COURT OF APPEALS
DECISION
DATED AND FILED

January 22, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1523-CR **Cir. Ct. No. 2011CT541**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEREK S. STRASEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Manitowoc County: PATRICK L. WILLIS, Judge. *Affirmed*.

¶1 BROWN, C.J.[1] Derek Strasen appeals convictions for operating a motor vehicle while intoxicated and operating a motor vehicle with a prohibited

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

alcohol concentration. Two preliminary breath tests (PBTs) were conducted, and everyone agrees that the first PBT result is inadmissible because it was administered without probable cause. Strasen mainly contends that without the first PBT, the officer lacked reasonable suspicion to extend his detention in order to perform field sobriety tests. We conclude that even without the first PBT, the officer had ample suspicion to continue his investigation of whether Strasen was intoxicated. And after the field tests were completed, the officer had probable cause to administer the second PBT. We affirm.

Facts

¶2 On October 2, 2011, at approximately 5:00 p.m., a state trooper stopped Strasen's vehicle going seventy-nine miles per hour in a sixty-five miles per-hour zone. During the initial stop, the trooper noticed a strong new car smell and a faint smell of intoxicants coming from Strasen's vehicle. He asked Strasen to exit and walk to the rear of the vehicle. When Strasen got out, the trooper again noticed a faint smell of intoxicants coming from him and also saw that Strasen's eyes were bloodshot and "glossy." When asked, Strasen admitted that he had been drinking earlier that day but was adamant that he had consumed his last drink at 2:00 a.m. At that point, the trooper decided to perform a PBT to verify his observations of indicia of intoxication. Strasen's PBT result was a .212.

¶3 The trooper then decided to have Strasen perform the standard field sobriety tests. He began with the horizontal gaze nystagmus (HGN) test, during which he had to remind Strasen to keep his head still for the examination. The trooper observed six out of six clues for intoxication during the HGN test. The trooper next administered the walk-and-turn test. Strasen was confused about the instructions for that test and exhibited three out of eight clues. Lastly, Strasen

performed the one-leg stand test, during which he exhibited no clues. After the three tests, the trooper had Strasen do another PBT. Strasen's second PBT revealed a .222 reading, after which Strasen was arrested.

¶4 Before trial, Strasen moved to suppress the PBT evidence, arguing that the trooper did not have probable cause to stop Strasen or to perform the tests. The court granted the motion to suppress as to the first PBT test only, holding that the trooper lacked probable cause to perform that test, and denied the rest of the motion to suppress. The trial court reasoned that even without the first PBT, the trooper had sufficient suspicion for the field tests and that all the information together, gave the trooper probable cause to administer the second PBT. The field tests, along with the second PBT, created sufficient probable cause to arrest Strasen for driving under the influence.

¶5 Strasen subsequently was convicted of second-offense operating a motor vehicle while intoxicated and second-offense operating a motor vehicle with a prohibited alcohol content. He appeals.

Analysis

¶6 "A trial court's determination of whether undisputed facts establish a reasonable suspicion justifying police to perform an investigative stop presents a question of constitutional fact, subject to *de novo* review." ***State v. Colstad***, 2003 WI App 25, ¶8, 260 Wis. 2d 406, 659 N.W.2d 394 (citation omitted). In examining the reasonableness of a traffic stop, we apply a commonsense test. ***Id***. "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." ***State***

v. Post, 2007 WI 60, ¶13, 301 Wis. 2d 1, 733 N.W.2d 634. We analyze whether a stop was reasonable based on the totality of the facts and circumstances. ***Id***.

¶7 We start with Strasen's argument that without the first PBT test,[2] the trooper lacked sufficient suspicion to extend the stop by requesting that Strasen perform field sobriety tests. He analogizes his case to ***State v. Betow***, 226 Wis. 2d 90, 593 N.W.2d 499 (Ct. App. 1999), which held that a traffic stop may only be extended based on suspicious factors distinct from the acts that prompted the traffic stop itself.

¶8 This case is nothing like ***Betow***. In ***Betow***, an officer improperly extended a stop when he decided to perform a dog-sniff search for drugs based solely upon a picture of a mushroom on the defendant's wallet, which the officer believed to be indicative of drug use. ***Id.*** at 92. No other indicia of intoxication or drug use were present. ***Id.*** Here, in contrast, numerous indicia of intoxication, aside from the first PBT, led the trooper to extend the stop. First, the trooper thought he smelled intoxicants on Strasen's breath, but the new car smell emanating from the car left him unsure. In these circumstances, it was reasonable for him to ask Strasen to exit the vehicle so he could further investigate. When Strasen got out, the smell of intoxicants was again present, and the trooper saw that Strasen's eyes were bloodshot and glossy. Also, when asked, Strasen admitted he had been drinking alcohol that day, though he insisted he stopped drinking hours earlier.

[2] The State acknowledges that the trial court held the first PBT to be inadmissible and does not challenge that ruling: "While the trial court held that the first PBT was inadmissible, the trial court also held that [the trooper] had sufficient reasonable suspicion to proceed to conduct field sobriety tests."

¶9 Hence, at this juncture, the trooper had enough to continue investigating whether Strasen was driving while intoxicated. The fact that the trooper administered the first PBT in order to confirm his suspicions is irrelevant. With or without that result, the trooper was justified in asking Strasen to perform the field tests. And the clues the trooper observed during those tests further confirmed his suspicions, prompting the second PBT. The trooper's investigation was a seamless process of information gathering based on suspicious factors distinct from the reason for the stop. While the first PBT would not have been admissible in court, and was correctly suppressed by the trial court, there is no law prohibiting an investigating officer from administrating a PBT simply to confirm that he or she is on the right track.[3]

¶10 Strasen also argues that the officer violated the law under ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 603 N.W.2d 541 (1999), because "the officer needs 'probable cause' to believe that [the driver is] operating a motor vehicle while impaired" before administering a PBT. But Strasen seems to misread ***Renz***, which explained that "the legislature did not intend to require an officer to have probable cause to *arrest* before requesting a PBT." ***Id.*** at 295 (emphasis added). Rather, the court noted how it was "well established in our case law that 'probable cause' does not refer to a uniform degree of proof, but instead varies in degree at different stages of the proceedings." ***Id.*** at 304. And so the court differentiated the words of the statute, "probable cause to *believe*" from "probable cause … to … *arrest*." ***Id.*** (emphasis added). The court therefore concluded that the use of the word "preliminary" in PBT indicates that it is meant to be used as a tool to allow

[3] In fact, the practice of administering a PBT to confirm an officer's suspicions might logically inure to the driver's benefit if the result shows that the officer's suspicions are wrong.

officers to determine whether or not to arrest a suspect. ***Id.*** As such, the level of probable cause needed to administer the PBT is necessarily lower than that required for arrest. ***Id.*** Here, the trooper had ample probable cause to administer the second PBT: an odor of intoxicants, bloodshot and glossy eyes, clues noticed during the field tests, and Strasen's own admission that he had been drinking alcohol that day.

By the Court.—Judgment affirmed.

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