COURT OF APPEALS
DECISION
DATED AND FILED

July 31, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP729-CR **Cir. Ct. No. 2006CT114**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

CATHERINE A. SCHUTZ,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Marquette County: RICHARD O. WRIGHT, Judge. *Affirmed*.

¶1 VERGERONT, J.[1] The State appeals the circuit court's order granting the motion of Catherine Schutz to suppress evidence. Schutz was charged with operating a motor vehicle while under the influence of an intoxicant,

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

third offense, in violation of WIS. STAT. § 346.63(1)(a) and WIS. STAT. § 346.65(2)(am)3., and one count of operating a motor vehicle with a prohibited alcohol concentration, third offense, in violation of § 346.63(1)(b) and § 346.65(2)(am)3. In her motion Schutz contended that the law enforcement officer who stopped her vehicle lacked reasonable suspicion that she was driving while under the influence of an intoxicant and thus the field sobriety tests were unlawful. The court agreed and granted her motion to suppress all evidence obtained during and after the field sobriety tests.

¶2 Based on the facts found by the circuit court, we conclude that, before performing the field sobriety tests, the officer did not have reasonable suspicion that Schutz was driving while under the influence of an intoxicant. We therefore affirm.

BACKGROUND

¶3 At the evidentiary hearing on Schutz's motion, the only witness was the arresting officer, John Bitsky, a patrolman for the Village of Westfield Police Department. He testified as follows. He stopped Schutz's vehicle in the early morning hours of August 10, 2006, because he "ran" the license plate number on her vehicle and that number came back on a different vehicle. He followed Schutz's vehicle approximately two blocks before stopping her. He did not believe she was speeding and he did not recall any other problems with her driving. When he turned on his red and blue emergency lights, she pulled into an apartment parking lot.

¶4 Schutz stopped her vehicle and got out. The officer did not recall if he saw her get out of her vehicle because his attention was focused on the passenger who had gotten out of the vehicle; the officer told him to get back into

the vehicle. When the officer looked over, Schutz was already standing outside of her vehicle. He did not recall that she had any trouble getting her driver's license out. He explained to her why he had stopped her and she responded that she had just bought this vehicle and had put her plates from the other vehicle on it. While he was speaking to her he noticed a strong odor of intoxicants emitting from her breath. She was standing between a foot and a half and two feet away from him. He asked her if she had consumed any intoxicating beverages and she responded that she had been drinking tequila at a local tavern, which was about three blocks away from where the stop occurred. He did not ask her how much tequila she had been drinking.

¶5 On direct examination the officer testified that, in addition to noticing a strong odor of intoxicants, her eyes were bloodshot, glassy, and her balance a little unsteady. He testified that he asked her to perform field sobriety tests because, based on his experience and "the strong odor of intoxicants and her admitting that she's been drinking, her bloodshot eyes, a little slurred speech and stuff, I thought maybe she was intoxicated." Schutz performed the field sobriety tests and was subsequently arrested.

¶6 On cross-examination, defense counsel pointed out that in the officer's report the officer noted that "[w]hile conducting [the horizontal gaze nystagmus test] I observed that Catherine's eyes were very bloodshot and glassy and I could smell a very strong odor of intoxicating beverages emitting from her breath"; however, the report did not note anything about her eyes looking bloodshot and glassy, slurred speech, or unsteadiness until after she had started performing the field sobriety tests. The officer, looking at his report, agreed that the "Contact with Catherine" section noted only the strong odor of intoxicants emitting from her breath and her admission that she had been drinking.

¶7 On redirect, the officer testified that he noticed Schutz's bloodshot and glassy eyes prior to her taking the field sobriety tests, but he did not document it.

¶8 In reaching its decision, the circuit court noted the length of time that had transpired since the incident, although through no fault of the officer. The court found the officer's memory to be "very uncertain." The court also found that the report was "closer to … what happened than what his testimony is," noting that the court would expect this because the events were fresher in his memory when he wrote the report. The court stated that it was "bothered particularly" by the testimony that Schutz was "a little unsteady." The court noted that the officer said this "very hesitatingly." The court stated that it did not know what "a little unsteady" meant and so the court could not "really give much credence to that testimony." The court then stated:

> That's -- leaves us with an odor, an admission of drinking, no admission to how much. And the bloodshot eyes, which apparently weren't observed to the point that it was necessary to write in his report that he observed that – the extent of that prior to doing the HGN. Obviously when you do the HGN is when you would be looking at the eyes a lot closer and be closer to the defendant to see whether or not -- you know, what kind of an odor.

¶9 The court concluded that there was not a reasonable suspicion that Schutz was driving while under the influence of an intoxicant.[2] It reasoned that the odor of alcohol without the knowledge of how much she had consumed was not sufficient to constitute reasonable suspicion for the field sobriety tests.

[2] The court used the term "reasonable suspicion" interchangeably with "reasonable cause." To avoid confusion, we use only "reasonable suspicion."

DISCUSSION

¶10 The State contends the court erred in concluding there was not reasonable suspicion to have Schutz perform the field sobriety tests. The State asserts that the strong odor of intoxicants, the admission she was drinking at a local bar, the early morning hours, and speech that was "a little slurred" are sufficient to constitute reasonable suspicion that she was driving while under the influence of an intoxicant.

¶11 Schutz responds that the court did not find that her speech was "a little slurred," but instead found that the officer's report was closer to what happened than was his testimony, and nothing in the officer's narrative report referred to slurred speech. Schutz asserts the other factors cited by the State are insufficient to establish reasonable suspicion that she was driving while under the influence of an intoxicant.

¶12 The State replies that the court did not make a finding one way or the other on whether Schutz's speech was slurred, unlike the finding it made relating to her balance. However, the State points out that, in making the finding on her balance, the court relied on the officer's report and, the State asserts, the "Incident Report of Arrest" form the officer completed has a check in the box next to "Slurred Speech." In addition, the State maintains that, even without slurred speech, the strong odor of intoxicants, the early morning hours, and Schutz's admission that she had consumed tequila at the tavern were sufficient to constitute reasonable suspicion for the field sobriety tests.

¶13 The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures, and an investigative stop is a seizure within the meaning of the Fourth Amendment. ***State v. Post***, 2007 WI 160, ¶10,

301 Wis. 2d 1, 733 N.W.2d 634. In order to be lawful, an investigative detention must be supported by 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, ¶8, 260 Wis. 2d 406, 659 N.W.2d 394 (alteration in original).

¶14 Schutz does not challenge the lawfulness of the initial stop based on her license plate. At the hearing in the circuit court, the State conceded that, at the point in time that the officer asked Schutz to take the field sobriety tests, she was not free to leave. However, the State argued, the field sobriety tests were lawful because there was reasonable suspicion that she was driving under the influence of an intoxicant. The State's initial brief on appeal employs a reasonable suspicion standard to determine the lawfulness of the field sobriety tests. In her responsive brief, Schutz agrees this is the correct standard and presents a developed argument to support her position. After stating that no Wisconsin case has addressed whether a field sobriety test is a search within the meaning of the Fourth Amendment or what standard must be met in order for the administration of the tests to be lawful, Schutz cites to several cases from other jurisdictions holding that field sobriety tests are a search and to numerous cases from other jurisdictions holding that reasonable suspicion is the correct standard to apply. In its reply brief, the State does not dispute that field sobriety tests are a search within the meaning of the Fourth Amendment and does not dispute that they must be supported by reasonable suspicion in order to be constitutional. We treat this as an implicit concession that Schutz is correct on these points. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322-23, 525 N.W.2d 99 (Ct. App. 1994) (when a reply brief does not dispute a proposition asserted in a responsive brief we may take it as a concession).

¶15 After briefing was completed and the appeal was submitted for decision, the State advised us in a letter that the recent case of ***State v. Arias***, 2008 WI 84, ___ Wis. 2d ___, ___ N.W.2d ___, "impact[s] the decision in this case." ***Arias*** involved a challenge to a dog sniff of the exterior of a vehicle that was stopped based on observations that led the officer to believe there were intoxicants in a vehicle being driven by a minor. ***Id.***, ¶¶4-5. The defendant did not challenge the lawfulness of the initial stop. ***Id.***, ¶35. The court first concluded that the dog sniff was not a search within the meaning of the Fourth Amendment. ***Id.***, ¶24. The court formulated the remaining issue as whether the dog sniff unreasonably prolonged the initial seizure, ***id.***, ¶25, explaining that "[r]easonableness … depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." ***Id.***, ¶38 (citations omitted) (alteration in original). The court found the dog sniff extended the duration of seizure by seventy-eight seconds, ***id.***, ¶28, and concluded that the "incremental intrusion upon Arias's liberty interest that resulted from the 78-second dog sniff is outweighed by the public interest served thereby." ***Id.***, ¶40.

¶16 We are not persuaded that ***Arias*** impacts this decision. Because the ***Arias*** court concluded the dog sniff was not a search, its analysis focused on the duration of the extension of the initial seizure. Here, the State has implicitly conceded in its reply brief that the field sobriety tests were a search. ***Arias*** does not address the constitutional standard for a search in general or for field sobriety tests in particular. *See* ***id.***, ¶¶31-32 (distinguishing between a search and a seizure).

¶17 We also observe that the test for reasonable suspicion is itself the balance struck between the interests of the State and right of the individual to be free from unreasonable intrusions. ***Post***, 301 Wis. 2d 1, ¶13. Thus, we do not

agree with the State that the circuit court here erred in not applying a balancing test, as it argues in its reply brief. (The State refers us to this argument in its letter.) The circuit court applied the reasonable suspicion standard to the field sobriety tests, which is the standard the State argued to the circuit court and employs in its main brief and reply brief on appeal.

¶18 In addition, even if we were to assume for purposes of argument that the ***Arias*** analysis—inquiry whether the field sobriety tests unreasonably prolonged the initial seizure—is applicable in this case, the analysis would require evidence of the administration of the field sobriety tests, including how long they lasted, and the court's findings based on that evidence. This record lacks that evidence and those findings. At the evidentiary hearing, when the prosecutor asked the officer what field sobriety tests he had her perform, the court stated "This is beyond the--" and defense counsel stated "Yeah, this is beyond the parameters…." The prosecutor responded "Okay. No further questions." This limitation on evidence to events that occurred before the administration of the tests, to which the prosecutor did not object, is consistent with the manner in which both parties framed the issue to the court: was there reasonable suspicion of for the field sobriety tests?

¶19 We conclude that we should apply the reasonable suspicion standard. Our reading of ***Arias*** does not persuade us that the reasonable suspicion standard is incorrect in the circumstances of this case. It is the standard the parties argued to the circuit court and, consequently, the standard that shaped the evidentiary basis on which the circuit court made its factual findings. And it is the standard that the parties have used in their briefs on appeal.

¶20 In reviewing a circuit court's determination that there was not reasonable suspicion of driving while under the influence of an intoxicant, we accept the circuit court's findings of historical fact unless they are clearly erroneous, and we review de novo the application of those facts to the constitutional standard. *See* ***Post***, 301 Wis. 2d 1, ¶8. When sitting as fact-finder, it is the circuit court's role to make credibility determinations and that includes deciding which portions of a witness' testimony to accept and which to reject. *See* ***O'Connell v. Schrader***, 145 Wis. 2d 554, 557, 427 N.W.2d 152 (Ct. App. 1988).

¶21 Driving while under the influence of an intoxicant requires proof that a person's ability to drive has been impaired by the consumption of an alcoholic beverage. *See* WIS JI—CRIMINAL 2663. This means that the "person has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to control a motor vehicle." ***Id.***

¶22 In this case there is no dispute that the officer did not observe anything about Schutz's driving that would give rise to or contribute to a reasonable suspicion that she was driving while under the influence of an intoxicant. We therefore turn to the circuit court's findings of Schutz's appearance and conduct after her vehicle was stopped. The court credited the officer's testimony that he noticed a strong odor of intoxicants emitting from her breath as he was talking to her and her admission that she had been drinking tequila at a local tavern. We read the court's discussion of the officer's testimony that Schutz was "a little unsteady" as not crediting that testimony to the extent it was an observation the officer made before he administered the field sobriety tests. The State appears to accept that the court found the officer did not make an observation on Schutz's unsteadiness before administering the field sobriety tests

and does not challenge this finding. The State also appears to implicitly concede that the court found that the officer did not make observations about Schutz's eyes being bloodshot and glassy before administering the field sobriety tests, and it does not challenge this finding.

¶23 Turning then to the officer's testimony on Schutz's slurred speech, the State is in essence asking us to make a finding that the officer observed her speech to be slurred before administering the field sobriety tests, even though the court did not make this finding. We decline to do so. It is clear from the court's comments that it is not considering slurred speech as an observation the officer made before administering the field sobriety tests. This implicit finding is not clearly erroneous. The court's assessment that the officer's memory was uncertain and his "testimony was very uncertain on lots of this," and the court's finding that the officer's report was a more accurate account of what happened provide a reasonable basis for finding that the officer did not observe slurred speech before administering the field sobriety tests. The section of the officer's narrative report under "Contact with Catherine," a section which precedes one on "Field Sobriety," does not mention slurred speech, but only the "strong odor of intoxicants emitting from her breath" and Schutz's acknowledgment that she had been drinking tequila at a tavern.

¶24 As noted above, the State argues that we should rely on the "Incident Report of Arrest" form that has a check in a box marked "Slurred Speech" under a heading of "Evidence of Intoxication." This form does not appear to have been introduced into evidence and, unlike the officer's narrative report, it is not apparent from the record that this form was brought to the court's attention. It is also not clear from the incident report *when* the officer made this observation. The items that can be checked off in the "Evidence of Intoxication" section in the

"Incident Report of Arrest" include items, such as the results of the chemical test for intoxication, that were plainly not observations made by the officer *before* administering the field sobriety tests. We therefore disagree with the State's contention that the "Incident Report of Arrest" form, without more, is evidence that the officer observed slurred speech before administering the field sobriety tests. Moreover, even if it were evidence of that, we could not reject the court's implicit finding that there was no observation of slurred speech before the administration of the field sobriety tests, because that is not clearly erroneous.[3] *See* WIS. STAT. § 805.17(2).

¶25 Although the court did not make a specific finding on the time of day, it is undisputed that it was early morning.

¶26 Based on the circuit court's findings of fact, which we accept because they are not clearly erroneous, we conclude there was not reasonable suspicion that Schutz was driving while under the influence of an intoxicant before the officer administered the field sobriety tests. There was no evidence of any conduct while driving that would indicate her ability to drive was impaired. There is no evidence that her movements in getting out of the vehicle or offering her driver's license indicated any difficulty with movement. We agree with the State that the time of day is a factor that may contribute to reasonable suspicion of driving while under the influence of intoxication. *See* ***Post***, 301 Wis. 2d 1, ¶36.

[3] When a court does not make explicit a particular factual finding that is necessary to its conclusion, we may consider that finding to be implicitly made if there is support in the record for it. ***Town of Avon v. Oliver***, 2002 WI App 97, ¶23, 253 Wis. 2d 647, 644 N.W.2d 260. However, this principle does not aid the State in this case because a finding that the officer observed slurred speech before administering the field sobriety tests is not necessarily implicit in the court's conclusion that there was no reasonable suspicion. Indeed, as we have already noted, it is inconsistent with the court's discussion of its reasoning.

However, that adds little if anything to the officer's knowledge in this case. The officer here knew by Schutz's own admission that she had come from a tavern. *Cf.* ***id.***, (the late hour was significant as a factor in making the initial stop as a possible indication that the driver may have been coming from a tavern). The State emphasizes that the officer smelled a "strong" odor of intoxicants, but there is no evidence or reasonable inference from the evidence that a "strong" odor of intoxicants results from consumption of alcohol in an amount that would impair a person's ability to drive. The officer acknowledged that Schutz did not say how much tequila she had consumed and that he did not know whether one shot of tequila smells any different than ten shots of tequila.

¶27 Based on the circuit court's findings of fact and the undisputed evidence, these were the articulable facts known to the officer before administering the field sobriety tests: Schutz had been drinking tequila, she had consumed enough tequila so that there was a strong odor of intoxicants one and a half to two feet away from her, and it was early morning. We conclude these facts and the reasonable inferences from them do not give rise to a reasonable suspicion that Schutz had consumed enough alcohol to impair her ability to drive.

CONCLUSION

¶28 We affirm the circuit court's order granting Schutz's motion to suppress all evidence obtained during and after the field sobriety tests.

By the Court.—Order affirmed.

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