COURT OF APPEALS DECISION DATED AND FILED

March 11, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP2684-CR

Cir. Ct. No. 2013CT470

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MITCHELL M. TREIBER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: DEE R. DYER, Judge. *Affirmed*.

¶1 HOOVER, P.J.[1] Mitchell Treiber, pro se, appeals a judgment of conviction for operating while intoxicated, second offense.[2] Treiber argues the

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[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.

circuit court erred by denying his suppression motion because the officer lacked reasonable suspicion to stop his vehicle, or because the officer unlawfully searched his vehicle. We affirm.

BACKGROUND

¶2 At the suppression hearing, officer Scott Sweetman testified that, on March 8, 2013 at approximately 2:07 a.m., he observed two vehicles racing on a county highway. At the time he observed the vehicles racing, Sweetman also estimated the vehicles were traveling between five and ten miles over the speed limit. Sweetman stopped both vehicles.

¶3 Sweetman spoke to the female driver of one of the vehicles. She informed Sweetman that she knew the occupants of the other vehicle and that they had all just left a nearby bar. Ultimately, the female driver submitted to a preliminary breath test, and Sweetman determined she was not impaired.

¶4 Sweetman then approached the other vehicle, which was a large truck. As he was approaching, Sweetman noticed at least two occupants in the vehicle. Although the vehicle's window was open, Sweetman opened the driver side door to speak with Treiber, who was driving.

¶5 Sweetman testified he opened the door because the size of Treiber's vehicle prevented him from seeing all of the occupants. Sweetman conceded he did not feel threatened by Treiber.

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[2] Attorney John Miller Carroll filed briefs on behalf of Treiber. Following briefing, Attorney Carroll's license to practice law was suspended. Attorney Carroll notified us of the suspension, and we removed him from the case.

¶6 After Sweetman opened the door, Treiber told Sweetman he had consumed several drinks at a bar. Sweetman also smelled the odor of intoxicants and observed Treiber had "very slurred speech and his face was red, and he did have bloodshot and glassy eyes[.]" Treiber submitted to field sobriety tests and a preliminary breath test. Ultimately, Sweetman arrested Treiber for operating while intoxicated.

¶7 Treiber argued the circuit court should suppress the evidence of his intoxication. He asserted Sweetman had no reasonable suspicion to stop his vehicle. Alternatively, Treiber contended Sweetman, by opening the door, conducted a search of his vehicle without probable cause. Treiber asserted that, had Sweetman not opened his door, Treiber would not have "made incriminating statements which added to the decision to require field sobriety tests" and Sweetman "may never have observed an odor of intoxicants emanating from Treiber[.]"

¶8 The State argued Sweetman had reasonable suspicion to stop Treiber's vehicle and Sweetman did not "search" Treiber's vehicle by opening the door. The State emphasized that, in ***Pennsylvania v. Mimms***, 434 U.S. 106, 111 (1977), the Court held that, based on legitimate concerns for officer safety, it was reasonable under the Fourth Amendment for officers to order individuals to exit

their vehicles during routine traffic stops.[3] The State asserted there was no practical difference between ordering an individual out of the vehicle and opening the vehicle door to speak to the individual. The State also argued that, even if Sweetman unlawfully "searched" the vehicle by opening the door, the inevitable discovery doctrine would prevent the evidence of intoxication from being suppressed. The State reasoned that, had Sweetman spoken with Treiber through the open window, Sweetman still would have observed the indicia of impairment that led Sweetman to request field sobriety tests.

¶9 The circuit court denied Treiber's suppression motion. It first concluded Sweetman had reasonable suspicion to stop Treiber's vehicle based either on his estimation that Treiber was speeding or, "more importantly," based on his observation that Treiber was racing another vehicle. The court then concluded Sweetman did not conduct an unlawful search by opening the vehicle door. The court found that Treiber's vehicle was a large truck, that Treiber was seated about level with Sweetman's chest, and that Sweetman could not see into the vehicle. The court determined that, based on ***Mimms***, it was reasonable for Sweetman to open Treiber's door as a safety precaution so that he could observe Treiber's and his passenger's movements inside the vehicle. Treiber now appeals.

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[3] In ***Pennsylvania v. Mimms***, 434 U.S. 106, 107 (1977), officers stopped a vehicle for having an expired license plate. One of the officers asked Mimms to exit the vehicle and produce his driver's license. ***Id.*** The Court was tasked with determining the "narrow question of whether the order to get out of the car, issued after the driver was lawfully detained, was reasonable and thus permissible under the Fourth Amendment." ***Id.*** at 109. The Court noted the proffered justification for the state's action was that "[e]stablishing a face-to-face confrontation diminishes the possibility, otherwise substantial, that the driver can make unobserved movements; this, in turn, reduces the likelihood that the officer will be the victim of an assault." ***Id.*** at 110. The Court concluded the justification was "both legitimate and weighty," and it determined the additional intrusion was "de minimis" because "[t]he driver is being asked to expose to view very little more of his person than is already exposed." ***Id.*** at 111. Accordingly, the Court held the officer's action was reasonable under the Fourth Amendment. ***Id.*** at 111 n.6.

DISCUSSION

¶10 When we review a circuit court's decision on a motion to suppress evidence, we accept the circuit court's findings of fact unless they are clearly erroneous. ***State v. Fields***, 2000 WI App 218, ¶9, 239 Wis. 2d 38, 619 N.W.2d 279. However, whether the facts fulfill the applicable constitutional standards is a question of law, which we review independently. ***Id.***

I. Reasonable suspicion to stop

¶11 Treiber first argues Sweetman lacked reasonable suspicion to stop his vehicle. Reasonable suspicion exists when, under the totality of the circumstances, "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 (citation omitted). "Such a stop must be based on more than an officer's 'inchoate and unparticularized suspicion or hunch.'" ***Id.***, ¶10 (quoting ***Terry v. Ohio***, 392 U.S. 1, 27 (1968)). Instead, the officer "'must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant' the intrusion of the stop." ***Id.*** (quoting ***Terry***, 392 U.S. at 21).

¶12 Treiber argues Sweetman lacked reasonable suspicion to stop his vehicle because Sweetman only had a hunch that Treiber was speeding. Treiber emphasizes that Sweetman estimated Treiber was traveling above the posted limit and that Sweetman did not use radar to confirm Treiber's speed.

¶13 Treiber's argument, however, overlooks that Sweetman also testified he stopped Treiber's vehicle because it was racing another vehicle. WISCONSIN

STAT. § 346.94(2) provides: "No operator of a motor vehicle shall participate in any race or speed or endurance contest upon any highway." The circuit court found that Sweetman observed Treiber racing on the county highway. Accordingly, we conclude Sweetman lawfully stopped the vehicle based on the racing violation.

II. Reasonable suspicion of impairment and opening the vehicle door

¶14 Once an officer lawfully stops a vehicle for a traffic violation, the officer needs reasonable suspicion of impairment before the officer may prolong the stop to investigate whether the individual was operating while intoxicated. *See* ***State v. Colstad***, 2003 WI App 25, ¶19, 260 Wis. 2d 406, 659 N.W.2d 394. In this case, after Sweetman opened the truck door to speak to Treiber about the racing violation, Treiber admitted to drinking and Sweetman noticed Treiber had "very slurred speech," his face was red, his eyes were glassy and bloodshot, and he smelled of alcohol. Sweetman then asked Treiber to participate in field sobriety tests.

¶15 On appeal, Treiber argues Sweetman unlawfully observed the indicia of impairment that led him to suspect Treiber was intoxicated. He asserts Sweetman's act of opening the truck door constituted a search under the Fourth Amendment and, therefore, Sweetman needed, but did not have, probable cause and exigent circumstances. Treiber also argues that the circuit court erred by analogizing this case to ***Mimms***, 434 U.S. 106, and that Sweetman did not open the door based on a concern for his safety. Finally, Treiber argues the inevitable discovery doctrine would not apply because, without opening the door, Sweetman would not have observed the indicia of impairment that caused him to suspect Treiber was operating while intoxicated.

¶16 The State responds that opening a vehicle door, by itself, does not constitute a search. It emphasizes Sweetman opened the door for safety reasons, and it argues ***Mimms*** is dispositive. Alternatively, the State argues that, even if Sweetman's actions constituted an unlawful search, the inevitable discovery doctrine would apply to the indicia of impairment Sweetman observed while speaking to Treiber. The State argues these indicia gave Sweetman reasonable suspicion to request field sobriety tests.

¶17 We need not determine whether Sweetman's act of opening the vehicle door constituted an unreasonable search under the Fourth Amendment. We conclude that, even if Sweetman's act of opening the door constituted an unreasonable search, the inevitable discovery doctrine would apply to the indicia of impairment Sweetman observed while speaking to Treiber. *See* ***Mercado v. GE Money Bank***, 2009 WI App 73, ¶2, 318 Wis. 2d 216, 768 N.W.2d 53 (appellate court may affirm on different grounds).

¶18 The inevitable discovery doctrine provides that "evidence obtained during a search which is tainted by some illegal act may be admissible if the tainted evidence would have been inevitably discovered by lawful means." ***State v. Lopez***, 207 Wis. 2d 413, 427, 559 N.W.2d 264 (Ct. App. 1996). To prove the evidence would have been inevitably discovered, the State must establish:

> (1) a reasonable probability that the evidence in question would have been discovered by lawful means but for the police misconduct, (2) that the leads making the discovery inevitable were possessed by the government at the time of the misconduct, and (3) that prior to the unlawful search the government was also actively pursuing some alternative line of investigation.

Id. at 427-28.

¶19 In this case, Sweetman lawfully stopped Treiber for racing and was therefore going to make contact with Treiber about that violation. Had Sweetman not opened the door to speak with Treiber, but instead talked to Treiber through the open driver side window, there is more than a reasonable probability that Sweetman still would have observed Treiber's glossy and bloodshot eyes, his "very slurred speech," his red face, and the odor of intoxicants. *See **State v. Avery***, 2011 WI App 124, ¶29, 337 Wis. 2d 351, 804 N.W.2d 216 (we independently apply inevitable discovery doctrine). Considering Treiber readily admitted to drinking, there is a reasonable probability that Treiber still would have admitted to drinking when asked through the open window.

¶20 Treiber argues the inevitable discovery doctrine should not apply because Sweetman's action startled him into admitting he was drinking. In addition, he contends the open door put Sweetman closer to Treiber than he otherwise would have been and therefore Sweetman would not have detected the odor of intoxicants through the open window. However, Treiber's argument does not change the fact that Sweetman still would have observed Treiber's glossy and bloodshot eyes, his "very slurred speech," and his red face. We conclude these indicia of impairment, combined with the fact that Sweetman had just observed Treiber racing on a highway, that the female driver told Sweetman she and Treiber had just left a nearby bar, and that it was 2:07 a.m., or "bar time," would have given Sweetman reasonable suspicion that Treiber was impaired. Because the evidence of impairment would have been inevitably discovered, we conclude Sweetman lawfully requested Treiber to participate in the field sobriety tests.

By the Court.—Judgment affirmed.

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