COURT OF APPEALS
DECISION
DATED AND FILED

June 16, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP2996-FT

Cir. Ct. Nos. 2008TR11921
2008TR11922

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

CITY OF RIPON,

PLAINTIFF-RESPONDENT,

V.

JONATHAN LEBESE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Fond du Lac County: RICHARD J. NUSS, Judge. *Affirmed*.

¶1 NEUBAUER, P.J.[1] Jonathan Lebese appeals from a forfeiture judgment of conviction for violating City of Ripon ordinances prohibiting

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(b) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

operating a motor vehicle while intoxicated (OWI) and operating a motor vehicle with a blood alcohol concentration of .10 or more (PAC). Lebese challenged the legality of the initial stop of his vehicle. He contends on appeal that the circuit court violated his due process rights when it issued a preliminary ruling on his motion to suppress prior to hearing the testimony of a defense witness. In light of the preliminary ruling, Lebese chose to forego calling his defense witness at a continued hearing. The circuit court ultimately found Lebese guilty of the cited offenses and assessed penalties on the PAC. We conclude that the circuit court's ruling at the suppression hearing did not violate Lebese's due process rights, but rather reflected a proper exercise of discretion. We therefore uphold the circuit court's denial of Lebese's motion to suppress and affirm the forfeiture judgment.

¶2 Lebese was cited for PAC and OWI in the early morning hours of Saturday, November 1, 2008. Lebese entered a not guilty plea and filed a motion to suppress evidence stemming from the stop of his vehicle. Prior to the motion hearing on March 27, 2009, Lebese's counsel advised the court that the passenger of the vehicle was unavailable to testify on the scheduled date and requested a continuance. The court indicated its preference to proceed with the scheduled hearing with the understanding that, if necessary, the court would allow the hearing to be continued at a later date.

¶3 At the suppression hearing, the arresting officer, Officer Nicholas Place, testified to the events leading up to the citation. Place was on general patrol at approximately 1:30 a.m. when he noticed two vehicles traveling side-by-side in the two westbound lanes of West Fond du Lac Street, which is a four-lane highway. He estimated that the vehicle in the passing lane was about three feet away from the vehicle in the right lane. The vehicles caught Place's attention because he thought "it was a little too close." As the vehicles approached Place,

who was traveling eastbound, he noticed that the vehicle in the passing lane "started to veer to the left." Based on its path of travel, he thought that the vehicle was going to cross the center line and come into his lane. Place started to stop his vehicle and get into the next lane. He then performed a U-turn and traveled westbound on West Fond du Lac Street until he caught up with the vehicle. At that time, he observed the vehicle "cross the centerline." He continued to follow the vehicle and noticed "that the vehicle's driver's side tires again touched the white dotted line, separating the westbound lanes of traffic." Place activated his emergency lights and stopped the vehicle.

¶4 On cross-examination, Lebese's counsel suggested that the vehicle took evasive action because the other car was coming close; however, Place testified, "No, it didn't take any evasive action." Place also clarified that the vehicle's tires went over the yellow centerline but never went past the line.

¶5 Lebese also testified at the suppression hearing. Lebese explained that he was driving in the passing lane with a white vehicle to his right in the right-hand lane. When the vehicle in the right-hand lane made a "wide right turn," it came over into his lane and he "moved over to avoid that vehicle." He then noticed the marked squad coming toward him and, subsequently, making a U-turn behind him. When questioned by his counsel, Lebese confirmed that when the other vehicle "swoop[ed] out," he took evasive action and moved left. Lebese stated that it was possible that his tires touched the yellow centerline, but disagreed with the officer as to how long he followed him and where Lebese took the evasive action.

¶6 After Lebese's testimony, the circuit court asked the defense if it was resting for purposes of the suppression hearing. Defense counsel replied that,

given the discrepancies in the testimony as to where and how things happened, she would still like to call the passenger in Lebese's vehicle to testify. The circuit court responded that corroborating testimony as to the specific timing or location of events would likely be of no consequence because there had been sufficient testimony on those issues and the standard is whether the officer had reasonable suspicion to stop Lebese. The court indicated that it was in a position to address reasonable suspicion, but did not want to "in any way deny [the] defense's day in court either." The court asked defense counsel whether she would like the court to reserve judgment or make a preliminary ruling based on the testimony received, "subject to defense's entitlement to call that passenger witness." Defense counsel then made an offer of proof that the passenger would testify "about the fact that [Lebese] did have to move over because this other car took a wide right turn. So if these cars were close together … which is what the officer testified was the original reason … his attention [was] drawn to them," the passenger's testimony would "tie in then with why it appeared that [Lebese] was veering over to the left towards the officer's vehicle."

¶7 The circuit court responded:

> Counsel, let me just offer this. We're really missing something that I think is pretty profound in stop motions, and that is that in the end when the dust settles, whatever a defendant's intentions were, given that particular point in time, is of limited, if any, consequence. None. What's important in stop motions is how do we look at this in the eyes and given the expertise and training of the officer. What would a reasonable police officer do under similar circumstances….
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> ….
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> What's important here is looking through his eyes, … how he perceives that totality of that situation, coming from the time that he initially observed the vehicle to the time he stopped it.

¶8 The court then discussed the reasonable suspicion analysis further, including the facts presented and the policy reasons behind the analysis, and made a "preliminary finding" that the stop was based on reasonable suspicion. In doing so, the court again indicated that if the witness's testimony would merely "buttress what the defendant has said about how he's moving his car around," it may not impact the legal analysis. The court stated that the defense had a right to a continuance of the hearing for purpose of producing the witness. Defense counsel then indicated that she would not be calling the additional witness because "we already know what your ruling is." The court went on to find, "subject to any further testimony," that at the time of the early morning stop, the officer had observed "weaving that could have crossed the centerline and caused a catastrophic situation," the vehicle going onto the yellow center line, and the vehicle going over the white dotted line. The court determined that the officer had reasonable suspicion to stop Lebese's vehicle. The court then reiterated that its ruling was preliminary and provided for a continuance of the hearing.

¶9 The hearing was reconvened on August 3, 2009, at which time the court invited defense counsel to present the passenger witness. After discussion with Lebese, defense counsel chose to proceed without the witness's testimony. The circuit court then reiterated that, in issuing the preliminary ruling, it was "very careful … to not in any way compromise the defendant's rights and the defendant's right to certainly have the passenger witness testify." The court then reaffirmed its findings at the earlier hearing, heard arguments from counsel, and issued its ruling. The matter was later tried and Lebese found guilty. The circuit court entered a forfeiture judgment of conviction for PAC on October 7, 2009. Lebese appeals.

¶10 Lebese's appellate arguments challenge both the circuit court's application of the law of reasonable suspicion and the issuing of the preliminary ruling. Lebese contends that the circuit court violated his due process right to a meaningful opportunity to be heard by "telegraphing its decision prior to the disposition of the suppression hearing, thereby prejudicing [Lebese] by not allowing a record to be made at the time of the hearing by counsel." *See* ***Cleveland Bd. of Educ. v. Loudermill***, 470 U.S. 532, 546-47 (1985) (procedural due process requires notice and the opportunity to be heard in a meaningful time and in a meaningful manner). In short, Lebese contends that the circuit court deprived him of his due process rights by arriving at an erroneous decision before he had the chance to present his complete defense. We disagree.

¶11 First, we reject Lebese's contention that the circuit court's preliminary ruling on his motion to suppress was based on an erroneous analysis of the law. Upon review of a motion to suppress, we will sustain the circuit court's historical findings of fact unless those findings are clearly erroneous. ***State v. Amos***, 220 Wis. 2d 793, 797, 584 N.W.2d 170 (Ct. App. 1998). However, whether those facts satisfy the constitutional requirement of reasonableness presents a question of law that we review de novo. *See* ***id.*** at 797-98.

¶12 WISCONSIN STAT. § 968.24, which codifies ***Terry***,[2] permits a police officer to temporarily detain and question a person in a public place when the officer reasonably suspects that the person is committing or is about to commit an offense. "The question of what constitutes reasonable suspicion is a common sense test: under all the facts and circumstances present, what would a reasonable

[2] ***Terry v. Ohio***, 392 U.S. 1 (1968).

police officer reasonably suspect in light of his or her training and experience." ***State v. Young***, 212 Wis. 2d 417, 424, 569 N.W.2d 84 (Ct. App. 1997). Police officers are not required to rule out the possibility of innocent behavior before initiating a ***Terry*** stop. ***State v. Anderson***, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990). Suspicious conduct, by its very nature, is ambiguous and therefore if any reasonable inference of wrongful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences, the police have a right to temporarily detain the suspect for purposes of inquiry. ***Id.***

¶13 The circuit court's "preliminary ruling" was based on the well-established standards of reasonable suspicion. Lebese's counsel had proffered that the additional defense witness would corroborate Lebese's account that he swerved in an evasive maneuver to avoid colliding with the car to his right. However, as the circuit court explained, for purposes of a motion to suppress and the reasonable suspicion inquiry, the focus is not on the explanations underlying the conduct the officer observed. Rather, the focus is on whether the officer's observations leading up to the ***Terry*** stop would give rise to reasonable suspicion. *See* ***Amos***, 220 Wis. 2d at 798-99. Here, the officer testified, and the circuit court found, that he had observed the vehicle swerve onto the yellow centerline and weave within its lane such that it was touching the white dotted line separating lanes of traffic. The circuit court also recognized the early morning hour, 1:30 a.m., as something that the officer had to consider. In the end, Lebese's testimony, and the proffered testimony of the witness, as to an innocent explanation for the swerving does not contradict the officer's testimony that he observed the vehicle swerve nor does it alter any other fact found to support the officer's reasonable suspicion. Place was not required to rule out the possibility of innocent behavior before initiating a ***Terry*** stop. *See* ***Anderson***, 155 Wis. 2d at 84.

¶14 Moreover, we do not read the circuit court's statements as precluding either the presentation of a further witness or further argument by the defense. The record reflects that the circuit court issued its preliminary ruling with defense counsel's consent, repeatedly offered defense counsel the opportunity to present the defense witness and, in fact, adjourned the hearing to provide defense counsel the opportunity to consult with the defendant and present the defense witness if counsel determined to do so. At the adjourned hearing, Lebese declined to present the witness and counsel was able to argue the motion. Lebese's due process rights were not violated.

¶15 Because the circuit court properly applied the law and provided Lebese with the opportunity to present an additional witness, we reject his contention that he was denied his due process rights. We conclude that Place's observations gave rise to a reasonable suspicion sufficient to justify a ***Terry*** stop. We therefore uphold the circuit court's denial of Lebese's motion to suppress and affirm the forfeiture judgment.

By the Court.—Judgment affirmed.

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