COURT OF APPEALS
DECISION
DATED AND FILED

January 22, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1926-CR **Cir. Ct. No. 2011CT55**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHAD ALLEN NELSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Bayfield County: JOHN P. ANDERSON, Judge. *Affirmed*.

¶1 STARK, J.[1] Chad Nelson appeals a judgment of conviction for operating while intoxicated, third offense, and an order denying postconviction

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

relief. He argues the circuit court erred in allowing the State to introduce additional evidence through a motion for reconsideration, which resulted in the denial of Nelson's suppression motion. He also argues the officer lacked reasonable suspicion to stop Nelson's vehicle. We affirm.

BACKGROUND

¶2 The State charged Nelson with operating while intoxicated and operating with a prohibited alcohol concentration, both as third offenses. Nelson moved to suppress evidence, challenging the lawfulness of the traffic stop.

¶3 At the suppression hearing, officer William Kurtz testified that, on October 3, 2011, at approximately 2:00 a.m., he was dispatched to Frosty's Tavern in the Town of Delta because some individuals were kicking, or damaging, another patron's vehicle in the parking lot. Before Kurtz arrived, dispatch informed him the suspects left Frosty's, and were bear hunters driving a blue Dodge pickup truck with a hound box in the back heading toward a bear camp located off Highway 2 west of Ino.

¶4 Kurtz testified he was familiar with the bear camp off Highway 2 and to get to the camp from Frosty's, which is on County Road H, a person would normally travel east on County Road H, turn north on County Road E, and then west on Highway 2. Kurtz explained the suspects would be traveling in his direction because he was dispatched from the Town of Iron River and he was traveling east on Highway 2 toward County Road E. As Kurtz approached the

intersection of Highway 2 and County Road E, he observed a Ford pickup truck with a hound box turn west on Highway 2.[2]

¶5 Kurtz believed the Ford was the vehicle involved in the situation at Frosty's. Kurtz explained he had observed no other vehicles on the road while responding to the dispatch, the Ford was a pickup truck, and it had a hound box in the back. Although dispatch described the vehicle as a Dodge pickup, Kurtz testified Ford and Dodge pickups have similar side profiles. Kurtz also explained the time from when the vehicle was reported to have left Frosty's headed toward the bear camp to when Kurtz observed the vehicle suggested it was the suspect vehicle. Kurtz stopped the vehicle, Nelson was driving, and Nelson was ultimately arrested for operating while intoxicated.

¶6 The circuit court first found Kurtz had been dispatched in response to an individual's report of potential criminal activity at a bar in rural Bayfield County and, while responding to the dispatch, Kurtz was advised the suspects had left the bar. Kurtz then stopped Nelson's vehicle believing it was the suspect vehicle. The court concluded Kurtz had reasonable suspicion to stop Nelson's vehicle because:

> When you take all of those things together – that the description of the vehicle is pretty close, it's got the dog containers in the back, it is a pickup truck, it's later at night, there's not a lot of traffic, it would be about the same time and place that the officer would have suspected if they left and they were heading that way.

Accordingly, the court denied Nelson's suppression motion.

[2] Kurtz testified he could not tell the vehicle color at the time of the stop. Nelson later testified he drove a black Ford.

¶7 Nelson moved for reconsideration based on ***United States v. Bohman***, 683 F.3d 861 (7th Cir. 2012).[3] Nelson argued, in part, Kurtz lacked reasonable suspicion to stop his vehicle because "[t]he number of routes and directions possible for a vehicle to travel from 'Frosty's Bar' were numerous" and Kurtz simply stopped the first vehicle he observed between his location and Frosty's that was a pickup truck with a hound box. Nelson asserted Kurtz had no individualized, articulable suspicion that Nelson's vehicle was the suspect vehicle and, as a result, Kurtz's seizure of Nelson's vehicle was based on a hunch.

¶8 The circuit court granted Nelson's motion for reconsideration and suppressed the evidence. The court reasoned ***Bohman*** had "some impact" on this case because "simply exiting a place where there may have been some known, or potential, criminal activity, in and of itself, is [not] enough to initiate a stop." The court explained that, when it denied the suppression motion, it "recall[ed] thinking how logical it would have been for a truck to exit out onto Highway 2 from Frosty's Bar[.]" However, the court stated it "look[ed] at the plat book now and I do realize that there were a number of other potential public roadways through rural Bayfield County that would have been a viable option for Mr. Nelson to turn down." The court also stated that Kurtz's "opinion" that the vehicle was headed to

[3] In ***United States v. Bohman***, 683 F.3d 861, 862-63 (7th Cir. 2012), an informant told officers about a methamphetamine laboratory located in a cabin in northern Wisconsin. When officers traveled to the location to investigate, one of the officers inadvertently beeped his vehicle's horn. ***Id.*** at 863. A vehicle subsequently emerged from the driveway of the suspected meth lab, and an officer stopped the vehicle. ***Id.*** The Seventh Circuit concluded law enforcement lacked reasonable suspicion to stop the vehicle. ***Id.*** at 867. It noted that, at the time of the stop, the officers had not yet corroborated the tip in any way. ***Id.*** at 864-65. The court stated that, although the circumstances may have supported a general suspicion about the vehicle, the officer did not have individualized, articulable suspicion to stop that particular vehicle; rather, the officer "stopped the car he did … because it emerged from a forty-acre tract containing a suspected meth cook site." ***Id.*** at 865. It stated, "[P]olice cannot simply pull over all vehicles on a certain road in hopes of finding violators." ***Id.*** at 866.

a bear camp "would also infer that, you know, bear hunters use camps – and I don't think that that's something that I can infer …. I know that some bear hunters use camps and lots of them don't use camps." The court determined Kurtz's stop of the vehicle was "probably good police work, but a lucky guess more than the reasoned, articulable suspicion that is necessary."

¶9 The State moved for reconsideration. It informed the court that, when reviewing the case to determine whether the case was still viable without the evidence the court suppressed, the State reviewed the companion case for the passenger in Nelson's vehicle who had allegedly damaged the patron's vehicle at Frosty's and found the original dispatch recordings from the incident. The State explained the caller in the dispatch recordings specifically described the suspect vehicle's direction of travel and its intended location. The State asserted this information "was clearly sufficient to establish reasonable suspicion to stop the vehicle in question."

¶10 Nelson objected and argued the State could not now rely on the dispatch recordings because they had been available at the initial suppression hearing and the State failed to present them. The circuit court, however, decided to consider the dispatch recordings.

¶11 The court then listened to the recordings and denied Nelson's suppression motion. The court stated:

> The concern that I raised when I changed my mind about the number of places that a car, or anybody could turn off, is now mitigated because dispatch was told, and then relayed on to the officer, that they think they're heading north to Highway 2 and they're heading to their bear camp just off of Highway 2.
>
> So, now that mitigates the ability, or the potential, to pull off on other roads. It doesn't mean someone can't turn off

> on another road, but now they have evidence they're heading in one particular direction … that would be the logical place if you're heading on the primary driving routes, that would be the logical place to go[.]
>
> ….
>
> [W]hen you take the totality of the situation now, based upon what I've heard from this, they have now not just a rough idea of where the car might be going, they have a very specific idea of where the car is going and that's relayed to law enforcement and that's relayed to the officer. The officer heads in that direction, specifically in that direction, specifically to meet up with the person, hoping to catch them when they get on to Highway 2, which happened.

¶12 Nelson subsequently pleaded no contest to operating while intoxicated. The court found him guilty.

¶13 Nelson then moved for postconviction relief, arguing the circuit court erred by considering the dispatch recordings. The court denied Nelson's postconviction motion.

DISCUSSION

I. Consideration of the dispatch recordings

¶14 On appeal, Nelson first argues the circuit court erred by granting the State's motion for reconsideration and considering the dispatch recordings. He emphasizes a motion for reconsideration may be granted only if the movant presents newly discovered evidence or establishes a manifest error of law or fact. *See* ***Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.***, 2004 WI App 129, ¶44, 275 Wis. 2d 397, 685 N.W.2d 853. Nelson argues the dispatch recordings should not have been considered because they were

not newly discovered evidence.[4] He contends the recordings were in the State's possession at the time of the original suppression hearing, and, given the State's questions to Kurtz at the original suppression hearing, the State knew about the existence of the recordings.

¶15 The State responds that, although stylized as a motion for reconsideration, it really brought a motion to reopen evidence. "The decision to reopen a case for additional evidence lies within the sound discretion of the trial court." ***State v. Harvey***, 2001 WI App 59, ¶10, 242 Wis. 2d 189, 625 N.W.2d 892. The State argues the circuit court appropriately exercised its discretion by reopening evidence and considering the dispatch recordings.

¶16 In reply, Nelson objects to the State's characterization of its reconsideration motion as a motion to reopen evidence and asserts the State's motion was a motion for reconsideration. Accordingly, the newly discovered evidence standard must apply.

¶17 We need not resolve the dispute between the parties as to the correct legal standard associated with the State's motion and whether the circuit court erred by considering the information in the dispatch recordings. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (cases should be decided on the narrowest possible ground). It is clear from the record that the circuit court properly reinstated its original denial of Nelson's suppression motion based on evidence that it had already heard. Although the court did not recall the

[4] Evidence is newly discovered if the moving party did not know about the evidence, the moving party's failure to discover the evidence did not arise from a lack of diligence in seeking to discover it, the evidence is material and not cumulative, and the new evidence would probably change the result. ***State v. Vodnik***, 35 Wis. 2d 741, 746, 151 N.W.2d 721 (1967); *see also* WIS. STAT. § 805.15(3).

evidence when considering Kurtz's motion for reconsideration, Kurtz had already testified at the original suppression hearing that dispatch told him the suspect vehicle's direction of travel and its intended destination. The court was not required to rely on the dispatch recordings to reach its decision.

¶18 Specifically, at the original suppression hearing, the following exchange occurred between the State and Kurtz:

> Q. Were you told that these were bear hunters that were involved in this situation?
>
> A. Yes.
>
> Q. Were you told that they were heading towards a bear camp?
>
> A. Yes.
>
> Q. Were you told that the bear camp was located off of Highway 2?
>
> A. Yes.
>
> Q. Were you told it was located off Highway 2 west of Ino?
>
> A. Yes.
>
> Q. How would you get from Frosty's to Ino?
>
> A. From H up to the intersection to County E, going north up to Ino, and then turning left, which would be west on Highway 2.
>
> Q. Is that what the vehicle did that you observed?
>
> A. Correct.

¶19 The dispatch recordings provided no new evidence concerning the vehicle's direction of travel and its intended destination. Accordingly, we conclude that any error by the circuit court in considering the dispatch recordings in order to reinstate its original decision to deny Kurtz's suppression motion was

harmless. *See* ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985) (error is harmless when there is no reasonable possibility that the error contributed to the outcome).

II. Reasonable suspicion

¶20 Nelson next argues Kurtz lacked reasonable suspicion to stop his vehicle. Whether there is reasonable suspicion is a question of constitutional fact. ***State v. Popke***, 2009 WI 37, ¶10, 317 Wis. 2d 118, 765 N.W.2d 569. We uphold the circuit court's factual findings unless they are clearly erroneous; however, we independently apply those facts to constitutional principles. ***Id.***

¶21 Law enforcement officers may lawfully stop a vehicle "if they have a suspicion grounded in specific, articulable facts and reasonable inferences from those facts, that the individual has committed a crime." ***State v. Guzy***, 139 Wis. 2d 663, 675, 407 N.W.2d 548 (1987). This standard is flexible enough "to allow law enforcement officers under certain circumstances, the opportunity to temporarily freeze a situation, particularly where failure to act will result in the disappearance of a potential suspect." ***Id.*** at 676.

¶22 Reasonable suspicion is evaluated under the totality of the circumstances. ***Popke***, 317 Wis. 2d 118, ¶¶22-23. Factors that courts should consider when determining whether a stop is reasonable include:

> (1) the particularity of the description of the offender or the vehicle in which he [or she] fled; (2) the size of the area in which the offender might be found, as indicated by such facts as the elapsed time since the crime occurred; (3) the number of persons about in that area; (4) the known or probable direction of the offender's flight; (5) observed activity by the particular person stopped; and (6) knowledge or suspicion that the person or vehicle stopped has been involved in other criminality of the type presently under investigation.

Guzy, 139 Wis. 2d at 677.

¶23 Nelson argues the ***Guzy*** factors show Kurtz did not have reasonable suspicion to stop his vehicle. He repeatedly emphasizes Kurtz stopped a black Ford instead of a blue Dodge pickup, and he also contends hound boxes are not a distinguishing feature because they are "regularly seen" during bear hunting season. Nelson then asserts there were other directions a vehicle could have traveled from Frosty's, and he stresses Kurtz could not give a specific calculation as to how long it would take a vehicle to travel from Frosty's to Highway 2. Finally, Nelson contends Kurtz simply stopped the first vehicle he observed coming from the direction of Frosty's and ***Bohman*** established law enforcement may not stop a vehicle simply because it is in the vicinity of a suspected crime.

¶24 We reject Nelson's arguments. Applying the ***Guzy*** factors to this case, we conclude Kurtz had reasonable suspicion to stop Nelson's vehicle. Specifically, Kurtz stopped Nelson's vehicle because: Nelson's vehicle was traveling north on County Road E from the direction of Frosty's; Nelson's vehicle then turned west on Highway 2, which was the direction the suspect vehicle was reportedly headed; Nelson's vehicle was a pickup truck with a hound box, which matched the general description of the suspect vehicle; Kurtz observed no other vehicles on the road at that late hour; and Kurtz observed Nelson's vehicle turn on Highway 2 at a time consistent with a vehicle fleeing from Frosty's and heading toward the bear camp. Based on these specific and articulable facts, Kurtz had reasonable suspicion from which to conclude Nelson's vehicle was the one involved in the situation at Frosty's.

¶25 Although Nelson emphasizes Kurtz stopped a black Ford instead of a blue Dodge pickup and that other trucks had hound boxes, Nelson overlooks

that: Kurtz testified the profiles of Ford and Dodge pickups are similar; Kurtz could not tell the vehicle's color at the time of the stop; and the circuit court found trucks with hound boxes are "not common" and the discrepancies in the vehicle description were minimal given the nighttime conditions. Further, dispatch specifically told Kurtz the suspect vehicle was traveling to a bear camp on Highway 2, and Kurtz testified he observed Nelson's vehicle at a time consistent with a vehicle fleeing from Frosty's. Finally, this case is not factually analogous to ***Bohman*** because, as shown above, Kurtz did not stop Nelson's vehicle simply because it was in the vicinity of the alleged crime reported at Frosty's.

¶26 Nelson next argues "circumstances did not warrant" the stop because Kurtz "still needed to investigate whether a crime actually occurred and it appeared no crime was ongoing." In support, he offers a single citation to ***United States v. Hensley***, 469 U.S. 221 (1985).[5] Nelson, however, develops no legal argument in support of his assertion or his reliance on ***Hensley***. We will not consider his argument further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (undeveloped arguments need not be considered).

[5] ***United States v. Hensley***, 469 U.S. 221, 223 (1985), involved the reasonableness of a traffic stop of a suspected armed robber twelve days after the robbery took place. The Court differentiated between stops "to investigate suspected ongoing criminal activity" and stops "to investigate an already completed crime," noting that "the exigent circumstances which require a police officer to step in before a crime is committed or completed are not necessarily as pressing long afterwards." ***Id.*** at 228. Ultimately, the Court held, "[I]f police have a reasonable suspicion, grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a completed felony, then a ***Terry*** [***v. Ohio***, 392 U.S.1 (1968)] stop may be made to investigate that suspicion." ***Id.*** at 229. The Court declined to address ***Terry*** stops based on other, lesser past crimes. ***Id.***

By the Court.—Judgment and order affirmed.

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