COURT OF APPEALS
DECISION
DATED AND FILED

April 28, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP3091-CR **Cir. Ct. No. 2009CT194**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH R. DAVISON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Fond du Lac County: PETER L. GRIMM, Judge. *Affirmed.*

¶1 NEUBAUER, P.J.[1] Joseph R. Davison appeals from a judgment of conviction for 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)(c) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

(OWI), third offense, contrary to WIS. STAT. § 346.63(1)(a). Davison raises only one issue on appeal, that the trial court erred in denying his motion to suppress evidence on grounds that the officer lacked reasonable suspicion to subject Davison to field sobriety tests. We conclude that Davison's admission to drinking four to five beers, the odor of alcohol on his breath, his close proximity to the bar at which he had been drinking, and the early morning hour gave rise to reasonable suspicion warranting further investigation through the administration of field sobriety tests. Because the totality of the circumstances supports a finding that the officer had the requisite reasonable suspicion to administer field sobriety tests, we uphold the trial court's order denying Davison's motion to suppress and affirm the judgment.

FACTS

¶2 The facts are taken from the motion hearing conducted on July 7, 2009, and are undisputed. On February 1, 2009, at approximately two a.m., a second-year Ripon city police officer stopped the vehicle driven by Davison for failure to have a front license or registration plate. The officer approached the vehicle and determined Davison was the sole occupant and owner of the vehicle. The officer then proceeded to inform Davison of the reason for the stop.

¶3 While conversing during the stop, the officer smelled an odor of alcohol coming from the interior of the vehicle. The officer asked Davison how much he had been drinking, and Davison replied, "four or five beers." The officer then asked Davison where he had been drinking; Davison replied, "Red's tavern." The officer knew that Red's tavern was only three or four blocks away from where the stop occurred.

¶4 The officer directed Davison out of the vehicle to investigate the odor of alcohol and conduct the citation process for the missing license plate. The officer then smelled alcohol on Davison's breath. The officer decided to administer field sobriety tests. Based on Davison's performance, the officer arrested him, and he was later charged with OWI, third offense. The officer testified that he had made approximately twelve to fifteen OWI arrests during his two years of employment as a police officer.

¶5 The trial court determined that the stop was lawful based on Davison's failure to properly display a license or registration plate. Additionally, the trial court determined that there were sufficient facts for the officer to continue the lawful stop and subject Davison to field sobriety tests. The court found that "[t]he four to five beers, proximity to the tavern, the odor of alcohol from his breath, and the time of night" provided sufficient reason to conduct field sobriety tests.

¶6 Davison subsequently pled no contest to OWI, third offense. He now appeals the trial court's order denying his motion to suppress.

DISCUSSION

¶7 When reviewing the denial of a motion to suppress evidence, we will uphold the trial court's findings of fact unless they are clearly erroneous. ***State v. Eckert***, 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996); WIS. STAT. § 805.17(2). Based on the trial court's findings of fact, we review de novo whether reasonable suspicion exists. ***State v. Martwick***, 2000 WI 5, ¶19, 231 Wis. 2d 801, 604 N.W.2d 552.

¶8 Here, Davison does not challenge the officer's initial stop of his vehicle. Therefore, the sole issue on appeal is whether the officer's observations upon making contact with Davison provided him with reasonable suspicion to subject Davison to field sobriety tests. In reviewing whether the officer's further investigation and request for field sobriety tests was warranted, we apply the same standard as for an initial stop. ***State v. Betow***, 226 Wis. 2d 90, 94-95, 593 N.W.2d 499 (Ct. App. 1999).

> Once a justifiable stop is made … the scope of the officer's inquiry, or the line of questioning, may be broadened beyond the purpose for which the person was stopped only if additional suspicious factors come to the officer's attention—keeping in mind that these factors, like the factors justifying the stop in the first place, must be "particularized" and "objective." ***United States v. Perez***, 37 F.3d 510, 513 (9th Cir. 1994). If, during a valid traffic stop, the officer becomes aware of additional suspicious factors which are sufficient to give rise to an articulable suspicion that the person has committed or is committing an offense or offenses separate and distinct from the acts that prompted the officer's intervention in the first place, the stop may be extended and a new investigation begun. The validity of the extension is tested in the same manner, and under the same criteria, as the initial stop.

Id. "The question of what constitutes reasonable suspicion is a common sense test: under all the facts and circumstances present, what would a reasonable 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). To meet this commonsense test, an officer must show specific and articulable facts which, taken together with rationale inferences from those facts, reasonably warrant the officer's intrusion. ***Terry v. Ohio***, 392 U.S. 1, 21 (1968).

¶9 Davison asserts that the officer lacked reasonable suspicion that he was impaired based on what the officer did not observe. Davison contends that

the facts show there was no unusual driving maneuvers to arouse suspicion, "[n]o slurred speech, no red and/or watery eyes, no slow movements, no mental confusion or otherwise suspicious behavior." However, Davison's argument ignores what the officer did observe—that Davison had the odor of intoxicants on his breath, he had admitted drinking four or five beers at a bar three or four blocks away from the location of the stop, which occurred at approximately two a.m. on a Sunday morning.[2] Officers need an objectively reasonable inference of wrongful conduct to support a finding of reasonable suspicion. ***State v. Anderson***, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (Ct. App. 1990). We agree with the trial court that the officer's decision in deciding to administer field sobriety tests was reasonable under the totality of the circumstances. *See* ***State v. Williams***, 2001 WI 21, ¶23, 241 Wis. 2d 631, 623 N.W.2d 106.

¶10 We reject Davison's assertions that because of his large size (270 pounds), the "slight odor" of alcohol on his breath should not give rise to reasonable suspicion, and that his admission to having a "modest number" of beers should not be unfairly magnified. Given that Davison was just a few blocks away from the bar at closing time, smelled of alcohol, and admitted to drinking not an insignificant amount of alcohol despite his large size, the officer had reasonable suspicion to investigate further.

[2] Recently, in ***State v. Lange***, 2009 WI 49, ¶¶32, 38, 317 Wis. 2d 383, 766 N.W.2d 551, the supreme court expressly stated that "the time of night is relevant" to a determination of probable cause to arrest for OWI when the officer encountered the defendant "about when Saturday night bar-time traffic arrives." The court observed that "[i]t is a matter of common knowledge that people tend to drink during the weekend when they do not have to go to work the following morning." ***Id.***

¶11 Indeed, this further investigation is exactly what ***Terry*** addressed in permitting investigatory stops based on reasonable suspicion. An officer is allowed, based on his or her reasonable suspicion from specific and articulable facts, to conduct further investigation when an officer reasonably suspects a person is about to commit or has committed a crime. *See* ***Anderson***, 155 Wis. 2d at 83-84; ***Terry***, 392 U.S. at 21. The main goal of an investigative stop is to quickly resolve ambiguity associated with suspicious conduct. ***Anderson***, 155 Wis. 2d at 84. We agree with the court in ***Terry*** when it stated that "[i]t would have been poor police work … to have failed to investigate [the defendant's behavior] further." ***Terry***, 392 U.S. at 23.

CONCLUSION

¶12 Based on the totality of circumstances, we conclude that the officer had the requisite reasonable suspicion to subject Davison to field sobriety tests based on observations made and information gathered during a lawful stop for a noncriminal traffic violation. We therefore uphold the trial court's order denying Davison's motion to suppress and affirm the judgment.

By the Court.—Judgment affirmed.

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