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SUPREME COURT

State of Wisconsin
Supreme Court
Appeal No. 2022AP000794

County of Winnebago,

Plaintiff-Respondent-Respondent,

v.

Ryan C. Kaltenbach,

Defendant-Appellant-Petitioner.

Petition for Review of an Opinion of the Wisconsin Court of Appeals, District 2

Petitioner's Petition and Appendix

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Table of Contents

Petition

Now comes the above-named petitioner, Ryan C. Kaltenbach, by his attorney, Jeffrey W. Jensen, and pursuant to § 809.62, Stats., hereby petitions the Wisconsin Supreme Court to review this matter.

As grounds, the undersigned alleges and shows to the court that the issue presented for review is a substantial question of federal and state constitutional law that is not squarely controlled by an existing opinion of the Wisconsin Supreme Court. Consequently, the issue calls for an opinion from the supreme court to clarify and harmonize the law.

Statement of the Issue

Kaltenbach was arrested for operating under the influence of alcohol as a first offense. He filed a pretrial motion to suppress evidence on the grounds that the arresting officer lacked a reasonable suspicion to continue to detain Kaltenbach after the initial stop. The circuit court conducted an evidentiary hearing at which the deputy testified that he initially stopped Kaltenbach's vehicle because there was a defective headlight. Once the deputy had contact with Kaltenbach, he (the deputy) smelled an order of alcohol on Kaltenbach, and Kaltenbach admitted that he had drank two beers approximately an hour

earlier. The deputy testified that, based only on the odor of alcohol and Kaltenbach's admission that he drank two beers, the deputy removed Kaltenbach from the vehicle, conducted field tests, and then arrested him.

The circuit court denied the motion to suppress, and Kaltenbach appealed.

The court of appeals affirmed the circuit court order. Significantly, though, in so doing the court relied heavily on an earlier, unpublished one-judge appellate opinion. In effect, the court of appeals held that, as a matter of law, the smell of alcohol combined with an admission of drinking, *ipso facto* establishes a reasonable suspicion to conduct field sobriety testing.

Thus, the issue presented by this appeal is whether, as a matter of Wisconsin law, the smell of alcohol combined with an admission of drinking, establishes a reasonable suspicion to conduct field testing.

Answered by the circuit court: Yes.

Answered by the court of appeals: Yes. Although it is a close call, the facts in this case are nearly identical to the facts in *State v. Glover*, an unpublished one-judge opinion in which the court of appeals held that these facts establish a reasonable suspicion to conduct field tests.

Statement of the Case

I. Procedural History

On October 11, 2019, a Winnebago County Sheriff's Deputy arrested and cited the petitioner, Ryan Kaltenbach (hereinafter "Kaltenbach"), for operating under the influence of alcohol, contrary to § 346.63(1)(a), Stats., and operating with a prohibited alcohol concentration, as a first offense.

Kaltenbach entered not guilty pleas to the charges, and he demanded a jury trial. [R:4, 5]

Kaltenbach filed a pretrial motion to suppress all evidence seized by the deputy after he removed Kaltenbach from his vehicle in order to conduct field sobriety tests. [R:16] The court held an evidentiary hearing into the motion, at which Deputy Charles Hebert testified. Following the presentation of evidence, the court made minimal findings of fact, and then denied the motion. [R:63-18; R:32] The court reasoned:

The circuit court reasoned:

> THE COURT: All right. The Court is going to find that there was adequate reason of suspicion. The officer here, initial stop was based upon an equipment violation that was observed by the Court in the evidence that was submitted here on the officer's cam. In addition, the officer smelled a moderate amount of intoxicants, and the individual here admitted to consuming alcohol.The Court does find the circumstances that there was

> sufficient reasonable suspicion and obviously continued the investigation into the field sobriety, which it appears the defendant here did fail some levels of that test. So the Court then does -- denies the request to suppress the evidence

[R:83-17, 18]

The case was called for trial on May 3, 2022. Kaltenbach waived the jury [R:64-3] and the matter proceeded as a court trial. After hearing the evidence, the court found Kaltenbach guilty. [R:84-12]

Kaltenbach timely filed a notice of appeal. [R:56] The sole issue he raised on appeal was whether the circuit court erred in denying his pretrial motion to suppress evidence.

On January 18, 2023, the Wisconsin Court of Appeals, District 2, issued an opinion affirming the circuit court's order denying Kaltenbach's motion to suppress. In so doing, the appellate court conceded that, "While this is a close case, close cases still need to be decided one way or the other." [Opinion p. 2; App. B] In deciding the close call, though, the court of appeals relied heavily on the court's unpublished opinion in *State v. Glover*, No. 2010AP1844-CR, unpublished slip op. (WI App Mar. 24, 2011; App. C), which had similar facts, and in which the court of appeals affirmed the circuit court's order denying Glover's motion to suppress evidence. The court's discussion of *Glover* suggests that *Glover* was being applied as legal precedent.

Kaltenbach now petitions the Wisconsin Supreme court to

review the matter.

II. Factual Background From Motion Hearing

Deputy Charles Hebert testified he stopped Kaltenbach's vehicle on October 12, 2019 at approximately 12:03 a.m., for an equipment violation (defective headlamp). [R.63:4]. After stopping the vehicle, Hebert had contact with Kaltenbach, and smelled an odor of intoxicant coming from the vehicle. Kaltenbach told the officer he had been at a haunted house with friends, and that he had consumed two beers. [R.63:7].

Nevertheless, Hebert continued the detention, directing Kaltenbach to exit the vehicle for field sobriety testing. [R.63:7-10] Following the field sobriety tests, Kaltenbach was arrested for operating a motor vehicle while impaired.

Hebert acknowledged that he observed no suspicious conduct in the manner in which Kaltenbach operated his vehicle. [R.63-13] Furthermore, other than observing an odor of intoxicant, Hebert made no observations of Kaltenbach's person or motor coordination that led him to suspect Kaltenbach was impaired. Kaltenbach's speech was clear, his driving was unimpaired, and his motor coordination was unimpaired. There is nothing in the record to suggest that Kaltenbach had red, glossy or blood shot eyes, a flushed face or anything else concerning his appearance which might suggest impairment. Likewise, there was nothing in the record

suggesting Mr. Kaltenbach had difficulty answering the officer's questions or did anything other than provide appropriate responses to the questions. Hebert acknowledged that the only reasons he asked Mr. Kaltenbach to exit the vehicle for field sobriety testing were the odor of alcohol, and that Kaltenbach admitted that he had consumed two beers. [R.63:14]

Discussion

The Wisconsin Supreme Court should review this matter because, if the law in Wisconsin is going to be that the odor of alcohol combined with an admission of drinking is, *ipso facto*, a reasonable suspicion to detain an individual for field testing; then the rule ought to come from the Wisconsin Supreme Court, and not from an unpublished one-judge opinion by the court of appeals.

The court of appeals correctly observed that, on appeal of an order denying a motion to suppress evidence, the circuit court's findings of fact are reviewed under the "clearly erroneous" standard. [Opinion p. 3; App. B] However, the court also accurately observed that, "Our review of whether the facts constitute reasonable suspicion, however, is *de novo*." In other words, whether those facts amount to a reasonable suspicion is a question of law.

Here, there were no contested issues of fact; and, therefore, the court of appeals was presented with a *question of law* as to whether the facts testified to by Hebert at the motion

hearing demonstrated a reasonable suspicion to conduct field sobriety testing.

There does not appear to be a supreme court case precisely addressing the issue presented by this appeal. Consequently, in deciding the issue, the court of appeals relied heavily on an unpublished one-judge opinion of the court of appeals. The facts in, *State v. Glover*, 2011 Wisc. App. LEXIS 237, *1, 2011 WI App 58, 332 Wis. 2d 807, 798 N.W.2d 321[1] are, indeed, very similar to the facts in the present case.

After spending several pages of the opinion comparing and contrasting the facts in *Glover* to the facts in the present case, the court of appeals-- without further explanation-- then concluded that, "[T]he deputy here engaged in 'good police work' by briefly extending the stop for field sobriety tests 'in order to ... maintain the status quo momentarily while obtaining more information'." [Opinion p. 6; App. B] To be sure, the court of appeals did not explicitly hold that, as a matter of law under *Glover*, the mere smell of alcohol on a person's breath, in conjunction with an admission by the person that he consumed alcohol, establishes, as matter of law, a reasonable suspicion to conduct field sobriety tests. Nevertheless, the manner in which the court of appeals presented its reasoning certainly suggests that the court's decision in *Glover* strongly informed the court's decision in this case. The court of appeals applied *Glover*

[1] *Glover* was decided by a one-judge panel, and it was ordered to be unpublished

almost as though it were legal precedent for the proposition that the smell of alcohol combined with an admission of drinking is, as a matter of law, reasonable suspicion to conduct field sobriety tests.

Thus, it follows that in any future case in which similar facts are presented, the court of appeals will follow the "precedent" of *Glover*, and now *Kaltenbach*, to affirm the lower court's denial of the motion. Even if the decisions of the court of appeals, mentioned above, do not expressly hold that, as a matter of law, the odor of alcohol combined with an admission of drinking establish reasonable suspicion, the effect is the same.

Consequently, if the law in the State of Wisconsin is going to be that the odor of alcohol, combined with an admission of drinking, establishes, as a matter of law, a reasonable suspicion to conduct field sobriety testing, the rule ought to come from the Wisconsin Supreme Court, not from an unpublished, single-judge opinion of the court of appeals.

Conclusion

For these reasons, it is respectfully requested that the Wisconsin Supreme Court review this matter.

Dated at Milwaukee, Wisconsin, this _____ day of February, 2023.

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Certification as to Length and E-Filing

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 1926 words.

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Dated this _____ day of February, 2023.

_____

Jeffrey W. Jensen