALS
STATE OF WISCONSIN
DISTRICT III

CASE NO. 2022:AP000389-CR

STATE OF WISCONSIN,
Plaintiff-Respondent

v.

IAIN A. JOHNSON,
Defendant-Appellant.

**ON APPEAL FROM THE JUDGMENT AND ORDER, ENTERED IN THE
CIRCUIT COURT FOR EAU CLAIRE COUNTY, CASE NO. 20 CM 258,
THE HONORABLE SARAH M. HARLESS, PRESIDING**

BRIEF OF PLAINTIFF-RESPONDENT

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COURT OF APPEALS
STATE OF WISCONSIN
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CASE NO. 20 Wis. Stat. § 968.24:AP000389-CR

STATE OF WISCONSIN,
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v.

IAIN A JOHNSON,
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BRIEF OF PLAINTIFF-RESPONDENT

ISSUE PRESENTED FOR REVIEW

- I. Did Trooper Wojcik have the necessary reasonable suspicion to extend the traffic stop and request that Johnson submit to field sobriety tests?**

The Trial Court Answered: “Yes.”

STATEMENT OF ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. The issue is neither novel nor factually complicated.

STATEMENT OF FACTS

On January 19, 2020 Trooper Wojcik was dispatched to a driving complaint that originated around milepost 4 of a I-94. (22: 6). The complainant reported a gray Dodge Ram with Minnesota license plate was observed speeding, and it was

weaving back and forth. (22: 13). At one point the vehicle was reportedly traveling below the posted speed limit. (22: 13). Trooper Wojcik observed the suspect vehicle around milepost 70 or 71, traveling faster than the 70 mph speed limit. (22: 6). Trooper Wojcik obtained a speed reading of 80 mph and he activated his emergency lights to conduct a traffic stop. (22: 6-7).

The vehicle failed to pull over for approximately three-quarters of a mile after the Trooper activated his emergency lights. (22: 7). The driver of the vehicle was identified as the defendant, Iain Johnson. (22: 7). When Trooper Wojcik approached the vehicle he observed a freshly lit cigarette, the defendant's eyes were red and glossy, his speech appeared thick and a little bit slower, almost to a slurred manner and more drawn out. (22: 8).

Trooper Wojcik testified based on his training and 12 years of experience as a law enforcement officer, a fresh lit cigarette is an indication of a possible cover odor. "Individuals who are impaired have a tendency to attempt to either a cigarette or a masking cover odor of perfume to mask the odor of intoxicants in the vehicle." (22: 9). He further testified officers look at an individual eyes, their speech pattern, and indicators of driving behavior like weaving within its lane, outside of its lane of traffic, as well as speed, either above or below the posted speed limit when trying to determine if someone's ability to operate a motor vehicle is impaired. (22: 9).

After making the observation of the freshly lit cigarette, Trooper Wojcik decided to remove the defendant from the vehicle so he could speak with the

defendant and determine if there was any indication or odor of intoxicants coming from his person away from the odor of the cigarette. (22: 9). Trooper Aguilar arrived on scene and Trooper Wojcik asked him to approach the defendant's vehicle to see if he could smell the odor of intoxicants and get the defendant's insurance information. (22: 10). Trooper Aguilar approached the defendant's vehicle and then returned to Trooper Wojcik reporting he smelled the freshly lit cigarette, but not the odor of intoxicants. (22: 10).

Trooper Wojcik returned to the defendant's vehicle and asked him to exit the vehicle so Trooper Wojcik could ascertain if there was an odor of intoxicants coming from his person and to start field sobriety tests. (22: 10). Trooper Wojcik testified based on his observations of the defendant's eyes and speech patterns, he wanted to remove him from the possible cover odor of the cigarette smoke so he could speak with the defendant to see if there was an odor of intoxicants. (22: 12).

ARGUMENT

First, an officer may make an investigative stop pursuant to Wis. Stat. § 968.24 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 civil traffic regulations. *County of Jefferson v. Renz*, 231 Wis. 2d 293, 310, 603 N.W.2d 541 (1999). After stopping the vehicle and contacting the driver, the officer's observations may cause the officer to suspect the driver of operating the vehicle

while intoxicated. *Id.* If the 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.

To lawfully request a driver perform field sobriety tests, an officer must have some evidence of *impairment*. As our supreme court stated in *Renz*:

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.

Renz, 231 Wis. 2d at 310.

Renz establishes that is not simply the official 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. *Id.* The requisite quantum of evidence for field sobriety testing should be at least equal to that of the initial stop's reasonable suspicion requirement. Because *Renz* states that an officer must make specific observations that lead the officer to “suspect” the individual is operating while intoxicated, we conclude that, to justify the intrusion of a field sobriety test, an officer must have reasonable suspicion that the driver is impaired before requesting field sobriety tests. *Id.*

An officer has reasonable suspicion that an individual is impaired if he or she is “able to point to specific and articulable facts which, taken together with rational inferences from those facts,” suggest impairment. *State v. Post*, 2007 WI 60, ¶ 10, 301 Wis. 2d 1, 733 N.W.2d 634 (quoting *Terry v. Ohio* 392 U.S. 1, 21 (1968)). “[W]hat 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. Young*, 212 Wis. 2d 417, 424, 569 N.W.2d 84 (Ct. App. 1997). An officer's “inchoate and unparticularized suspicion or ‘hunch,’ ” however, will not give rise to reasonable suspicion. *Post*, 301 Wis.2d 1, ¶ 10.

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*, 2009 WI 37, ¶ 25, 317 Wis. 2d 118, 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, there is no dispute Trooper Wojcik had reasonable suspicion to conduct a traffic stop. He had received a driving complaint of a Dodge Ram with Minnesota license plate that was speeding, weaving back and forth, and at one point traveling below the posted 70 mph speed limit. Trooper Wojcik observed the suspect vehicle matching this description traveling above the posted speed limit and obtained a speed reading of 80 mph. Speeding is a reason for a traffic stop.

After a stop is made, an officer may expand the scope of inquiry only to investigate “additional suspicious factors” that come to the officer's attention. *State v. Hogan*, 2015 WI 76, ¶ 35, 364 Wis. 2d 167, 868 N.W.2d 124. “An expansion in the scope of the inquiry, when accompanied by an extension of time longer than would have been needed for the original stop, must be supported by reasonable suspicion.” *Id.*

In this case, Trooper Wojcik had these additional suspicious factors:

1. After Trooper Wojcik activated his emergency lights the vehicle failed to immediately pull over.
2. The vehicle traveled for approximately three quarters of a mile until the vehicle pulled over.
3. Trooper Wojcik’s initial observations of the defendant included a freshly lit cigarette
4. The defendant had red and glossy eyes
5. The defendant had thick and slowed, almost slurred speech.

All of these facts, including the initial traffic complaint and the observations of speeding, taken together led Trooper Wojcik to suspect the defendant may be operating while intoxicated and support finding Trooper Wojcik had reasonable suspicion to ask the defendant to step out of the vehicle to determine if there was an odor of intoxicants coming from his breath and to perform field sobriety tests.

Trooper Wojcik testified “Based on the – his eyes and his speech patterns, I wanted to remove him from the possible cover odor of the cigarette smoke so I could speak to him outside of that area to see if there was an odor of intoxicants if – for impairment at the back of the vehicle.” (22: p. 12).

It is well established that “a combination of behaviors – all of which may provide the possibility of innocent explanations – can give rise to reasonable suspicion.” *Hogan*, 364 Wis. 2d 167, ¶ 36.

The defense may argue Trooper Wojcik could not consider the initial traffic complaint in determining whether or not to ask the defendant to step out of the vehicle. However, reasonable suspicion does not need to derive from personal knowledge. *State v. Mabra*, 61 Wis. 2d 613, 625, 213 N.W.2d 545 (1974). An officer “may rely on all the collective information in the police department” as long as “there is police-channel communication to the arresting officer” and the officer acts in good faith. *Id.* Further, information given by citizen informants may provide a basis for reasonable suspicion. *Id.*

The citizen tip that the vehicle was weaving back and forth, speeding, and at one point traveling below the posted 70 mph speed limit are all facts Trooper Wojcik took into consideration when he decided to ask the defendant to step out of the vehicle. Additionally, after Trooper Wojcik activated his emergency lights the vehicle failed to immediately pull over. The vehicle traveled approximately three quarters of a mile before pulling over. Failure to immediately pull over can be a sign of impairment.

Trooper Wojcik verified the initial traffic complaint when he observed the vehicle matching the description provided by the caller speeding 80 mph in a 70 mph zone. As an initial matter, speeding is evidence of general impairment. See generally, *City of West Bend v. Wilkens*, 2005 WI App 36, 278 Wis. 2d 643, 693 N.W.2d 324. Additionally, Trooper Wojcik testified officers are trained to look for slurred speech and red and glossy eyes as additional signs of impairment. (22: 9). These were all signs observed by Officer Wojcik.

Trooper Wojcik provided specific and articulable facts supporting why he asked the defendant to step out of the vehicle. He testified, “Specifically to this case, the fresh lit cigarette is an indication of possible cover odor. Individuals who are impaired have a tendency to attempt to either a cigarette or a masking cover odor of perfume to mask the odor of intoxicants in the vehicle.” (22: 9). The reasonable inference from this fact is the possibility the driver is operating while under the influence of an intoxicant.

In *State v. Kolman*, 2012 WL 87713, 2012 WI App 27, ¶ 3, 339 Wis. 2d 492, 809 N.W.2d 901 (authored one judge opinion), the Trooper conducted a traffic stop for a vehicle with a defective brake light. ¶3, Once the officer approached the vehicle, the Trooper noticed the driver had “bloodshot and glassy eyes.” The Trooper testified based on his training and experience, bloodshot and glassy eyes can indicate alcohol consumption. The Trooper also testified “There was an overwhelming odor of cigarette smoke coming from the vehicle because she had just lit up a cigarette.” In the Trooper’s experience, it is “not uncommon for someone to try to cover the odor of intoxicants with [a] cigarette[.]” *Id.* at ¶ 4. Based on those initial observations, the Trooper asked the defendant to recite the alphabet, which she did poorly, and he conducted a modified HGN test, all while the defendant remained seated in the vehicle. *Id.* at ¶¶ 7-8.

In *Kolman*, the defense argued the Trooper unreasonably expanded the traffic stop when he asked the defendant to recite the alphabet and perform the “mini” HGN test. *Id.* at ¶ 17. The court concluded:

[U]sing the supreme court decision in *Arias* as its primary authority, that the trooper's apparently diligent and speedy attempt to confirm or dispel the suspicion of impaired driving raised by Kolman's bloodshot and glassy eyes and lighting of a cigarette, by asking Kolman to recite the alphabet, while still seated in her vehicle, represented an incremental intrusion on her liberty that is outweighed by the public interest served by the request. The trooper's request was only minimally more intrusive than asking Kolman if she had been drinking, a question that clearly was permissible, under the totality of the circumstances here, in light of the case law cited in this opinion.

Id. at ¶ 25.

Like the Trooper in *Kolman* had enough reasonable suspicion based on bloodshot and glassy eyes and a freshly lit cigarette, to extend the stop long enough to dispel the suspicion of impaired driving, Trooper Wojcik in this case had enough reasonable suspicion based on bloodshot and glassy eyes, and a freshly lit cigarette, to ask the defendant to step out of the vehicle so he could separate the defendant from the cigarette smoke to see if there was any indication or odor of intoxicants coming from the defendant. This inquiry was minimal invasive and very brief.

Once Trooper Wojcik smelled the odor of intoxicants coming from the defendant's breath outside the vehicle, he had every right, and perhaps even a duty, to continue with the field sobriety tests to determine if the defendant was operating while intoxicated.

Lastly, Trooper Wojcik is an experienced officer with twelve years of experience who has investigated hundreds of intoxicated driving cases. See *State v. Wille*, 185 Wis. 2d 673, 683, 518 N.W.2d 324 (Ct. App. 1994) (the court can consider an officer's investigative experience in determining whether facts known to the officer establish probable cause). Taken together, these facts support a reasonable conclusion that the defendant was probably operating a motor vehicle while intoxicated enough to warrant a brief extension of a valid *Terry* stop to investigate further.

CONCLUSION

For the foregoing reasons, this Court should uphold the circuit court's order denying the defendant's motion to suppress.

Dated this 15th day of August, 2022.

Respectfully Submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 15 pages and 2369 words.

Dated this 15th day of August, 2022.

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