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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Case No. 2024AP1221-CR

STATE OF WISCONSIN,

Plaintiff-Respondent

vs.

JONAH MICHAEL HOFFMAN,

Defendant-Appellant

APPEAL FROM THE JUDGMENT OF CONVICTION ENTERED IN THE
CIRCUIT COURT FOR WAUSHARA COUNTY, THE HONORABLE
SCOTT C. BLADER PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT OF THE ISSUES

Did Sergeant Schaut possess reasonable suspicion to continue investigating a violation of Wis. Stat. Sec. 346.935 following the conclusion of field sobriety exercises?

Circuit Court Answer: Yes.

Did Sergeant Schaut possess probable cause to search Hoffman's vehicle?

Circuit Court Answer: Yes

STATEMENT ON ORAL ARGUMENT

The State does not request oral argument in this appeal as the argument can be addressed through briefing.

STATEMENT ON PUBLICATION

The State does not request publication as the case can be decided based on the application of existing case law to the facts in the case, and the case is a one-judge appeal.

STATEMENT OF FACTS

Hoffman was charged with Operating While Intoxicated as a Second Offense, and later Operating With a Detectable Amount of a Restricted Controlled Substance. R3, R16. Hoffman subsequently filed a motion to suppress evidence based on the extension of the stop and the search of Hoffman's vehicle. R51. By extension he was challenging the subsequent OWI arrest.

The case proceeded to an evidentiary hearing on November 29, 2023. R58. Testimony was taken from Sgt. Scott Schaut of the Waushara County Sheriff's Department, who testified that he was a patrol Sgt. For the Waushara County Sheriff's Office, with "15, going on 16" years in law enforcement. R58:6. Sgt. Schaut testified that he had gone through standard field sobriety training and advanced roadside impairment training and various refreshers. R58:7. He estimated that he had conducted between 700 and 800 arrests for OWI over the course of his career. R58:8.

Sgt. Schaut testified that on June 19, 2021, at approximately 1:10 a.m., he conducted a traffic stop after running a check on a vehicle and learning that the registered owner, identified as Jonah Hoffman, came back with his license cancelled. R58:8. Sgt. Schaut noted that when he attempted to stop the vehicle, the vehicle took a prolonged period of time to pull over. R58:9. Sgt. Schaut noted that "typically when I see that happen, it's usually somebody's doing something in the cab of the vehicle. There's always the risk of people concealing things, hiding weapons, contraband, anything really." R58:9-10.

Sgt. Schaut approached the vehicle and noted in the backseat a six-pack of beer, one of which was missing, and noted condensation on the six-pack. R58:10. Sgt. Schaut made contact with the driver, who was identified as Hoffman. R58:10-11. Sgt. Schaut noted that Hoffman appeared to be smoking a newly lit cigarette that he was smoking "rather expeditiously," and also had both windows down, which Sgt. Schaut felt was odd due to the fact that it was raining off and on that morning. R58:11. Sgt. Schaut noted that in his training and experience that individuals pulled over smoking a freshly lit cigarette do so to conceal odors within the vehicle, and opening both windows is typically done to try to exhaust odors from a vehicle. R58:12.

Sgt. Schaut noted that while speaking to Hoffman, he observed the odor of intoxicants coming from Hoffman's breath and that Hoffman had

glassy bloodshot eyes. R58:12. Hoffman stated that he had a few drinks “[twenty-five] minutes prior, maybe [thirty].” R58:13. Sgt. Schaut then elected to administer field sobriety exercises. R58:13. He first administered the Horizontal Gaze Nystagmus test and observed two out of six clues, which is generally not indicative of impairment due to alcohol. R58:13-14. Sgt. Schaut then administered the Walk and Turn exercise, in which Hoffman exhibited three of eight clues, which is indicative of impairment. R58:14-15. Sgt. Schaut then administered the One Leg Stand exercise, in which Hoffman exhibited one of four clues, which is one less than what is typical of impairment. R58:16. Hoffman submitted to a preliminary breath test, with a result of 0.052. R58:17.

Sgt. Schaut decided not to place Hoffman under arrest for OWI based on the results of field sobriety exercises, telling the defendant that he was “right on the fringe” of being under arrest for OWI. R58:17. However, Sgt. Schaut did not let Hoffman leave the scene because of the cancelled license and “that I still wasn’t comfortable with him driving,” based upon Hoffman being on the border between being impaired and not impaired. R58:18. Sgt. Schaut explained to Hoffman that he could call for a licensed and sober driver to pick him up. R58:18. Sgt. Schaut further explained that he would allow Hoffman to wait inside of Hoffman’s vehicle but indicated he wanted to do a “protective sweep” of Hoffman’s vehicle. R58:18. Sgt. Schaut testified that this was based on a safety concern because “I don’t want somebody all of a sudden getting agitated, grabbing something from the vehicle to harm me or I don’t know what kind of weapons would be in the vehicle.” R58:19. Sgt. Schaut explained that the area he would look through would be “in the reach, lunge, grasp, obviously where they could very easily grab something without me really noticing it.” R58:19.

Sgt. Schaut testified that when discussing this with Hoffman, he became argumentative, and noted that when Hoffman was accessing his

vehicle for his phone, he tried “slamming it while I was, like, standing almost in the doorway.” R58:19. Sgt. Schaut also noted that at this point he was still concerned about the possibility of open containers of alcohol within the vehicle, noting the six pack of beer in the back with a bottle missing from it. R58:20.

Sgt. Schaut then searched the floorboard, the passenger floorboard area, and then the center console area, and located two glass pipes and a grinder in the vehicle. R58:20-21. Sgt. Schaut then testified that based on this he began to suspect that Hoffman was under the influence of marijuana. R58:21. Sgt. Schaut spoke to Hoffman, who admitted to having smoked marijuana four hours prior. R58:21. Sgt. Schaut then administered two additional exercises: the lack of convergence exercise and the Romberg balance exercise. R58:22. At the conclusion of those exercises, he concluded that Hoffman was under the influence of marijuana and arrested him. R58:23.

The Court noted that it’s review of the squad video indicated that Sergeant Schaut had questioned Hoffman about whether there were open alcoholic containers in the vehicle shortly after the PBT. R58:61-62. It noted that the concern about the open intoxicants didn’t appear to have been extinguished, and noted that may provide cause for the search of the vehicle. R58:62. After inviting the parties to provide memorandums on the issues concerning the suppression motion, the Court held an oral ruling on January 30, 2024. R81. The Court noted the unusual nature of the case, noting that “There was a stop and what ensued was a traditional OWI, complete with field sobriety tests. After completing those tests and noticing some indicators, the officer did not feel that he had enough probable cause to arrest for alcohol-based OWI and told Mr. Hoffman as much. He then searched the car -- the truck, rather, and found a grinder with marijuana and two marijuana smoking pipes. He then began a secondary investigation,

acquired additional information, and arrested Mr. Hoffman for operating with a restricted or controlled substance.” R81:7.

The Court found that the stop was not impermissibly extended beyond its scope and mission because Sgt. Schaut had information that would have led a reasonable officer to believe that the forfeiture of open intoxicants (Wis. Stat. Sec. 346.935) within Hoffman’s vehicle existed. R81:8. The court further found that the search of the vehicle was permissible because there was sufficient evidence to believe the vehicle contained evidence of open intoxicants within the vehicle. R81:8. The Court noted that based on the results of the search there was additional information to follow up with an OWI investigation based on consumption of marijuana, which led to the arrest, which the Court found there was probable cause for. R81:13. The Court did not find that the protective sweep rationale articulated by the Sergeant was a permissible reason to search the vehicle. R81:13-14.

Hoffman would later enter a plea to Operating While Intoxicated and appeals. R80.

ARGUMENT

This court’s review of a circuit court’s order denying a motion to suppress presents “a question of constitutional fact.” *State v. Dearborn*, 2010 WI 84 ¶13, 327 Wis. 2d 252, 786 N.W. 2d 97. A circuit court’s findings of fact should be sustained unless they are clearly erroneous, but the court reviews the application of those facts to the law de novo. *State v. Truax*, 2009 WI App 60, ¶18, 318 Wis. 2d 113, 767 N.W. 2d 369.

In order to justify an investigatory seizure under the Fourth Amendment, the police must have a reasonable suspicion, grounded in specific articulable facts and reasonable inferences from those facts, that an individual is or was violating the law. *State v. Colstad*, 2003 WI App 25, ¶18,

260 Wis. 2d 406, 659 N.W. 2d 394. Such a violation can include traffic ordinance violations. See *Id.* at ¶9. When determining whether reasonable suspicion exists, the court are to apply a commonsense test and consider what a reasonable police officer reasonably would suspect in light of his or her training and experience under all facts and circumstances present. *State v. Bons*, 2007 WI App 124, ¶13, 301 Wis. 2d 227, 731 N.W. 2d 367. An officer may extend a valid traffic stop if the officer becomes aware of additional suspicious circumstances that give rise to a reasonable suspicion that the driver has committed or is committing an offense distinct from that which prompted the traffic stop. See *Id.*

An officer's subjective basis for continuing Fourth Amendment intrusion, whether by detention or search, is not determinative as to whether a Fourth Amendment violation occurred, so long as there is an objectively lawful basis for it. See *State v. Rose*, 2018 WI App 5, ¶¶27-8, 379 Wis. 2d 664, 907 N.W. 2d 463 (citing *State v. Baudhuin*, 141 Wis. 2d 642, 650-51, 416 N.W. 2d 60 (1987)).

I. SERGEANT SCHAUT HAD REASONABLE SUSPICION TO CONTINUE INVESTIGATING FOLLOWING THE CONCLUSION OF THE FIELD SOBRIETY EXERCISES

The State would first note that there appears to be no dispute from Hoffman that the initial stop and the subsequent extension of the stop to conduct an OWI Investigation concerning alcohol. Nor does Hoffman dispute in his appeal that once the vehicle was searched, Sergeant Schaut had reasonable suspicion to investigate an OWI for marijuana consumption. Nor does Hoffman dispute that Sergeant Schaut had probable cause after the subsequent investigation to arrest for OWI for marijuana consumption.

The State would further argue that Sergeant Schaut not only had reasonable suspicion to continue investigating an OWI after the field sobriety exercises, but also had probable cause to arrest for Operating While Intoxicated. Sergeant Schaut first observed that Hoffman's vehicle took what he believed to be an extended amount of time to drive, which sometimes can be because the driver is hiding something. R58:9. Hoffman contends this is because Hoffman could not pull over because of the lack of level terrain close to the road, but that is a competing inference and Sergeant Schaut was not required to rule out all other explanations. He further noted the six pack of alcohol with one missing and also noted condensation on the six pack. R58:10. Sergeant Schaut further noted that Hoffman was smoking a newly lit cigarette, had both windows down on his truck, had glassy bloodshot eyes, and was emitting the odor of intoxicants from his breath. R58:11-12. Hoffman admitted to recent consumption of alcohol. R58:13. Hoffman's performance on one field sobriety exercise was indicative of impairment. R58:14-15. Hoffman's PBT had a result of 0.052. R58:17. A BAC of 0.052 is not prima facie evidence of an OWI due to alcohol but it is evidence of an OWI. See Wis. Stat. Sec. 885.235(1g)(b). This is not a situation where, as Hoffman alleges, Hoffman was "cleared" of the OWI, but rather a situation where Sergeant Schaut elected, knowing that that Hoffman was "on the fringe" of being arrested for OWI, elected in his discretion not to do so and rather allowed him to get a ride as Sergeant Schaut was still not comfortable with Hoffman driving. R58:17-18. But the State recognizes that it was a close call and there existed another justification to extend the stop and later search the vehicle.

The Court made an ample record as to why there was also reasonable suspicion to further investigate on the issue of whether there was an open intoxicant in Hoffman's vehicle. It first noted,

“When Officer Schaut approached the car, he noticed a six-pack of beer bottles sitting on the seat behind the driver. He noted that one bottle was missing... He observed condensation on the remaining five bottles. I guess, why does that matter? Because arguably, it suggests that the bottles were recently placed there and presumably, the operator of the vehicle, therefore, knew that they were there.”

R81:8-9.

The Court then noted that the odor of alcohol was also present on Hoffman’s breath, which generally would indicate recent consumption, and also noted Hoffman’s admission that he had been drinking recently, that Hoffman had glassy bloodshot eyes, was smoking a freshly lit cigarette, and had both windows down on the truck. R81:9.

The Court also noted that Sergeant Schaut was also investigating the issue of open intoxicants in this vehicle, noting, “it is true that the officer later advises Mr. Hoffman that he will not be arrested for impaired alcohol operation or for OWI due to alcohol. But I do not see a clear suggestion in this record that the officer's interaction with Mr. Hoffman was clearly over.” R81:10.

The evidence further shows that, as the court previously noted, after the preliminary breath test, Sergeant Schaut asked Hoffman about the possible presence of open intoxicants in the vehicle. R58:61-62. While Hoffman said no, Sergeant Schaut was not required to take his explanation as dispositive.

Wis. Stat. Sec 346.935 provides that

“1) No person may drink alcohol beverages...while he or she is in any motor vehicle when the vehicle is upon a highway, 2) No person may possess on his or her person, in a privately owned motor vehicle upon a public highway, any bottle or receptacle containing alcohol beverages...if the bottle or receptacle has been opened, the seal has been broken or the contents of the bottle or receptacle have been partially removed or released, and 3) The owner of a privately owned motor vehicle, or the driver of the vehicle if the owner is not present in the vehicle, shall not keep, or allow to be kept in the motor vehicle when it is upon a highway any bottle or receptacle containing alcohol beverages...if the bottle or receptacle has

been opened, the seal has been broken or the contents of the bottle or receptacle have been partially removed or released.”

Based on this evidence Sergeant Schaut continued to have reasonable suspicion to investigate the issue of open intoxicants in the vehicle after the conclusion of field sobriety exercises.

II. SERGEANT SCHAUT HAD PROBABLE CAUSE TO SEARCH HOFFMAN’S VEHICLE FOR OPEN INTOXICANTS

Police may conduct a search of a vehicle without a warrant if there is probable cause to believe the vehicle contains contraband or evidence of a crime. See *State v. Jackson*, 2013 WI App 66, ¶8, 348 Wis. 2d 103, 831 N.W. 2d 426; See also *State v. Secrist*, 224 Wis. 2d 201, 210, 589 N.W. 2d 387 (1999).

Sergeant Schaut testified that when he performed the search of the vehicle he continued to have concerns about the presence of open intoxicants within the vehicle based upon the fact that one of the bottles from the six-pack was missing. R58:20

The Court noted that an informative case on this issue was *State v. Bons*, 2007 WI App 124, 301 Wis. 2d 227, 731 N.W. 2d 367. In *Bons*, the investigating officer had noted that Bons was “very fidgety and appeared nervous but was cooperative.” *Id.* at ¶2 The officer noted that he observed a shot glass between the front seat and passenger seat which Bons attributed to a previous party. *Id.* The officer had Bons step out of the vehicle, and in doing so, Bons rolled up the window and locked the doors. *Id.* at ¶4. The Court of Appeals concluded that Bons’ behavior combined with the presence of the shot glass gave rise to reasonable suspicion that Bons

had been committing or was about to commit a crime involving alcohol, specifically Wis. Stat. Sec. 346.935, the open container prohibition. Id. at ¶15.

While the situation in *Bons* is not fully analogous to the facts in this case, as the Court was dealing with the issue of the extension of the stop and whether a consent to search the vehicle was valid, in this case there was much more evidence at Sergeant Schaut's disposal than in *Bons* that gave rise to clear probable cause to search the vehicle. The previous pieces of evidence observed by Sergeant Schaut that have been mentioned here was much more substantial than a shot glass observed in the vehicle. The ample evidence of recent alcohol consumption, a six-pack with condensation and one bottle missing, the odor of intoxicants, admission to recent drinking, combined with suspicious behavior on Hoffman's part and the observations on fields and the PBT provide ample probable cause that there was evidence inside the vehicle that Hoffman had been drinking while driving and that there was an open intoxicant in the vehicle.

The Court did find that the other stated rationale for searching the vehicle, the protective sweep, was not a valid reason to search the vehicle. R81:13-14. The State is not contesting this. However, even if this court were to conclude that Sergeant Schaut did not also possess the subjective intent to search the vehicle for evidence of open intoxicants, his subjective intent is irrelevant. What matters is there was an objectively valid reason to search the vehicle based on the evidence observed by that point. After the search, there existed reasonable suspicion to re-institute the OWI investigation and there existed probable cause to arrest following the additional investigation.

CONCLUSION

The Circuit Court properly found that Sergeant Schaut possessed reasonable suspicion to continue his investigation following the conclusion of fields and had probable cause to search the vehicle for evidence of open intoxicants. Based on this, the Circuit Court's ruling denying the motion to suppress should be affirmed.

Respectfully submitted,

Dated this 30th Day of January, 2025

Electronically signed by Matthew R. Leusink

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RULE 809.19(8)d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b),(bm), and (c) for a brief. The length of this brief is 3412 words.

Electronically signed by Matthew R. Leusink

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