STATE OF WISCONSIN COURT OF APPEALS DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

Appeal No. 2023AP890-CR
Circuit Court Case No. 22CT150

Lauren Dannielle Peterson,

Defendant-Respondent.

ON APPEAL FROM THE FINAL ORDER SUPPRESSING EVIDENCE, THE HONORABLE PATRICIA A. BARRETT, PRESIDING.

REPLY BRIEF OF PLAINTIFF-APPELLANT

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ARGUMENT

I. The Circuit Court did not err in denying the motion to suppress because the deputy had reasonable suspicion to engage in an OWI investigation.

a. Deputy Trager had Reasonable Suspicion to inquire whether Peterson had anything to drink that night.

Peterson does not challenge the original basis for the stop; however, takes issue with whether Deputy Trager had reasonable suspicion to ask Peterson whether she had been drinking that night. Respondent Br. 8. It is undisputed that "[a]n 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." *State v. Hogan*, 2015 WI 76, ¶ 35, 364 Wis.2d 167 (citing *State v. Betow*, 226 Wis. 2d 90, 94, 593 N.W.2d 499 (Ct. App. 1999)). Reasonable suspicion means that the police officer "possess[es] specific and articulable facts that warrant a reasonable belief that criminal activity is afoot." *State v. Young*, 2006 WI 98, ¶ 21, 294 Wis. 2d 1, 717 N.W.2d 729. What constitutes reasonable suspicion is a common-sense, totality-of-the-circumstances test that asks, "[w]hat would a reasonable police officer reasonably suspect in light of his or her training and experience?" *State v. Waldner*, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996). That suspicion cannot be inchoate, but rather must be particularized and articulable: "[a] mere hunch that a person . . . is . . . involved in criminal activity is insufficient." *Young*, 294 Wis. 2d 1, ¶ 21. "Although officers sometimes will be confronted with behavior that has a possible innocent explanation, a combination of behaviors—all of which may provide the possibility of innocent explanation—can give rise to

reasonable suspicion." *Hogan*, 364 Wis. 2d 167, ¶ 36. In other words, police do not need "to rule out the possibility of innocent behavior before initiating a brief stop." *Waldner*, 206 Wis. 2d at 59. Peterson argues the circuit court should have considered only two facts when conducting the reasonable suspicion inquiry: (1) that Ms. Peterson's eyes were allegedly bloodshot and glossy, and (2) that an odor of intoxicants was emanating from the vehicle. Resp. Br. 8-9. That's not true. Numerous factors support reasonable suspicion that Peterson was operating a motor vehicle under the influence. Those facts are: (1) the time of night: 9:03pm, (2) the fact Ms. Peterson was coming from watching a sporting event, (3) bloodshot and glossy eyes, and (4) the odor of intoxicants coming from the vehicle. Peterson does not explain why the reasonable-suspicion calculus here only involves "two facts." Resp. Br. 8. As our supreme court recently described the reasonable-suspicion test," [i]t is the whole picture, evaluated together, that serves as the proper analytical framework." *State v. Genous*, 2021 WI 50, ¶ 12, 397 Wis.2d 293. Disregarding the totality of the circumstances makes for an unpersuasive argument that the deputy lacked reasonable suspicion of an operating under the influence violation when he asked Peterson whether she had anything to drink.

Peterson's argument plainly ignores the time of driving (9:03pm) and where Peterson was coming from (watching the Buck's game). When including those two facts in the calculus, it is reasonable to suspect that Peterson was operating a motor vehicle while under the influence. Thus, it was reasonable for Deputy Trager to inquire whether she had anything to drink that night. Much like the legs of a tripod, which would fall if not supported by each other, the facts of this case in their totality bolster

each other and lend to both the stability and strength of the reasonable suspicion underpinning Deputy Trager's expanded investigation. While Deputy Trager's original mission in stopping Peterson was to investigate the defective tail light, Mot. Hr'g. Tr. 8:7-8, as he conducted ordinary inquiries incident to the original mission of the stop, he learned of specific and articulable facts that lead to the reasonable inference that Peterson was violating the law by operating a motor vehicle while intoxicated. *See State v. Floyd*, 2017 WI 78, ¶20, 377 Wis. 2d 394. This permitted Deputy Trager to lawfully extend the stop by asking questions, separate from the original mission of the stop, about recent alcohol consumption. *See State v. Davis*, 2021 WI App 65, ¶24, 399 Wis. 2d 354.

b. The Inquiry Into Whether Peterson Had Anything to Drink Was Negligibly Burdensome, and Did Not Prolong the Length of the Stop.

A traffic stop constitutes a seizure for constitutional purposes, and triggers Fourth Amendment protections from unreasonable search and seizures. *State v. Gammons*, 2001 WI App 36, ¶ 6, 214 Wis. 2d 296. "A seizure for a traffic violation justifies a police investigation of that violation." *Rodriguez v. United States*, 575 U.S. 348, 135 S. Ct. 1609, 1614 (2015). A traffic stop is more like a *Terry* stop than a formal arrest. *Id.* (citing, *Knowles v. Iowa*, 525 U.S. 113, 117, 119 S. Ct. 484 (1998) (citations omitted). "Like a *Terry* stop the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's "mission" - to address the traffic violation that warranted the stop." *Rodriguez* at 1614. (citing, *Illinois v. Caballes*, 543 U.S. 405, 407, 125 S. Ct. 834, 837 (2005), *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968)).

"Officers may engage in unrelated inquiries during the course of a traffic stop—but, unless reasonable suspicion develops to support such inquiries, they cannot prolong the duration of the stop beyond the time that it reasonably should take to complete the [original] mission." *Davis*, 2021 WI App 65, ¶24. The traffic stop "mission" normally includes addressing the traffic violation that warranted the stop, conducting ordinary inquiries incident to the stop, and taking negligibly burdensome precautions to ensure officer safety. *State v. Wright*, 2019 WI 45 ¶ 24, 386 Wis. 2d 495 (citing *Rodriguez*, 575 U.S. at 1614.) When an officer asks a driver negligibly burdensome questions after issuing a traffic citation, those questions are not considered an extension of the stop. *Floyd*, 2017 WI 78, ¶ 28. The length of a stop becomes unreasonable if extended past the point "'when tasks tied to the traffic infraction are—or reasonably should have been—completed.'" *State v. Brown*, 2020 WI 63, ¶10, 392 Wis. 2d 454 (quoted source omitted). "Authority for the seizure ends when these tasks are, or reasonably should have been, completed." *Rodriguez* at 1614. However, "the Fourth Amendment tolerates certain unrelated investigations that do not lengthen the roadside detention. *Wright* at ¶ 27, (citing, *Rodriguez* at 1614). A seizure will remain lawful, "so long as those inquires do not measurably extend the duration of the stop." *Wright* at ¶ 27 (citing, *Arizona v. Johnson*, 555 U.S. 323, 333, 129 S. Ct. 781 (2009)).

Deputy Trager asked a single question ("if she had anything to drink") that was clearly permissible when looking at the totality of the conversation and circumstances. As addressed above, Deputy Trager had reasonable suspicion to ask this question. This one question about drinking took just seconds to ask and was done in the course of Deputy

Trager's initial conversation with Peterson, prior to Deputy Trager returning to his squad and running Peterson's information through dispatch. An officer who stops a person driving home after watching a sports game, with glossy and bloodshot eyes, and smells of intoxicants would be ignoring their public safety obligations by not investigating further. When looking at the totality of the circumstances in this case, the Court can clearly see that Deputy Trager had reasonable suspicion to believe the defendant committed a crime, the investigation of which would be furthered by her performance on field sobriety tests. See *Hogan*, 2015 WI 76, ¶ 37. Asking the question did not extend the stop beyond what would have been needed for the original stop, and did not unreasonably prolong the duration of the stop.

Accordingly, the circuit court here correctly held that Deputy Trager had reasonable suspicion to believe that Peterson was operating while impaired or with a prohibited alcohol concentration when he inquired whether she had been drinking. This court should also find that the single question did not unreasonably extend the length of the stop.

II. Deputy Trager had Probable Cause to Request a Preliminary Breath Test.

As the State noted in its brief-in-chief, the question of whether Deputy Trager had probable cause to request a preliminary breath test is based on the totality of the circumstances. (State's Br. 9-10.) At the time he requested the PBT, Deputy Trager knew of a slew of information supporting probable cause to request the PBT.

First, Peterson was driving home from watching a sporting event at 9:03pm. Peterson argues the time that the stop took place did not add to the equation. Resp. Br. 15. While not around bar time, when combined

with the knowledge where Peterson was coming from, the time of driving is important to the analysis of this case. Peterson was not driving home from work at 9:03pm. She was driving home from watching the Buck's game at her brother-in-law's house. This is incredibly important to the analysis as it reasonable to suspect that Peterson may have been drinking while watching the game.

Second, Peterson had bloodshot and glassy eyes. Peterson does not dispute this fact, nor offers argument as to why this fact should not be considered.

Third, there was an odor of intoxicants coming from the vehicle, later attributed to Peterson. Peterson attempts to downplay the observed odor of intoxicants coming from the vehicle by ignoring the fact the odor was later attributed to Peterson herself. Deputy Trager testified that while speaking with Peterson he noticed an odor of intoxicants emitting from the vehicle, though he could not tell exactly where it was coming from. Mot. Hr'g Tr. 9:5-19. He later testified that once Peterson was out of the vehicle, Deputy Trager noticed that he could smell the odor of intoxicants coming from her person. Mot. Hr'g Tr. 13:8-12. Picking and choosing facts to present to the court is contrary to the totality of the circumstances analysis the court is to employ.

Fourth, Peterson admitted to drinking. Not only that, Peterson admitted to finishing her last drink approximately 20 minutes prior to her contact with Deputy Trager. Mot. Hr'g. Tr. 10:20-22. Peterson attempts to distinguish her response of having two drinks from *Glover* where the response was three beers; however, the importance at this point is not how many Peterson had, but rather the fact that she admitted to drinking. By focusing on what Peterson had to drink, she

creates a red herring to distract the court from the overarching fact that she admitted to drinking in the first place.

Fifth, Peterson had one prior OWI conviction. Peterson does not discuss this fact in her brief; however, knowledge of a prior OWI conviction is important to the court's analysis. *See State v. Goss*, 2011 WI 104, ¶¶2, 24, 338 Wis. 2d 72 (explaining that the existence of prior convictions is an appropriate consideration supporting probable cause to administer a preliminary breath test). Deputy Trager could take this evidence into account when determining whether he had probable cause to believe that the defendant was under the influence of an intoxicant while operating her vehicle.

Sixth, Peterson's performance on the field sobriety tests. Peterson exhibited no clues on the OLS test, six clues on the HGN test, and one clue on the WAT test. Thus, this court must determine whether those clues, along with the information discussed in Section I, was enough for probable cause to believe Peterson was operating a motor vehicle under the influence of an intoxicant. As testified to at the motion hearing, nystagmus is an *involuntary* shaking of the eye. Mot. Hr'g. Tr. 14:7-8 (emphasis added). Thus, HGN is an important and reliable tool for officers because it involves a reaction that cannot be practiced or controlled. Deputy Trager also testified that when someone exhibits four clues on the HGN test, that is indicative of impairment. Mot. Hr'g. Tr. 14:19-21. While Peterson demonstrated only one clue on the WAT test and no clues on the OLS test, this Court should feel comfortable giving weight to the fact that Peterson exhibited 6/6 clues on the HGN test, again noting that when someone exhibits 4/6 clues that is indicative of impairment.

Clues exhibited on SFSTs are to be considered in addition to the information already known to the officer; however, it's important to note that probable cause to believe does not necessarily require the use of standardized field sobriety tests. *State v. Goss*, 2011 Wis 104, ¶ 4. The idea behind field sobriety tests is not to pass them or fail them with a rigid scoring system which dictates that if a high enough score is achieved, the person is always arrested under suspicion of OWI. Or, conversely, if a low score is obtained, that person shall always be released and absolved of all suspicion of operating while under the influence. Field sobriety tests provide an opportunity for an officer to observe a person who is reasonably suspected of being under the influence of an intoxicant performing acts which are most readily affected by alcohol impairment. Peterson asks this Court to determine there was no probable cause to believe she was operating a motor vehicle under the influence because she "passed both balance and divided attention standardized field sobriety tests." Resp. Br. 15. This request, again, asks this Court to ignore the totality of the circumstances and decide this case solely on Peterson's performance on SFSTs. That is not the analysis the court is to perform. When coupled together with the information already known, the additional clues observed during SFSTs give rise to probable cause to believe that Peterson was operating a motor vehicle while under the influence, allowing Deputy Trager to request the Preliminary Breath Test.

For the above reasons, the circuit court erred in holding that Deputy Trager did not have probable cause to request the preliminary breath test.

Conclusion

For the reasons outlined above, the State respectfully requests that the Court of Appeals find that Deputy Trager had reasonable suspicion to inquire of Ms. Peterson whether she had been drinking, and that the single question did not unreasonably prolong the length of the stop. The State further requests that the Court of Appeals find that Deputy Trager had probable cause to request Peterson submit to a Preliminary Breath Test, and remand this case for further proceedings consistent with that ruling.

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CERTIFICATION

I hereby certify that this brief conforms to the rules continued in Wis. Stat. §§ 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2408 words.

Dated this 17th day of November, 2023

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Assistant District Attorney