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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Appellant,

Grant County Case No. 23-CT-86
Appeal No. 2024AP000791-CR

v.

JOSEPH MARTIN BLANKENSHIP,

Defendant-Appellee.

ON APPEAL OF JUDGMENT ENTERED IN GRANT COUNTY CIRCUIT COURT, THE HONORABLE CRAIG R. DAY, PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLEE JOSEPH MARTIN BLANKENSHIP

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STATE OF WISCONSIN

C O U R T O F A P P E A L S

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STATEMENT OF THE ISSUES

I. DID OFFICER HOUGAN HAVE SUFFICIENT ARTICULABLE FACTS TO SUPPORT A REASONABLE SUSPICION OF IMPAIRED DRIVING SO AS TO ALLOW HIM TO REQUIRE MR. BLANKENSHIP TO SUBMIT TO FIELD SOBRIETY TESTS?

The trial court answered: no.

STATEMENT ON ORAL ARGUMENT

Counsel anticipates that the issues raised in this appeal can be fully addressed by the briefs. Accordingly, Mr. Blankenship is not requesting oral argument, although he

does not object to such argument.

STATEMENT ON PUBLICATION

Publication may be merited here, as it involves a situation wherein reasonable suspicion that an individual was operating while impaired was found to be lacking under circumstances where there was no observed bad driving, and while there are many cases addressing reasonable suspicion of impaired driving, comparatively few involve neither an equipment violation nor any observed poor driving.

STATEMENT OF THE CASE

The State's recitation of the facts and procedural posture of this case is largely accurate so far as it goes, with the main exception being that the circuit court found as a fact that Mr. Blankenship's speech was not slurred due to intoxication, but was off due to cognitive impairments, and as such, Mr. Blankenship adopts it with that exception, again so far as it goes, but adds the following information so as to ensure that said recitation is complete.

After the conclusion of the evidentiary portion of the hearing on Mr. Blankenship's motion to suppress, the circuit court rendered an oral ruling ultimately granting the motion. (R20: 28). In so doing, the court made a number of factual findings, none of which are challenged by the State as being clearly erroneous, and which include all of the following: (1) there was no evidence of bad driving on Mr. Blankenship's part (R20: 24); (2) there had been a seemingly anonymous but identifiable reporter who alleged to dispatch that Mr. Blankenship was a drunk driver, that said reporter had taken away his keys for a time, and that he was driving a vehicle of a particular make and color in a particular direction, the last of which details regarding the vehicle and its direction of travel were confirmed by the officer (R20: 25); (3) the time was 11:39 at night, which is not bar time, but is also not 6:00 p.m. (R20: 26); (4) Mr. Blankenship's speech was not substantially slurred, and while his demeanor was slow, it was not the kind of slow associated with drunkenness, but rather with cognitive issues (R20: 26); (5) Mr. Blankenship did not exhibit an odor of intoxicants (R20: 26); (6) Mr. Blankenship

did not exhibit bloodshot eyes (R20: 26); (7) when asked about his alcohol consumption that day, Mr. Blankenship did not state that he had "a couple" or "a few" beers, but rather stated that he had three beers three or four hours prior to driving (R20: 26); (8) Mr. Blankenship described his interaction with the reporting party in such a way that suggested that said party was picking on him rather than concerned that he was drunk, which the circuit court found reduced the reliability of the report of drunk driving (R20: 26-27); and (9) the report itself was vague and of limited credibility given what the officer actually observed. (R20: 28).

The circuit court ultimately found that the combination of the vague report, slight slowness of speech that was "not entirely clearly alcohol related," and Mr. Blankenship's admission to consuming a precise amount of alcohol three or four hours before did not supply the officer with sufficient reasonable suspicion to justify the officer's request that Mr. Blankenship submit to field sobriety testing, that Mr. Blankenship's conduct in immediately handing his driver's license to Officer Hougan when Hougan approached his vehicle meant nothing given that this is what citizens are supposed to do in such situations, and that as a result, Mr. Blankenship's motion had to be granted. (R20: 28).

The State filed a notice of appeal, and this appeal follows. Further facts shall be stated as necessary below.

ARGUMENT

I. THE CIRCUIT CORRECTLY FOUND THAT OFFICER HOUGAN DID NOT HAVE SUFFICIENT ARTICULABLE FACTS TO SUPPORT A REASONABLE SUSPICION OF IMPAIRED DRIVING SO AS TO ALLOW HIM TO REQUIRE MR. BLANKENSHIP TO SUBMIT TO FIELD SOBRIETY TESTS.

A suppression issue presents a question of constitutional fact . *See* ***State v. Floyd***, 2017 WI 78, ¶11, 377 Wis. 2d 394, 898 N.W.2d 560. "[This Court reviews] the circuit court' s findings of historical fact under the clearly

erroneous standard. But the circuit court's application of the historical facts to constitutional principles is a question of law [which this Court reviews] independently." ***Id.*** (internal citations omitted, brackets added).

As is noted above, the State does not challenge any of the circuit court's factual findings as being clearly erroneous, and as such, the facts as found by the circuit court are essentially undisputed. While it is true that when there is an audiovisual recording of an event, this Court may draw its own factual conclusions from said recording, the recording in this matter fully supports all of the circuit court's findings of fact. *See* ***State v. Walli***, 2011 WI App 86, ¶¶17-18, 334 Wis.2d 402, 799 N.W.2d 898.

A law enforcement officer may detain an individual for investigative purposes if reasonable suspicion or probable cause of criminal activity exists. ***State v. Young***, 2006 WI 98, ¶¶20-21, 294 Wis.2d 1, 717 N.W.2d 729. Reasonable suspicion exists if, under the totality of the circumstances, "the facts of the case would warrant a reasonable police officer, in light of his or her training and experience, to suspect that the individual has committed, was committing, or is about to commit a crime." ***State v. Post***, 2007 WI 60, ¶13, 301 Wis.2d 1, 733 N.W.2d 634. Reasonable suspicion must be based on more than an officer's "inchoate and unparticularized suspicion or 'hunch.'" ***Id.***, ¶10 (citation omitted). An officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant' the intrusion of the stop." ***Id.*** (citation omitted); *see also* ***State v. Betow***, 226 Wis.2d 90, 94-95, 593 N.W.2d 499 (Ct. App. 1999).

A traffic stop which was justified by reasonable suspicion of a traffic offense may become unlawful if the scope of the police officer's investigation extends beyond the purpose for which the stop was made without additional particularized reasonable suspicion to justify detouring from the stop's original mission. ***Rodriguez v. United States***, ___ U.S. ___, 135 S.Ct. 1609, 1614, 191 L.Ed.2d 492 (2015). Absent such additional reasonable suspicion, a stop which lasts longer than is reasonably necessary to address the justified mission of the stop is unlawful, as "[a]uthority for

the seizure . . . ends when tasks tied to the traffic infraction are—or reasonably should have been—completed." ***Id.*** (brackets and ellipsis added) (citing ***United States v. Sharpe***, 470 U.S. 675, 686, 105 S.Ct. 1568, 84 L.Ed.2d 605 (1985) ("in determining the reasonable duration of a stop, "it [is] appropriate to examine whether the police diligently pursued [the] investigation")).

"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." ***State v. Hogan***, 2015 WI 76, ¶35, 364 Wis. 2d 167, 868 N.W.2d 124. A request that a person perform field sobriety tests must be supported by reasonable suspicion of impaired driving. *See* ***State v. Colstad***, 2003 WI App. 25, ¶19, 260 Wis.2d 406, 659 N.W.2d 394.

To begin, the circuit court properly found that Mr. Blankenship was seized when Officer Hougan required him to perform field sobriety testing, a finding which the State does not challenge on appeal. Where, as here, there is no evidence of any sort of bad driving, this Court has held, albeit in an unpublished but citable opinion, that "other factors suggesting impairment must be more substantial." ***County of Sauk v. Leon***, No. 2010AP1593, ¶20 (Ct. App. Nov. 24, 2010) (unpublished authored opinion). Here, much like in ***Leon***, there was no evidence of bad driving, nor was there speeding, lane deviations, weaving within the lane, etc. Further, as the circuit court properly found, Mr. Blankenship did not emit any odor of alcoholic beverages, and his eyes were neither bloodshot nor glossy. Further, precisely similarly to ***Leon***, Mr. Blankenship did not present Hougan with a "suspiciously vague admission" to having had "a few" or "a couple" of drinks, he stated that he had had three beers three to four hours earlier. (R20: 26); ***Leon***, No. 2010AP1593, ¶21.

In yet another parallel with ***Leon***, Mr. Blankenship was asked to perform field sobriety tests at around 11:39 p.m., and while that fact does add somewhat to the reasonable suspicion calculus, it does not do so strongly. ***Id.*** Further, the tip received by the officer that Mr. Blankenship was a "drunk driver" was vague, and as the circuit court found, was of diminished credibility in light of Mr. Blankenship's

uncontradicted account of a group of people essentially picking on him; the State does not argue that the circuit court's finding to this effect was clearly erroneous, and as such, that finding must be accepted by this Court. ***Walli***, 334 Wis.2d 402, ¶17. The State similarly does not argue that the circuit court's finding that Mr. Blankenship's speech, while slowed, was not substantially slurred, and what slowing was there was apparently not due to drunkenness, but rather to a cognitive issue, and in light of what is revealed by the squad video, this finding could not be found to be clearly erroneous even if the State had raised such a challenge. *See* ***id.***

Thus, as found by the circuit court, the following facts and only these facts were available to Hougan when he required Mr. Blankenship to submit to field sobriety testing: (1) he had admitted to consuming three beers three to four hours prior to the stop; (2) his speech was very slightly slurred, but that it was apparent that what slowness there was to his speech was not due to drunkenness but rather to a cognitive issue; and (3) there was a vague and not particularly credible, under all of the circumstances, tip that Mr, Blankenship may be a "drunk driver." These facts do not even add up to the level of suspicion available to the officer in ***Leon***, and they certainly do not rise to the level of suspicion present in many cases where courts have found that reasonable suspicion of impaired driving was present. *See*, *e.g.*, ***State v. Kennedy***, 2014 WI 132, ¶22, 359 Wis.2d 454, 856 N.W.2d 834 (bloodshot eyes, odor of intoxicants, slurred speech indicators of intoxication); *see also* ***State v. Lange***, 2009 WI 49, ¶¶33, 37, 317 Wis.2d 383, 766 N.W. 2d 551 (possible indicators of intoxication include prior convictions for OWI, odors of intoxicants, admission of consumption).

The State cites the facts that there were no other vehicles on the road, and that Mr. Blankenship pulled over without being signaled to do so as allegedly suspicious facts, but no case has ever held that such things are in fact suspicious, and under the circumstances here these are not in fact suspicious facts at all. There is nothing suspicious about being the only car on the road in a small town between 11pm and midnight, and as Mr. Blankenship explained to Hougan, he had just left a crowd of people who had taken his keys for a time and who were picking on him, leading him to conclude

that the officer was in fact looking for him. His acquiescence to police authority cannot be a reason to believe that Mr. Blankenship was impaired. Further, the notable absence of nearly all traditional indicia of impairment here means that the circuit court's ruling that Hougan did not possess sufficient articulable and objective facts under the totality of the circumstances to give rise to a reasonable suspicion of impairment, and therefore the circuit court's ruling granting Mr. Blankenship's motion to suppress must be affirmed. ***Post***, 301 Wis.2d 1, ¶13.

CONCLUSION

For the reasons stated above, the circuit court's order granting Mr. Blankenship's motion to suppress must be affirmed by this Court.

Respectfully submitted 07/17/2024:

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 1,891 words.

Dated July 17, 2024:

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

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