COURT OF APPEALS
DECISION
DATED AND FILED

January 23, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1295-CR **Cir. Ct. No. 2006CT2329**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TODD J. BARDEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: RALPH M. RAMIREZ, Judge. *Affirmed*.

¶1 ANDERSON, P.J.[1] Todd J. Barden argues that the trial court erred in three ways: first, by denying his motion to suppress evidence because the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

officer lacked probable cause to initiate a traffic stop for violating WIS. STAT. § 346.13; second, by admitting the blood test result at trial because the State failed to show that the blood was drawn by a qualified person as required by WIS. STAT. § 343.305(5)(b); and third, by denying his motion in limine to preclude testimony that he had taken a prescription drug prior to driving. None of Barden's arguments persuade this court. We therefore affirm the decision of the trial court.

¶2 The facts are not in dispute and are drawn from the record, including the trial and probable cause motion hearing transcripts. On November 17, 2006, at approximately 9:30 p.m., Deputy Torin Misko of the Waukesha County Sheriff's Department was traveling eastbound on I-94 approaching Brookfield Road when he observed a sport utility vehicle swerve into the emergency lane. Its passenger side tires were on the fog line and, according to Misko, the vehicle was "pretty much traveling entirely in [the] emergency lane." He then observed the SUV, after several seconds of traveling in the emergency lane, come back into the left lane, travel again eastbound in the left lane of I-94 and, on two more separate occasions, swerve back into the emergency lane, breaking the fog line, and then swerving back into the left lane.

¶3 After these observations, Misko activated his emergency lights and siren to initiate a traffic stop. The SUV did not pull over for another two miles. Rather, it continued to travel in the left lane, eventually changing lanes into the center lane of eastbound I-94. It traveled in the center lane for approximately a mile, at which time it came over into the right lane of eastbound I-94. It then traveled in that lane for a short distance and "finally" came to a stop on the off ramp of Moorland Road.

¶4 Upon making contact with the driver of the SUV, Misko identified Barden by his Wisconsin driver's license. Misko observed that Barden had glassy, bloodshot eyes and an odor of consumed intoxicants. He then asked Barden to exit the vehicle for field sobriety testing. Barden failed testing and his preliminary breath test showed an alcohol concentration over the legal limit. Misko formed the opinion that Barden's ability to safely operate a motor vehicle was impaired and subsequently arrested him for operating while intoxicated.

¶5 After arresting Barden, Misko transported him to Waukesha Memorial Hospital for an evidentiary blood draw. At some point, Misko ran Barden's Wisconsin driving record which showed that Barden was previously convicted of an implied consent violation and/or operating a motor vehicle while under the influence of intoxicants or having a prohibited alcohol concentration. Misko issued a citation for operating while intoxicated, second offense. He then read the Informing the Accused form aloud to Barden. Misko asked and received consent from Barden to take an evidentiary sample of his blood. Misko then filled out the medical release form requesting a blood draw on Barden's behalf and Barden signed the form. Upon turning over the paperwork to the hospital staff, a phlebotomist came in to conduct the blood draw. After drawing two vials of blood, the phlebotomist gave the vials to Misko who placed them in a State of Wisconsin prepackaged OWI blood kit and sealed the vials and the kit in the usual fashion before mailing it to the State crime lab.

¶6 Upon its completion, the State crime lab's blood draw analysis indicated a result of .172 percent of alcohol by weight in Barden's blood. A citation for operating with a prohibited alcohol concentration, second offense, was issued and, on December 14, 2006, an amended criminal complaint was filed

charging Barden with OWI and operating with a prohibited alcohol concentration, both as second offenses.

¶7 On January 3, 2007, Barden filed a motion to suppress based upon lack of reasonable suspicion to detain him and lack of probable cause to arrest him. Barden's motion was denied after a hearing held on February 21, 2007. A jury trial followed.

¶8 At trial, Misko testified that Barden admitted to drinking a ten ounce glass of wine that evening. The prosecutor then asked whether Barden admitted to consuming any medication. Misko replied "yes," at which time Barden's defense attorney issued a standing objection to allowing testimony as to whether or not Barden admitted to taking any prescription medication. The trial court overruled the objection. Misko then testified that Barden admitted to taking two Oxycodone pills, one at 5:45 and one at 6:15. The Alcohol/Drug Influence Report completed by Misko on Barden's behalf,[2] signed by Barden, and admitted into evidence states that Barden took Oxycodone "2 Tablets 1 at 5:45 p.m. [and] 1 at 6:15 p.m. 11-17-06."

¶9 The State entered, without objection from Barden, Barden's "State of Wisconsin Blood/Urine Analysis" form containing signed verification that a "Med. Tech" had collected Barden's blood specimen. At the close of the State's case, the trial court ruled that, because the blood was drawn at a hospital by a person who was designated as a phlebotomist and in a controlled setting, the

[2] This report is State's Exhibit 3 in the record.

phlebotomist was under the direction of a physician and the requirements of WIS. STAT. § 343.305(5)(b) were satisfied.

¶10 Barden testified that he took a full tablet of Oxycodone at 6:15 a.m. and a half tablet at 5:45 p.m.[3] He stated that he took the medication for a root canal. Barden admitted on cross-examination that he "believed" the Oxycodone bottle stated it "may cause drowsiness with effect of alcohol."

¶11 After a two-day trial, the jury found Barden guilty on both counts. The trial court entered a judgment of conviction accordingly. Barden appeals.

¶12 On appeal, Barden argues that the trial court erred in three ways: first, by denying his motion to suppress evidence because the officer lacked probable cause to initiate a traffic stop for violating WIS. STAT. § 346.13; second, by admitting the blood test result at trial because the State failed to show that the blood was drawn by a qualified person as required by WIS. STAT. § 343.305(5)(b); and third, by denying his motion in limine to preclude testimony that he had taken a prescription drug prior to driving.

¶13 Barden contends that Misko did not have reasonable suspicion to stop him. He advocates the view that his "gradual swerving into the emergency lane did not give Deputy Misko probable cause to believe that Mr. Barden violated [WIS. STAT.] § 346.13." We roundly disagree.

[3] Barden's testimony was inconsistent with the Alcohol/Drug Influence Report completed by Misko on Barden's behalf and signed by Barden. This report states that Barden took Oxycodone, "1 at 5:45 p.m [and] 1 at 6:15 p.m. 11-17-06."

¶14 Investigative traffic stops are subject to the constitutional reasonableness requirement. ***State v. Post***, 2007 WI 60, ¶12, 301 Wis. 2d 1, 733 N.W.2d 634. The question we must answer is whether the State has shown that there were "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" the intrusion of the stop. ***Terry v. Ohio***, 392 U.S. 1, 21 (1968). The burden of establishing that an investigative stop is reasonable falls on the State. ***Post***, 301 Wis. 2d 1, ¶12. The determination of reasonableness is a commonsense test. ***Id.***, ¶13.

¶15 The crucial question is whether 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. ***Id.***, ¶13. This commonsense approach balances the interests of the State in detecting, preventing, and investigating crime and the rights of individuals to be free from unreasonable intrusions. ***Id.*** The reasonableness of a stop is determined based on the totality of the facts and circumstances. ***Id.***

¶16 In ***Post***, our supreme court addressed whether there was reasonable suspicion for an investigative stop when a driver was observed weaving within a single lane. ***Id.***, ¶2. The court held that weaving within a single traffic lane does not alone give rise to the reasonable suspicion necessary to conduct an investigative stop of a vehicle. ***Id.***, ¶38. However, after examining the totality of the circumstances, it also held that the police officer did have reasonable suspicion and that the stop did not violate Post's constitutional right to be free from unreasonable searches and seizures. ***Id.***

¶17 The totality of the circumstances the supreme court examined in ***Post*** are as follows. In February 2004, Sauk Prairie police sergeant Josh Sherman

was on routine patrol on Water Street in Sauk City. ***Id.***, ¶3. The northbound side of Water Street is approximately twenty-two to twenty-four feet wide from the yellow center line to the curb. ***Id.*** It contains a traffic lane and parking lane. ***Id.*** There is no line or marking delineating the traffic lane from the parking lane. The parking lane is bounded by the curb. ***Id.***

¶18 Sherman testified that at approximately 9:30 p.m., he was traveling southbound on Water Street and observed two cars traveling northbound. ***Id.***, ¶4. The second vehicle, a Chevrolet Cavalier driven by Post, was "canted" such that it was driving at least partially in the unmarked parking lane. ***Id.***

¶19 After the two cars passed, Sherman turned around to follow them. ***Id.***, ¶5. He did not lose sight of the cars and caught up to them after six or seven blocks. ***Id.*** While following the cars, Sherman observed Post's car traveling in a smooth "S-type" pattern. ***Id.*** Sherman described the movement as "a smooth motion toward the right part of the parking lane and back toward the center line." ***Id.*** He stated that Post's car moved approximately ten feet from right to left within the northbound lane, coming within twelve inches of the center line and to within six to eight feet of the curb. ***Id.*** Post's car repeated the S-pattern several times over two blocks. ***Id.*** The movement was neither erratic nor jerky, and the car did not come close to hitting any other vehicles or to hitting the curb at the edge of the parking lane. Sherman testified that the manner of Post's driving was a "clue that he may be intoxicated." ***Id.***

¶20 After being followed by Sherman for two blocks, both cars signaled and made a left turn onto a cross street. ***Id.***, ¶6. The first car turned into the oncoming traffic lane. ***Id.*** The second car, driven by Post, made a proper turn. Sherman activated his emergency lights and both cars pulled over. ***Id.***

¶21 The supreme court held these facts to be sufficient for a stop. ***Id.***, ¶37. It explained:

> When viewed in isolation, the individual facts that Post was weaving across the travel and parking lanes, that the weaving created a discernible S-type pattern, that Post's vehicle was canted into the parking lane, and that the incident took place at night may not be sufficient to warrant a reasonable officer to suspect that Post was driving while intoxicated…. "[A]ny one of these facts, standing alone, might well be insufficient." *However*, such facts accumulate, and "as they accumulate, reasonable inferences about the cumulative effect can be drawn."

Id. (emphasis added) (citing ***State v. Waldner***, 206 Wis. 2d 51, 58, 556 N.W.2d 681 (1996)). In essence, a point is reached where the whole is greater than the sum of its individual parts. ***Id.***, ¶37.

¶22 That is what we have here. Like Post, Barden's driving on the highway at night was such that it caught the attention of the officer. Post's driving was described by the arresting officer as "weaving"; Barden's was described as "swerving." Post moved approximately ten feet from right to left *within* the northbound lane. Barden's swerving was such that he moved *outside* his lane entirely on one occasion and traveled this way for several seconds before swerving back into his lane. He then, on two more occasions, swerved outside his lane of travel into the emergency lane before Misko activated his siren and lights to pull him over.

¶23 We determine, under the totality of the circumstances, that Misko, like the officer in ***Post***, presented specific and articulable facts which, taken together with rational inferences from those facts, give rise to the reasonable suspicion necessary for an investigative stop. Accordingly, the stop did not violate Barden's constitutional right to be free from unreasonable searches and seizures.

¶24 Barden's second argument is that the court erred by admitting the blood test result at trial because the State failed to show that the blood was drawn by a qualified person as required by WIS. STAT. § 343.305(5)(b). This section states:

> (b) Blood may be withdrawn from the person arrested for violation of s. 346.63(1), (2), (2m), (5) or (6) or 940.25, or s. 940.09 where the offense involved the use of a vehicle, or a local ordinance in conformity with s. 346.63(1), (2m) or (5), or as provided in sub. (3)(am) or (b) to determine the presence or quantity of alcohol, a controlled substance, a controlled substance analog or any other drug, or any combination of alcohol, controlled substance, controlled substance analog and any other drug in the blood only by a physician, registered nurse, medical technologist, physician assistant or person acting under the direction of a physician.

¶25 In denying Barden's motion to suppress the blood test result, the trial court ruled that the requirements of WIS. STAT. § 343.305(5)(b) were met because the record demonstrates that the blood was drawn at a hospital by a person designated as a phlebotomist in a controlled setting and, therefore, the phlebotomist was under the direction of a physician as the statute required. We agree with the trial court and find no error in its decision to deny the motion to suppress the blood test result.

¶26 Barden's last argument is that the trial court erred by denying his motion in limine to preclude testimony that he had taken a prescription drug prior to driving. Barden argues that evidence regarding his use of Oxycodone should have been precluded because the information had no bearing on the probability that Barden was driving while under the influence of an intoxicant and the medication evidence was prejudicial because Barden would have to overcome juror speculation about whether the drug augmented the effects of alcohol. Barden also argues that an expert was required to testify that the Oxycodone was present

in Barden's blood and that Oxycodone would augment the impairing effects of alcohol.

¶27 Barden's arguments in this regard fall short. The fact that Barden had taken Oxycodone was information provided by Barden himself during an interview with a law enforcement officer, which is admissible under WIS. STAT. § 908.01(4)(b)1.[4] Barden's admission was an admission by a party opponent and it was made after he was read his ***Miranda***[5] rights, thus, Barden was properly warned that any admission could be used against him.

¶28 In conclusion, Barden's appellate arguments do not convince this court that the trial court erred in any way. Under the totality of the circumstances, there existed specific and articulable facts, which taken together with rational inferences from those facts, gave rise to the reasonable suspicion necessary for an investigative stop. Further, the record demonstrates that both the results of Barden's blood draw and his admission that he had taken Oxycodone were properly admitted.

By the Court.—Judgment affirmed.

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[4] WISCONSIN STAT. § 908.01(4)(b)1. provides:

> **(4)** STATEMENTS WHICH ARE NOT HEARSAY. A statement is not hearsay if:
>
> ….
>
> (b) *Admission by party opponent*. The statement is offered against a party and is:
>
> 1. The party's own statement, in either the party's individual or a representative capacity ….

[5] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

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