COURT OF APPEALS DECISION DATED AND FILED

August 20, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. ***See*** **WIS. STAT. § 808.10 and RULE 809.62.**

Appeal No. 02-0937

Cir. Ct. No. 01-TR-5008
01-TR-5009

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

COUNTY OF DUNN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH W. UETZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dunn County: WILLIAM C. STEWART, Judge. *Affirmed.*

¶1 CANE, C.J.[1] Joseph Uetz appeals from a judgment convicting him of operating a motor vehicle while under the influence of an intoxicant, first offense, in violation of WIS. STAT. § 346.63(1)(a). In his motion to suppress the

---

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

evidence and again on appeal, Uetz contends that the arresting officer lacked a reasonable suspicion to make the initial investigatory stop. Alternatively, Uetz contends that even if the initial stop was permissible, the officer lacked probable cause to administer the preliminary breath test and therefore lacked probable cause to arrest him. We reject both contentions and affirm the judgment.

BACKGROUND

¶2 The underlying facts are undisputed. While on routine patrol at approximately 9:50 p.m., deputy Marshall Multhauf of the Dunn County Sheriff's Department observed Uetz's vehicle momentarily drive onto the gravel shoulder of the highway. Consequently, Multhauf followed Uetz for four to five miles while observing Uetz's vehicle touch or cross the fog line five or six times. Multhauf explained that when Uetz's car touched or crossed the fog lines, it would go over and come back, and then travel, go over and come back. The consistency of this behavior concerned Multhauf because it was more than just one or two times, and it occurred over a four- to five-mile stretch on the highway. Multhauf then activated his squad's emergency lights and stopped Uetz who was driving alone in the vehicle.

¶3 When asked for his driver's license, Uetz produced his license but with some difficulty, resulting in the paper driver's license extension notice falling to the ground. Multhauf observed that Uetz's eyes were slightly glassy and also detected an odor of alcohol emanating from the car. Uetz at first admitted to having a couple of beers shortly before the stop. When asked to step out from the car, Uetz hesitated while saying, "you are going to get me." Uetz then admitted to drinking more than two beers, estimating that he had consumed eight to ten beers since 5 p.m. Before performing the field sobriety tests, Uetz denied having

anything physically wrong that would affect his ability to perform these tests. Uetz hesitated for some time when asked to perform the heel-to-toe test and eventually agreed to do the one-leg stand instead, which he could do for only about one second while commenting that he did not think he could do it. However, he never complained that a bad leg prevented him from doing the test. At times, Uetz's speech was slurred. When Uetz was asked to recite the alphabet test, he sang it. Finally, after observing and talking to Uetz, Multhauf formed the opinion that Uetz was under the influence of an intoxicant and that there was probable cause to administer a preliminary breath test, which registered at .23%. Blood tests taken later showed Uetz's blood alcohol level at .22%.

DISCUSSION

¶4 In reviewing a motion to suppress evidence, we will uphold a circuit court's findings of fact unless they are clearly erroneous. ***State v. Eckert***, 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996). However, the application of constitutional principles to the facts as found is a question of law that we decide without deference to the circuit court. ***State v. Patricia A.P.***, 195 Wis. 2d 855, 862, 537 N.W.2d 47 (Ct. App. 1995).

¶5 The stop of a vehicle and the detention of its passengers constitute a seizure within the meaning of the Fourth Amendment to the United States Constitution; however, there are situations in which an investigative stop may be constitutionally permissible when prompted by an officer's suspicion that the occupants have committed a crime. ***State v. Guzy***, 139 Wis. 2d 663, 675, 407 N.W.2d 548 (1987). For an investigatory stop to be valid, a law enforcement officer must reasonably suspect, in light of his or her experience, that some kind of criminal activity has taken or is taking place. ***State v. Richardson***, 156 Wis. 2d

128, 139, 456 N.W.2d 830 (1990). An investigatory stop is permissible even when the conduct may constitute only a civil forfeiture. ***State v. Krier***, 165 Wis. 2d 673, 678, 478 N.W.2d 63 (Ct. App. 1991). Whether an officer's suspicion justifies an investigative stop involves an objective test. ***Guzy***, 139 Wis. 2d at 675. "Law enforcement officers may only infringe on the individual's interest to be free of a stop and detention if they have a suspicion grounded in specific, articulable facts and reasonable inferences from those facts, that the individual has committed a crime." ***Id.*** An "inchoate or unparticularized suspicion or 'hunch'" will not suffice. ***Id.*** (quoting ***Terry v. Ohio***, 392 U.S. 1, 27 (1968)).

¶6 Whether an officer had reasonable suspicion is an objective test. ***State v. Waldner***, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996). The suspicion must be "grounded in specific, articulable facts and reasonable inferences from those facts." ***Id.*** The focus is on the totality of the circumstances, not individual facts standing alone. ***Id.*** at 58.

¶7 Reasonable suspicion does not require that the officer have grounds to issue a traffic citation in order to make a traffic stop. ***Id.*** at 59-60. Nor does it require that the officer have grounds to believe that the weaving is caused by intoxication rather than drowsiness or some other more "innocent" cause before the stop. ***Id.*** As the ***Waldner*** court observed, "when a police officer observes lawful but suspicious conduct, if a reasonable inference of unlawful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, police officers have the right to temporarily detain the individual for the purpose of inquiry." ***Id.*** at 60. The question of what constitutes reasonable suspicion is a commonsense test: Under all the facts and circumstances present, what would a police officer reasonably suspect in light of

his or her training and experience? ***State v. Jackson***, 147 Wis. 2d 824, 834, 434 N.W.2d 386 (1989).

¶8 After hearing the testimony and reviewing the videotape exhibit showing the following of Uetz's vehicle and the field sobriety tests, the circuit court found that Multhauf observed the tires of Uetz's vehicle strike the graveled portion of the highway and cross or touch the fog line approximately four to five times over a four- to five-mile distance. Importantly, these crossings occurred in a consistent over-and-back motion during this four- to five-mile stretch. Although Uetz's car remained within his own lane of traffic during this time, applying a commonsense test to these facts would lead a reasonable police officer to suspect the driver was under the influence of an intoxicant. Thus, we are satisfied that Multhauf had observed sufficient facts to constitute a reasonable suspicion for the initial investigatory stop.

¶9 Next, Uetz contends that the trial court erred by denying his suppression motion because Multhauf lacked probable cause to administer the PBT and, therefore, lacked probable cause to arrest him. We disagree.

¶10 WISCONSIN STAT. § 343.303 provides in relevant part:

> If a law enforcement officer has probable cause to believe that the person is violating or has violated s. 346.63(1) … the officer, prior to an arrest, may request the person to provide a sample of his or her breath for a preliminary breath screening test.… The result of this preliminary breath screening test may be used by the law enforcement officer for the purpose of deciding whether or not the person shall be arrested for a violation of s. 346.63(1). … The result of the preliminary breath screening test shall not be admissible in any action or proceeding except to show probable cause for an arrest.

¶11 In ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 304, 603 N.W.2d 541 (1999), our supreme court explained that the purpose of WIS. STAT. § 343.303 is "to allow officers to use the PBT as a tool to determine whether to arrest a suspect and to establish that probable cause for an arrest existed, if the arrest is challenged." The court stated that the statute "maximizes highway safety, because it makes the PBT an effective tool for law enforcement officers investigating possible OWI violations." ***Id.*** at 315. The court fixed the level of probable cause under the statute at "a quantum of proof greater than the reasonable suspicion necessary to justify an investigative stop ... but less than the level of proof required to establish probable cause for arrest." ***Id.*** at 316.

¶12 The question in this case is whether the facts Multhauf observed satisfied this level of probable cause. Whether undisputed facts constitute probable cause is a question of law that we review without deference to the circuit court. ***State v. Babbitt***, 188 Wis. 2d 349, 356, 525 N.W.2d 102 (Ct. App. 1994). However, despite our de novo standard of review, we value the circuit court's opinion. *See* ***Scheunemann v. West Bend***, 179 Wis. 2d 469, 475, 507 N.W.2d 163 (Ct. App. 1993).

¶13 While probable cause is a varying standard depending on the different burdens of proof that apply at a particular stage of the proceeding, *see* ***Renz***, 231 Wis. 2d at 308, the core concept of probable cause remains constant. Probable cause "is a test based on probabilities; and, as a result, the facts … 'need only be sufficient to lead a reasonable officer to believe that guilt is more than a possibility.'" ***Dane County v. Sharpee***, 154 Wis. 2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990) (citation omitted). As a result, the probabilities addressed by probable cause are not technical. ***Id.*** Instead, they rest on the practical considerations of everyday life upon which reasonable and prudent persons, not

legal technicians, act. ***Id.*** The bottom line is that probable cause represents a commonsense test. ***Id.***

¶14 In ***Renz***, the driver did not smell of intoxicants (although his car did) and he did not have slurred speech. He was able to complete all of the field sobriety tests, although he exhibited some clues of intoxication. The supreme court concluded, "The officer was faced with exactly the sort of situation in which a PBT proves extremely useful in determining whether there is probable cause for an OWI arrest," and allowed the test results. ***Id.*** at 317.

¶15 Here, Uetz was the only person in the car who smelled of alcohol; had difficulty producing his driver's license; admitted to drinking eight to ten beers; stated "you are going to get me" when asked to step out of his car; sang the alphabet when asked to recite it; performed the one leg stand for only one second while explaining that he did not think he could perform the test and admitted that his performance on the field sobriety tests was borderline.

¶16 We conclude that under the totality of the circumstances and all of the facts available to the arresting officers at the time of the arrest, a reasonable officer would have probable cause to believe that Uetz was driving the vehicle while under the influence of an intoxicant. The judgment of conviction is therefore affirmed.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.