COURT OF APPEALS
DECISION
DATED AND FILED

October 22, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0277-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ERIC J. HEINE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Rock County: EDWIN C. DAHLBERG, Judge. *Affirmed.*

EICH, J.[1] Eric J. Heine appeals from a judgment finding him guilty of driving while intoxicated (third offense). He argues (a) that the arresting officer lacked "reasonable suspicion" to stop his vehicle, and (b) that the trial court erred

[1] This appeal is decided by a single judge pursuant to § 752.31(2)(c), STATS.

in finding that he "failed" sobriety tests administered to him by the officer. We affirm.

Police officers may, "in appropriate circumstances and in an appropriate manner," stop a person for the purpose of investigating possible wrongful behavior even where there is no probable cause to arrest. ***Terry v. Ohio***, 392 U.S. 1, 22 (1968). To execute a valid investigatory stop, the officer must reasonably suspect, in light of his or her experience, that criminal activity has, is, or is about to take place. ***State v. Richardson***, 156 Wis.2d 128, 139, 456 N.W.2d 830, 834 (1990). To be reasonable, that suspicion must be based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant th[e] intrusion." ***Id.***, *citing* ***Terry***, 392 U.S. at 21.

It is a common sense test whose fundamental focus is reasonableness under all of the facts and circumstances present. ***Richardson***, 156 Wis.2d at 139-40, 456 N.W.2d at 834. It asks the questions: "What is reasonable under the circumstances? What would a reasonable police officer reasonably suspect in light of his or her training and experience? What should a reasonable police officer do?" ***State v. Anderson***, 155 Wis.2d 77, 83-84, 454 N.W.2d 763, 766 (1990). At bottom, "if any reasonable inference of wrongful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, the officers have the right to temporarily detain the individual for the purpose of inquiry." ***Id***. at 84, 454 N.W.2d at 766.

At the hearing on Heine's motion to suppress evidence of his arrest on grounds that he had been illegally stopped, the arresting officer, David Burwell, an experienced police officer, testified that he first saw Heine's car stopped at a flashing red light at an intersection. As he watched, Heine pulled into the

intersection in the path of an oncoming car, an action Burwell described as requiring the driver of the other car "to abruptly brake in order to avoid a collision." Burwell followed Heine for three or four blocks, noting that his car was "drift[ing] from side to side"—about three or four feet either way—in his own lane of traffic as he drove. Based on his training and experience, all this led Burwell "to believe that possibly the subject may be operating while under the influence," and he pulled Heine over.

After the stop, Burwell noted that Heine's speech, while not "slurred," was "somewhat labored," and that there was a strong odor of intoxicants on his breath. Burwell administered three field sobriety tests. He said that, on the "Horizontal Gaze" test, Heine exhibited two or three "signals" of intoxication, that he was able to recite the alphabet in a satisfactory manner, and that, while he successfully performed the "one-leg stand" on one leg, while attempting it with the other, he had to put his other foot down in order to keep balance. All this indicated to Burwell that Heine was under the influence of an intoxicant and he placed him under arrest.

On cross-examination, Burwell stated that, when Heine entered the intersection, he came within ten feet of the other car. He said that he heard no tires squealing at the time, and acknowledged that Heine was "cooperative" throughout their encounter.

Heine also testified. He said that he had stopped at the flashing red light, checked for traffic and pulled out. He said he "never thought there was going to be a collision," and that the closest the cars ever came together was about twenty feet. Steve Sanda, a long time friend who was a passenger in Heine's car

that night, stated that he, too, didn't feel there was going to be a collision, and that he didn't see anything wrong with Heine's driving.

The trial court concluded that Burwell's observations of Heine's entry into the intersection, and of his "drifting" back and forth in his lane of traffic, were adequate to raise a reasonable suspicion that Heine may have been committing an offense, and thus grounds to detain him for further inquiry. The court also said that Burwell's further observations of Heine, and the manner in which he performed the field tests, were adequate to establish probable cause to arrest him for driving while intoxicated.

With respect to the stop, we agree with the trial court that, applying the "common-sense" test of reasonableness which we have outlined above, the facts apparent to Officer Burwell—Heine's entry into the intersection within ten to twenty feet of an oncoming vehicle, and his repeated side-to-side drifting in his traffic lane—are adequate, viewed in light of Burwell's experience as a police officer, to reasonably justify a suspicion that Heine may have been committing an offense—either a traffic offense, such as failure to yield the right-of-way, or, as he testified, driving while intoxicated.

Heine also argues that the trial court erred "in finding that [he] failed the field sobriety tests" and that, as a result, the court's determination that there was probable cause to arrest Heine for driving while intoxicated must be reversed.

We do not see that the court "found" that Heine had failed the field sobriety tests. All the court had to say on the subject of the tests was this:

> "[O]n the Horizontal Gaze … test, he did not pass that; and … on the balance test where he was required to stand on one foot, he was successful with one foot, but not with the other."

Nor has Heine made us aware of any legal authority with respect to "passing" or "failing" a field sobriety test. The manner in which a defendant performs a specific test is routinely received as evidence of intoxication in drunk-driving cases. And we can only infer that the court's reference to Heine's "not pass[ing]" the gaze test, referred to Burwell's testimony that the "lack of tracking" in Heine's eyes, and their "involuntary twitching" in two instances, constituted "signals" that, based on Burwell's experience and training, "suggest the possibility that the subject is under the influence." Heine contends that his counsel established on cross-examination that one of the three "signals" testified to by Burwell didn't really appear; and he criticizes Burwell for failing to "recall everything" he had ever studied "with regard to the Horizontal Gaze … test" when he was trained.

Be that as it may, when he placed Heine under arrest, Burwell had observed and noted: Heine's erratic driving—entering a stop-lighted intersection into the path of another car and drifting from side to side while driving; the strong odor of intoxicants on Heine's breath; the fact that he exhibited either two or three signs of intoxication on the Horizontal Gaze test;[2] and the fact that, while

[2] Heine argues that "there is nothing in the record to indicate how many [signals] are needed to establish that a subject may be impaired." As indicated, Officer Burwell testified that, based on his training and experience, "there are three … signals or scores that, if indicated while performing the test, suggest the possibility that the subject is under the influence," and that he "received all three of them." Heine's counsel cross-examined Burwell at length with respect to the Horizontal Gaze test, and never inquired into whether one, two, three or more "signals" are necessary to indicate intoxication. We are thus left with a record indicating that officers look for three such signals in administering the test, and that Burwell observed either two or three of them in this case. Whether that's called "passing" or "failing" the test seems to us to be immaterial—especially considering the absence of any evidence on what those terms mean. As indicated, we are satisfied that Heine's conduct and actions, as observed by Burwell throughout the period of their encounter that night—including the description of his performance of the field sobriety tests—are adequate to establish probable cause for his arrest for driving while intoxicated.

adequately performing the one-leg stand test on one leg, he lost his balance when attempting to do it with the other.

Probable cause, like the concept of "reasonable suspicion" in the case of a stop, is a common-sense test grounded in the concept of reasonableness. As its very name implies, it is a concept based on probabilities—not "technical" probabilities, but those based on the "factual and practical considerations of everyday life on which reasonable and prudent persons, not legal technicians, act." ***State v. Truax***, 151 Wis.2d 354, 360, 444 N.W.2d 432, 435 (Ct. App. 1989).

Probable cause to arrest exists where the officer, at the time of the arrest, has knowledge of facts and circumstances sufficient to warrant a person of reasonable prudence to believe that the person arrested is committing, or has committed an offense. ***Dane County v. Sharpee***, 154 Wis.2d 515, 518, 545 N.W.2d 508, 510 (Ct. App. 1990). As the very name implies, it is a test based on probabilities; and, as a result, the facts before the officer need only lead to the conclusion that guilt is more than a possibility. ***Richardson***, 156 Wis.2d at 148, 456 N.W.2d at 838. We measure the quantum of information that constitutes probable cause to arrest by the facts of the particular case, ***State v. Wilks***, 117 Wis.2d 495, 502, 345 N.W.2d 498, 501 (Ct. App. 1984), and in making that measurement, we look to the totality of the circumstances within the officer's knowledge at the place and time of the arrest. ***State v. Koch***, 175 Wis.2d 684, 701, 499 N.W.2d 152, 161 (1993).

Much of Heine's argument relates to what signs of intoxication he did not exhibit—that his eyes were not red, that he was not so impaired as to "stumble" or fail the alphabet test, or be unable to understand Burwell's instructions. What he did do was this: he exhibited erratic driving in at least two

instances, one involving another automobile; he had a strong smell of intoxicants on his breath; his speech was "labored"; and, finally, his performance on the three field tests administered to him was, at the very best, mixed. On this record, we are satisfied, as was the trial court, that the totality of the circumstances facing Burwell on the night in question meets the test of probable cause under the cases discussed above.

By the Court.—Judgment affirmed.

This opinion will not be published in the official reports. *See* RULE 809.23(1)(b)4, STATS.