COURT OF APPEALS
DECISION
DATED AND FILED

September 9, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP613 **Cir. Ct. No. 2012CT44**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TRAVIS DANIEL THOM,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Pierce County: JOSEPH D. BOLES, Judge. *Affirmed*.

¶1 STARK, J.[1] Travis Daniel Thom appeals a judgment convicting him of one count of operating with a prohibited alcohol concentration (PAC)—second offense. Thom argues the circuit court erred by denying his suppression

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

motions. First, he argues his vehicle was unlawfully stopped without reasonable suspicion. Second, he argues the circuit court improperly applied the good faith exception to the exclusionary rule when it refused to suppress the results of a warrantless blood draw. We reject Thom's arguments and affirm.

BACKGROUND

¶2 A three-count criminal complaint charged Thom with operating while intoxicated (OWI)—second offense; PAC—second offense; and operating while revoked. Thom moved to suppress, arguing his vehicle was stopped without reasonable suspicion.

¶3 At the suppression hearing, sheriff's deputy Adam Olson testified he was "doing license plate checks" near a roundabout located at the intersection of Highway 65 and Cemetery Road in River Falls shortly after midnight on March 11, 2012. Olson's vehicle was parked on the shoulder of Highway 65, ten to twenty yards south of the roundabout, facing north. Olson's headlights were on, and the intersection was "lighted[.]"

¶4 Olson observed a vehicle negotiating the roundabout. The driver "appeared to be a male subject with short hair" who was not wearing a hat. Olson could not tell the driver's age. He "ran a license plate check" on the vehicle and determined it was registered to Thom. Olson was familiar with Thom and other members of his family "through contacts in law enforcement." Olson "ran a driver's license check" on Thom and determined he had an occupational license that prohibited him from driving after 10:00 p.m.

¶5 Olson followed the vehicle for about one-quarter to one-half mile. The vehicle traveled within the speed limit, and Olson did not observe any

impaired or erratic driving. Olson followed the vehicle into a driveway and made contact with the driver, who was later identified as Thom. Olson ultimately placed Thom under arrest for OWI. Thom was transported to a local hospital, where he refused to consent to a blood draw. Thom's blood was subsequently drawn without his consent.

¶6 After the suppression hearing, Thom filed a second suppression motion arguing the warrantless blood draw was unconstitutional. Thom acknowledged that, in ***State v. Bohling***, 173 Wis. 2d 529, 534, 494 N.W.2d 399 (1993), our supreme court concluded the rapid dissipation of alcohol in a suspect's bloodstream constitutes a per se exigency justifying a warrantless blood draw in an OWI case. However, Thom argued ***Bohling*** was wrongly decided.

¶7 The circuit court issued a written decision denying both of Thom's suppression motions. The court determined Olson had reasonable suspicion to stop Thom's vehicle based on Olson's knowledge that the registered owner of the vehicle was prohibited from driving after 10:00 p.m. and the "common sense assumption that the registered owner of the vehicle was also likely to be the driver." The court also determined the warrantless blood draw was constitutional under ***Bohling***, which was "still the law in Wisconsin[.]"

¶8 Thereafter, the United States Supreme Court decided ***Missouri v. McNeely***, 133 S. Ct. 1552, 1563 (2013), in which it held the natural dissipation of alcohol in the blood does not constitute a per se exigency justifying a warrantless blood draw in every case. Instead, whether a warrantless blood draw is reasonable must be determined on a case-by-case basis dependent on the totality of the circumstances. ***Id.*** Thom subsequently filed a "Brief in Support of Defendant's Motion for Suppression of Defendant's Blood Test Result Based upon

Unconstitutional Search and Seizure[,]" in which he argued the collection of his blood without a warrant was unconstitutional under ***McNeely***. Thom asked the circuit court to address this issue "at the defendant's final pretrial conference[.]"

¶9 In accordance with Thom's request, the circuit court addressed his ***McNeely*** argument at the beginning of the final pretrial hearing. The court agreed with Thom that the warrantless blood draw was unconstitutional under ***McNeely***, but it agreed with the State that the good faith exception to the exclusionary rule applied because there was "no evidence that the officers acted in anything but … good-faith reliance on the prior case law." The court therefore declined to suppress the results of the blood draw.

¶10 After the court denied his suppression motion, Thom pled guilty to the PAC charge. The OWI charge was merged, and the operating while revoked charge was dismissed, pursuant to a plea agreement. Thom now appeals, arguing the circuit court erred by denying his suppression motions.

DISCUSSION

¶11 Our review of a circuit court's denial of a motion to suppress presents a mixed question of fact and law. ***State v. Casarez***, 2008 WI App 166, ¶9, 314 Wis. 2d 661, 762 N.W.2d 385. We uphold the circuit court's findings of historical fact unless they are clearly erroneous, but the application of the law to those facts presents a question of law subject to independent appellate review. ***Id.*** "Where a violation of the Fourth Amendment right against an unreasonable search and seizure is asserted, the burden of proof upon the motion to suppress is upon the state." ***State v. Taylor***, 60 Wis. 2d 506, 519, 210 N.W.2d 873 (1973).

I. Reasonable suspicion

¶12 Thom first argues the circuit court erred by concluding the stop of his vehicle was supported by reasonable suspicion.[2] A police officer may conduct a traffic stop when he or she has grounds to "reasonably suspect that a crime or traffic violation has been or will be committed." ***State v. Popke***, 2009 WI 37, ¶23, 317 Wis. 2d 118, 765 N.W.2d 569. Reasonable suspicion exists when, under the totality of the circumstances, the facts of the case would warrant a reasonable officer, in light of his or her training and experience, to suspect an individual has committed, was committing, or is about to commit a crime or traffic violation. ***Id.*** Reasonable suspicion must be based on more than an "'officer's inchoate and unparticularized suspicion or hunch[.]'" ***Id.*** (quoted source omitted). The 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.*** (quoted source omitted).

¶13 In ***State v. Newer***, 2007 WI App 236, ¶7, 306 Wis. 2d 193, 742 N.W.2d 923, we explained it is "a reasonable assumption that the person driving a particular vehicle is that vehicle's owner." Consequently, knowledge that a vehicle's registered owner has a revoked license is generally sufficient to support a reasonable suspicion of criminal activity when an officer observes the vehicle being driven. ***Id.***, ¶¶2, 5. However, reasonable suspicion will dissipate if the officer "comes upon information" suggesting the registered owner is not actually driving the vehicle—for instance, if "the vehicle's driver appears to be much

[2] Thom spends a portion of his brief-in-chief arguing that he was, in fact, seized within the meaning of the Fourth Amendment. However, neither the State nor the circuit court asserted Thom was not seized. Accordingly, we do not address the issue further.

older, much younger, or of a different gender than the vehicle's registered owner[.]" ***Id.***, ¶8.

¶14 Thom does not dispute that, under ***Newer***, it was reasonable for Olson to assume Thom was driving the vehicle in question because Thom was the registered owner. However, Thom argues the State failed to prove at the suppression hearing that Olson was unaware of any additional facts suggesting Thom was not the driver. Thom notes that the area where Olson observed the vehicle was well-lit, and Olson knew Thom, but he did not recognize Thom as the driver. Thom also observes that Olson testified the driver was a male with short hair who was not wearing a hat, but he did not testify Thom's appearance was consistent with that description. Thom argues that, by failing to "elicit any testimony regarding how familiar [Olson] was with [Thom] or whether the individual he observed appeared consistent with [Thom's] appearance[,]" the State failed to meet its burden of proof.

¶15 The problem with Thom's argument is that Olson could not possibly have observed any additional facts suggesting that Thom was not driving the vehicle because *it is undisputed that Thom was actually driving*. In other words, because Thom was actually driving the vehicle, it would have been impossible for Olson to observe anything about the driver's appearance that was inconsistent with Thom's appearance. Additional questioning by the State regarding Olson's familiarity with Thom or whether Olson's observations were consistent with Thom's appearance would therefore have served no purpose. Under these circumstances, we reject Thom's argument that the State failed to meet its burden

of proof. Pursuant to ***Newer***, reasonable suspicion existed to stop Thom's vehicle.[3]

II. Warrantless blood draw

¶16 Thom next argues the warrantless blood draw was unconstitutional under ***McNeely*** and, as a result, the circuit court should have suppressed the results of the blood draw. The circuit court agreed with Thom that the blood draw was unconstitutional, but it concluded suppression was not required because the good faith exception to the exclusionary rule applied.

¶17 The exclusionary rule bars the admission of evidence obtained as the result of an illegal search or seizure in a criminal proceeding against the victim of the constitutional violation. ***State v. Ward***, 2000 WI 3, ¶46, 231 Wis. 2d 723, 604 N.W.2d 517. However, our supreme court has recognized a good faith exception to the exclusionary rule "where officers conduct a search in objectively reasonable reliance upon clear and settled Wisconsin precedent that is later deemed unconstitutional by the United States Supreme Court." ***State v. Dearborn***, 2010 WI 84, ¶4, 327 Wis. 2d 252, 786 N.W.2d 97; *see also* ***Ward***, 231 Wis. 2d 723, ¶3. In this case, the circuit court concluded the good faith exception applied because there was "no evidence that [Olson] acted in anything but … good-faith reliance on the prior case law" when he ordered the warrantless blood draw.

[3] Further, we note that Thom was present at the suppression hearing. The circuit court could therefore observe for itself whether Thom's appearance was consistent with Olson's description of the driver. The court did not note any discrepancy between Thom's appearance and Olson's description in its decision denying Thom's suppression motion. Thom does not argue on appeal that his appearance is inconsistent with Olson's description.

¶18 Whether the good faith exception to the exclusionary rule applies to pre-***McNeely*** warrantless blood draws is an issue currently pending before our supreme court.[4] However, in this appeal, Thom makes the narrower argument that the circuit court erred by applying the good faith exception without first holding an evidentiary hearing. This argument fails for two reasons.

¶19 First, Thom has forfeited his right to argue on appeal that the circuit court should have held an evidentiary hearing regarding the good faith exception. The record shows that, after the Supreme Court decided ***McNeely***, Thom renewed his previously denied motion to suppress the results of the warrantless blood draw. However, Thom did not specifically request an evidentiary hearing. He simply asked that the motion be "heard" at the final pretrial conference.

¶20 At the beginning of the final pretrial conference, the circuit court gave the State an opportunity to address Thom's renewed suppression motion. The prosecutor summarized the issue raised by the motion and then stated, "I know that the ruling in this county—the rule in this county is that the …." At that point, the court interrupted, stating, "Well, there'd be a ruling in each particular case, so let's just hear what you've got to say about this one and then I'll make a ruling on the record." The prosecutor then stated the State was "just relying on the good-faith exception and ***Dearborn***, arguing that the motion should be denied." The court then asked Thom's attorney whether he wanted to "make an

[4] *See* ***State v. Foster***, No. 2011AP1673, unpublished op. and order (WI App Dec. 10, 2012), *review granted*, 2014 WI 14, 843 N.W.2d 706; ***State v. Tullberg***, No. 2012AP1593, unpublished slip op. (WI App June 25, 2013), *review granted*, 2014 WI 14, 843 N.W.2d 706; ***State v. Kennedy***, No. 2012AP523, unpublished slip op. (WI App Apr. 9, 2013), *review granted*, 2014 WI 14, 843 N.W.2d 706.

argument[,]" and it invited him to "go ahead and put on the record whatever you would like." Thom's attorney responded:

> Your Honor, I would just rely on the motion and briefs that were filed. I know [another attorney], in another case here, previously argued this motion, and I—I expect the Court's ruling to be the same. And, as we previously discussed, we—we do plan to appeal, so we're just asking for the—the ruling from the Court.

¶21 Thus, Thom never argued in the circuit court that he was entitled to an evidentiary hearing regarding the good faith exception. Instead, his attorney explicitly urged the court to rule on the issue without having heard any evidence. Accordingly, Thom has forfeited his right to argue the court should have held an evidentiary hearing. *See* ***State v. Van Camp***, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997) (arguments raised for first time on appeal generally deemed forfeited). We do not "blindside trial courts with reversals based on theories which did not originate in their forum." ***State v. Rogers***, 196 Wis. 2d 817, 827, 539 N.W.2d 897 (Ct. App. 1995).[5]

[5] In his reply brief, Thom asserts he did not forfeit his right to argue the circuit court should have held an evidentiary hearing. He points out that, in his brief in support of the motion to suppress, he asserted ***Missouri v. McNeely***, 133 S. Ct. 1552 (2013), required the circuit court to analyze the reasonableness of the warrantless blood draw based on the totality of the circumstances. Thom asserts this was tantamount to requesting an evidentiary hearing. This argument misses the mark. On appeal, Thom is arguing the circuit court should have held an evidentiary hearing on the good faith exception to the exclusionary rule, not on the constitutionality of the warrantless blood draw.

Alternatively, Thom asserts we should exercise our discretion not to apply the forfeiture rule because "the circumstances … were such that [Thom] did not have an opportunity to specifically request an evidentiary hearing." There is no support in the record for this assertion.

(continued)

¶22 Moreover, Thom's argument that the circuit court should have held an evidentiary hearing also fails on the merits. Thom suggests an evidentiary hearing was necessary for the court to determine whether Olson actually relied on ***Bohling*** as the basis for the warrantless blood draw. However, application of the good faith exception depends on whether the challenged search or seizure was conducted "in *objectively* reasonable reliance upon clear and settled Wisconsin precedent that is later deemed unconstitutional by the United States Supreme Court." ***Dearborn***, 327 Wis. 2d 252, ¶4 (emphasis added). "The test of whether the officers' reliance was reasonable is an *objective* one" that asks "'whether a reasonably well trained officer would have known that the search was illegal' in light of 'all of the circumstances.'" ***Id.***, ¶36 (emphasis added; quoted source omitted). Because we apply an objective standard, whether Olson actually relied on ***Bohling*** is irrelevant.

¶23 Thom also argues an evidentiary hearing was necessary to determine whether reliance on ***Bohling*** was objectively reasonable under the circumstances. Specifically, he asserts that even before the United States Supreme Court decided ***McNeely***, a well-trained officer could have concluded that warrantless blood draws were unconstitutional in light of the Missouri Supreme Court's decision to that effect in ***State v. McNeely***, 358 S.W.3d 65 (Mo. 2012). However, before the United States Supreme Court's ruling, ***Bohling*** was the law in Wisconsin. An officer's awareness of the Missouri Supreme Court's decision would not have

---

Thom also argues we should address the merits of his argument because it is "clear from the transcript [of the final pretrial conference] that the trial court had already come to a decision that the good faith exception would apply[.]" To the contrary, the circuit court specifically indicated that, although it had ruled on a similar motion in another case, it would make an independent ruling "in each particular case." It was Thom's attorney who declined to make any argument based on his belief that the court's ruling would be the same as it was in the other case.

rendered the officer's reliance on binding Wisconsin precedent objectively unreasonable. We therefore reject Thom's argument that the circuit court erred by failing to hold an evidentiary hearing.

By the Court.—Judgment affirmed.

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