COURT OF APPEALS
DECISION
DATED AND FILED

November 18, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1045-CR **Cir. Ct. No. 2009CT449**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSHUA L. MCDONALD,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Wood County: JAMES M. MASON, Judge. *Affirmed.*

¶1 BLANCHARD, J.[1] Joshua McDonald appeals from a judgment of conviction for operating with a prohibited blood alcohol concentration, in

[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.

violation of WIS. STAT. § 346.63(1)(b). McDonald contends that the circuit court erred in denying his motion to suppress all evidence obtained after he was stopped for speeding. McDonald argues that the deputy (1) illegally expanded the scope of the detention by asking whether he had been drinking alcohol, (2) lacked the requisite reasonable suspicion to conduct field sobriety tests, and (3) lacked "probable cause to believe" that McDonald was driving while intoxicated before asking McDonald to take a preliminary breath test (PBT). We conclude that the deputy reasonably extended the scope of the detention, and had the required levels of reasonable suspicion and "probable cause to believe" to conduct field sobriety tests and the PBT, respectively. Accordingly, we affirm.

BACKGROUND

¶2 A deputy stopped a pickup truck at approximately 2:40 a.m. for a speeding violation. McDonald was driving the pickup sixty-two miles per hour in a forty-five-mile-per-hour zone. Upon making contact with McDonald the deputy observed that McDonald's eyes were very glassy and bloodshot. The deputy also noticed a strong odor of intoxicants emanating from McDonald's breath when he spoke.

¶3 The deputy asked McDonald whether he had been drinking. McDonald responded that he had consumed six or seven beers earlier in the night, but had been drinking soda for the previous four hours.

¶4 The deputy then asked McDonald to perform field sobriety tests, starting with the horizontal gaze nystagmus (HGN) test. McDonald failed the HGN test because he exhibited six out of six clues of intoxication. During the next test, the walk and turn test, McDonald exhibited one clue by stepping off the line once. In the one-leg stand test, McDonald showed one clue by hopping to

maintain his balance. McDonald "passed" the walk and turn test and the one-leg stand test because both require at least two clues of intoxication for failure.

¶5 Thereafter, the deputy asked McDonald to submit a breath sample for a PBT. McDonald agreed and the PBT result was 0.171. The deputy arrested McDonald on a charge of operating while intoxicated (OWI), in violation of WIS. STAT. § 346.63(1)(a). After blood tests were performed, the State also charged McDonald with operating with a prohibited blood alcohol concentration, in violation of § 346.63(1)(b).

¶6 In his suppression motion, McDonald argued that he was unlawfully detained and arrested. The circuit court disagreed and denied the motion, concluding that the deputy's question was permissible and also that the deputy had both reasonable suspicion to request field sobriety tests and "probable cause to believe" that McDonald was operating while intoxicated, the level of suspicion sufficient to ask McDonald to submit to a PBT. Subsequently, the circuit court found him guilty of operating with a prohibited blood alcohol concentration. We affirm the circuit court's dismissal of McDonald's suppression motion.

DISCUSSION

¶7 In reviewing a denial of a motion to suppress, we uphold the circuit court's findings of fact unless they are against the great weight and clear preponderance of the evidence. ***State v. Jackson***, 147 Wis. 2d 824, 829, 434 N.W.2d 386 (1989). Whether those facts satisfy the constitutional requirement of reasonableness is a question of law that we review de novo. ***State v. Guzy***, 139 Wis. 2d 663, 671, 407 N.W.2d 548 (1987).

¶8 The temporary detention of individuals during the stop of an automobile by the police constitutes a "seizure" of "persons" within the meaning of the Fourth Amendment. ***Whren v. United States***, 517 U.S. 806, 809-10 (1996). Therefore, an automobile stop is unlawful if it is not "reasonable" under Fourth Amendment jurisprudence. ***Id.*** at 810. To determine whether a search or seizure is "reasonable," we first determine whether the initial interference with an individual's liberty was justified, and then determine whether subsequent police conduct was reasonably related in scope to the circumstances that justified the initial interference. ***Terry v. Ohio***, 392 U.S. 1, 19-20 (1968); ***State v. Arias***, 2008 WI 84, ¶30, 311 Wis. 2d 358, 752 N.W.2d 748.

¶9 An initial interference with the liberty of a motorist is reasonable if the police officer has probable cause to believe that a traffic violation has occurred, ***id.***, or if the officer reasonably suspects, based on the totality of the circumstances, that the motorist has committed, is in the process of committing, or is about to commit an unlawful act. *See* WIS. STAT. § 968.24; ***State v. Krier***, 165 Wis. 2d 673, 677-78, 478 N.W.2d 63 (Ct. App. 1991). "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. Colstad***, 2003 WI App 25, ¶8, 260 Wis. 2d 406, 659 N.W.2d 394 (citation omitted).

Scope Of Detention To Ask Question

¶10 McDonald admits that the deputy had either probable cause or reasonable suspicion to believe that he had committed a traffic violation, namely speeding, to justify the initial stop. McDonald argues, however, that the deputy illegally expanded the scope of the detention by asking McDonald whether he had

been drinking.[2] McDonald relies on ***State v. Betow***, 226 Wis. 2d 90, 593 N.W.2d 499 (Ct. App. 1999), to support his assertion that the deputy could not ask about a potential offense other than speeding unless there existed facts creating a reasonable suspicion of that separate offense. We assume that McDonald is referring to the following language in ***Betow***: "Once a justifiable stop is made—as is the case here—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 suspicion factors come to the officer's attention …." ***Id.*** at 94 (emphasis added).

¶11 McDonald asks us to apply an incorrect standard for determining whether the deputy's question exceeded the scope of the initial detention. In ***State v. Arias***, our supreme court explained that the "broad dicta" in ***Betow*** that McDonald relies on "misstates the manner in which courts are to evaluate the reasonableness of the continuation of a seizure that was lawful at its inception." ***Arias***, 311 Wis. 2d 358, ¶45. Instead, when a person argues that subsequent police conduct after a legal seizure is unreasonable under the Fourth Amendment, we are to focus on whether "the incremental liberty intrusion" that resulted from the subsequent police conduct was unreasonable. ***Id.***, ¶38. "A seizure becomes unreasonable when the incremental liberty intrusion resulting from the investigation supersedes the public interest served by the investigation." ***Id.***

[2] McDonald does not argue that the initial stop had concluded before the deputy asked if he had been drinking. When a traffic stop has concluded, an individual is unlawfully seized if a reasonable person would not feel free to leave or decline the officer's requests. *See* ***State v. Williams***, 2002 WI 94, ¶¶27, 35, 255 Wis. 2d 1, 646 N.W.2d 834. In this case, the deputy asked McDonald if he had been drinking before the deputy issued McDonald a citation for speeding.

¶12 Therefore, the relevant inquiry here is not whether the deputy posed a question on a permissible topic, but instead whether the deputy acted unreasonably in detaining McDonald for the length of time it took to ask the question and receive an answer. *See* ***id.***, ¶41. We therefore examine, under the totality of the circumstances, the public interest served by asking the question, the degree to which the continued seizure advances the public interest, and the severity of the interference of McDonald's liberty interest resulting from the incremental intrusion. *See* ***id.***, ¶39.

¶13 We conclude that the time it took for the deputy to ask McDonald whether he had been drinking that night and for McDonald to answer did not unreasonably prolong the stop. The deputy asked McDonald the single, uncomplicated question in order to help determine whether McDonald was driving while intoxicated. The public interest in keeping the roads safe for public use by prosecuting those who drive while intoxicated and deterring others from such action has repeatedly been recognized as a significant public interest. *See*, *e.g.*, ***State v. Nordness***, 128 Wis. 2d 15, 33, 381 N.W.2d 300 (1986). Additionally, our supreme court has held that the time it takes to ask a question "is not sufficiently intrusive to transform a reasonable, lawful stop into an unreasonable unlawful one." ***State v. Griffith***, 2000 WI 72, ¶61, 236 Wis. 2d 48, 613 N.W.2d 72. Clearly, this exceedingly brief extension of McDonald's seizure is significantly outweighed by the importance of prosecuting and preventing impaired driving.

"Reasonable Suspicion" For Field Sobriety Tests

¶14 McDonald next argues that the deputy lacked reasonable suspicion that he was driving under the influence of an intoxicant necessary to lawfully administer field sobriety tests. Accordingly, we determine whether there were

specific and articulable facts that, taken together with the reasonable inferences from those facts, provided a basis for the deputy to reasonably suspect that McDonald had enough to drink to impair his ability to drive. *See* ***Krier***, 165 Wis. 2d at 677-78. Based on the totality of the circumstances, we conclude that the deputy had the necessary reasonable suspicion to conduct the field sobriety tests.

¶15 After the deputy made contact with McDonald, the deputy noticed that McDonald's breath had a strong odor of intoxicants and that McDonald's eyes were bloodshot and glassy. McDonald admitted to drinking six to seven drinks earlier that evening, albeit ending four hours previously, when the deputy inquired. Additionally, the time of night is a factor that contributes to reasonable suspicion that McDonald was operating his vehicle while under the influence of alcohol. *See* ***State v. Lange***, 2009 WI 49, ¶32, 317 Wis. 2d 383, 766 N.W.2d 551. The incident here occurred around "bar time."

¶16 McDonald asserts that we should disregard the deputy's observation of McDonald's bloodshot and glassy eyes because a federal study allegedly suggests that bloodshot eyes are not an objective indicator of intoxication. This study is not in the record and McDonald does not indicate that the circuit court was given the opportunity to consider the merits of such a study in connection with this case. Moreover, these factors have been considered in determining whether an officer had reasonable suspicion to conduct field sobriety tests. *See, e.g.*, ***State v. Haynes***, 2001 WI App 266, ¶12, 248 Wis. 2d 724, 638 N.W.2d 82 (bloodshot and glassy eyes are relevant factors that may give rise to officer's suspicion that driver had committed the offense of driving while intoxicated). Accordingly, we do not consider the purported federal study. *See* ***Van Deurzen v. Yamaha Motor Corp. USA***, 2004 WI App 194, ¶6, 276 Wis. 2d 815, 688 N.W.2d

777. ("We do not normally consider evidence presented for the first time on appeal."). McDonald also argues that the officer may have had reasonable suspicion that he had consumed some alcohol, but that in and of itself is not illegal. Yet, the deputy was "not required to rule out the possibility of innocent behavior." ***State v. Anderson***, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990).

¶17 For the reasons above, we conclude that the deputy had a reasonable suspicion that McDonald had enough to drink to impair his ability to drive. Therefore, the administration of the field sobriety tests was lawful.

"Probable Cause To Believe" For PBT

¶18 Finally, McDonald argues that the deputy did not have "probable cause to believe" that McDonald was operating a vehicle while impaired, as required by WIS. STAT. § 343.303,[3] in order to request that McDonald provide a sample of his breath for a PBT because the deputy did not witness poor driving, McDonald did not seem to slur his speech, and he "passed" two of the three field sobriety tests. Again, we disagree.

¶19 In ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 317, 603 N.W.2d 541 (1999), our supreme court concluded that the phrase "probable cause to

[3] WISCONSIN STAT. § 343.303 provides in pertinent part:

> If a law enforcement officer has *probable cause to believe* that the person is violating or has violated s. 346.63(1) or (2m) … the officer, prior to an arrest, may request the person to provide a sample of his or her breath for a preliminary breath screening test using a device approved by the department for this purpose.

(Emphasis added.)

believe" in WIS. STAT. § 343.303 referred "to a quantum of proof that is greater than the reasonable suspicion necessary to justify an investigative stop … but less than the level of proof required to establish probable cause for arrest."

¶20 The ***Renz*** court outlined an example of an OWI investigation, beginning with an investigative stop by police requiring reasonable suspicion, to illustrate the application of the "probable cause to believe" standard. ***Id.*** at 310. First, if after making the lawful investigatory stop, the officer makes observations that cause the officer to suspect that the driver is driving while drunk but that do not provide a sufficient basis to establish probable cause to arrest for an OWI violation, the officer may request the driver to perform field sobriety tests. ***Id.*** Next, if the field sobriety tests do not produce enough evidence to establish probable cause for arrest, WIS. STAT. § 343.303 authorizes an officer to use a PBT to aid in the determination of the facts. ***Id.*** at 310-11. If the driver consents to the PBT, the result can be relevant to a decision as to whether there is probable cause to arrest. ***Id.*** at 311. Finally, if under all the facts, there are reasonable grounds for the officer to believe that the driver committed the offense of drunk driving, the officer has probable cause to arrest the person. ***Id.***

¶21 The facts of ***Renz*** are similar to those in this case. In ***Renz***, the driver showed several indicators of intoxication. ***Id.*** at 316. His car smelled strongly of intoxicating beverages, he admitted to drinking three beers earlier that evening, and he exhibited six out of six clues of intoxication on the HGN test. ***Id.*** at 298, 316. Yet, he substantially completed four other field sobriety tests. ***Id.*** at 297-99. The ***Renz*** court concluded that these indicators satisfied the statutory requirement of "probable cause to believe" that the driver had committed the offense of drunk driving and therefore enabled the officer to ask the driver to submit a PBT. ***Id.*** at 317.

¶22 In this case, the circuit court found that McDonald exhibited multiple indicators of intoxication. As noted above, his breath smelled strongly of intoxicating beverages. His eyes were bloodshot and glassy. He admitted to drinking six or seven beers earlier that evening. Additionally, he failed the HGN test by exhibiting six out of six clues of intoxication.

¶23 We conclude that the deputy, like the officer in ***Renz***, faced "exactly the sort of situation in which a PBT proves extremely useful in determining whether there is probable cause for an OWI arrest." ***Id.*** The deputy identified equivalent indicators of intoxication for McDonald as were found for the driver in ***Renz***, including odor of intoxicants, bloodshot and glassy eyes, admitted drinking, and failure of the HGN test. Accordingly, as in ***Renz***, the deputy acquired the statutory standard of "probable cause to believe" necessary for the deputy to request McDonald to submit to a PBT because the undisputed facts demonstrate that the deputy possessed more than reasonable suspicion, but did not yet possess probable cause necessary to arrest.

¶24 In summary, we conclude that the deputy did not unreasonably expand the scope of the initial detention by asking McDonald whether he had been drinking alcohol, had a reasonable suspicion that McDonald was driving while intoxicated necessary to conduct field sobriety tests, and acquired "probable cause to believe" that administering a PBT was justified. We therefore conclude that the detention was lawful and affirm.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.