

FILED
10-26-2022
CLERK OF WISCONSIN
COURT OF APPEALS

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

COUNTY OF WINNEBAGO
Plaintiff-Respondent,

Case No. 2022AP000794

v.

RYAN C. KALTENBACH
Defendant-Appellant.

BRIEF OF PLAINTIFF-RESPONDENT

AN APPEAL FROM THE DECISION OF THE TRIAL COURT DENYING
THE DEFENDANT'S MOTION FOR SUPPRESSION OF EVIDENCE IN THE
CIRCUIT COURT FOR WINNEBAGO COUNTY, THE HONORABLE
TERESA S. BASILIERE JUDGE, PRESIDING

Eric D. Sparr
District Attorney
State Bar No. 1052703

Attorneys for Plaintiff-Appellant

Adam J. Levin
Assistant District Attorney
State Bar No. 1045816

Winnebago County Dist. Atty's Office
448 Algoma Boulevard, Second Floor
P O Box 2808
Oshkosh, WI 54903-2808
(920) 236-4977

Table of Contents

Statement of Issue Presented for Review	1
Statement on Oral Argument and Publication	1
Statement of the Case	1
Argument	2
Conclusion	4
Certification	6

Cases Cited

<u>Terry v. Ohio</u> , 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)	2
<u>Whren v. United States</u> , 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996)	2
<u>State v. Arias</u> , 2008 WI 84, 311 Wis.2d 358, 752 N.W.2d 748	2
<u>State v. Colstad</u> , 2003 WI App 25, 260 Wis.2d 406, 659 N.W.2d 394	3
<u>State v. Krier</u> , 165 Wis.2d 673, 478 N.W.2d 63 (Ct.App.1991)	3
<u>State v. Popke</u> , 317 Wis.2d 118, ¶ 25, 765 N.W.2d 569	3
<u>State v. Richardson</u> , 156 Wis.2d 128, 456 N.W.2d 830 (1990)	3
<u>State v. Waldner</u> , 206 Wis.2d 51, 556 N.W.2d 681 (1996)	3

Statutes Cited

Wis. Stat. 752.31	1
Wis. Stat. 809.19	1
Wis. Stat. 809.23	1, 4
Wis. Stat. 968.24	3

I. Statement of Issues Presented for Review

- 1) Did Officer Hebert have reasonable articulable suspicion to detain Mr. Kaltenbach 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. Kaltenbach'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 Hebert had reasonable articulable suspicion to ask Mr. Kaltenbach to perform field sobriety tests. Because Officer Hebert articulated he saw Mr. Kaltenbach driving after midnight, admit coming from a haunted house and consuming too many beers, and had the odor of intoxicants coming from his person, Officer Hebert'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," we first examine 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, we then determine 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).

The State files as an appendix State v. Glover, 2011 WI App 58, 332 Wis.2d 807, 798 N.W.2d 321 (Ct. App. 2011) unpublished, but be cited for

persuasive value. Wis. Stat. 809.23(3). In Glover, a driver was stopped for 9 miles an hour over at 1:19 a.m, admitted coming from a bar, and that he had been drinking. The Glover Court found that the totality of the circumstances, including the time of night, the admission to drinking, and coming from a bar, presented the officer with “the requisite reasonable suspicion to administer field sobriety tests[.]” Glover, 2011 WI App 58, ¶19, Appendix 1, P3

In this case Officer Hebert pointed to the following specific and articulable facts to ask the defendant perform field sobriety tests after the stop: Officer Hebert observed the defendant travelling at 12:03 a.m. with a defective headlight, (R63:P4); the defendant had a moderate odor of intoxicants on him (R63:P7); the defendant admitted he had been drinking “two beers,” (*Id.*); and the defendant was coming from a haunted house event. (*Id.*).

Officer Hebert’s rational suspicion from these facts was that Mr. Kaltenbach was on some substance impairing his ability to drive, and further detention for field sobriety testing was lawful.

V. Conclusion

The only issue on review is whether Officer Hebert’s request for field sobriety tests was lawful. Because Officer Hebert’s request was based on reasonable, articulable suspicion, the trial court’s denial of Mr. Kaltenbach’s motion to suppress should be affirmed.

Dated at Oshkosh, Wisconsin this October 25, 2022

Electronically signed by:

Adam J Levin 10/25/22

Adam J. Levin
WSBA No. 1045816
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 824 words.

Dated at Oshkosh, Wisconsin this October 25, 2022

Electronically signed By:

By: Adam J Levin 10/25/22

Adam J. Levin

WSBA No. 1045816

Assistant District Attorney

Winnebago County, Wisconsin

Attorney for the Respondent