COURT OF APPEALS
DECISION
DATED AND FILED

September 25, 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. 2014AP735

Cir. Ct. No. 2013CV287

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

CITY OF TOMAH,

PLAINTIFF-RESPONDENT,

V.

STEVEN SEWARD,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Monroe County: J. DAVID RICE, Judge. *Affirmed.*

¶1 KLOPPENBURG, J.[1] Steven Seward appeals the judgment finding him guilty of operating while intoxicated (OWI) and operating with a prohibited alcohol concentration (PAC) in violation of WIS. STAT. § 346.63(1)(a) and

[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.

346.63(1)(b). Seward argues that the circuit court erred in: (1) finding that the officer had reasonable suspicion to conduct a traffic stop; and (2) finding that the officer complied with the implied consent law, and affording the City the evidentiary benefits of automatic admissibility and the statutory presumption of intoxication. I conclude that the circuit court did not err in finding that the officer had reasonable suspicion to conduct a traffic stop and in finding that the officer complied with the implied consent law. Accordingly, I affirm the judgment.

BACKGROUND

¶2 The facts relevant to the circumstances of the arrest and Seward's breath test are substantially undisputed. Officer Helgerson testified at the motion hearing that at approximately 11:34 p.m., Helgerson was traveling northbound on North Superior Avenue in her squad car when a "veer[ing]" vehicle caught her attention. Helgerson described Superior Avenue as a straight divided highway with two lanes in each direction. Helgerson was approximately one car length behind the vehicle when she observed the vehicle "bouncing from the dotted line to … the solid fog line, never crossing either of them, riding them for a short amount of time, but gradually going from side to side."

¶3 After following the vehicle for approximately one mile, during which the vehicle continued to veer in its traffic lane, Helgerson conducted a traffic stop. The driver of the vehicle was identified as Steven Seward. Helgerson testified that she smelled a strong odor of intoxicants emanating from inside the vehicle, and that Seward admitted he had been drinking. Helgerson asked Seward to perform several field sobriety tests, which Seward failed, and a preliminary breath test, which registered a blood alcohol concentration level of 0.198.

¶4 Helgerson testified that she then transported Seward to the police department, where she conducted a second breath test using an intoximeter at approximately 12:38 a.m. Helgerson testified that:

> [Helgerson] first read [to Seward] what's called the Informing the Accused [form, which] basically advises [Seward] that he's been under ... arrest for OWI. He can either say yes to the breath test or blood test or urine test that we want to administer or he can say no; and it also explains the suspension of the license or revocation of the license if he says no ....

Helgerson testified that Seward agreed to a breath test. The result of this breath test, which showed Seward had a blood alcohol concentration of 0.17, was presented at trial. The Informing the Accused form was not entered into evidence.

¶5 Seward filed a pretrial motion to suppress any evidence arising from the stop, arguing that the traffic stop was unlawful because the officer did not have reasonable suspicion that Seward was committing an offense. Upon review of the digital video recording of the stop, the circuit court denied Seward's motion and found that based on the totality of the circumstances, the officer had reasonable suspicion to conduct a traffic stop. The circuit court reasoned:

> [T]he defendant was quite clearly weaving between the two edges of that lane.
>
> On multiple occasions his vehicle touched … and drove for a brief time on the fog line which would be on the defendant's left and then veered back to the dotted line that divided the lanes which was on his right. He did this multiple times. It was quite distinctive and noticeable.
>
> I note that this occurred at 11:34 p.m. on a Wednesday night. While that's not the time that the bars close, it's a time of night that someone driving at that time of night might raise at least some suspicion in the middle of the week that the person might be drinking.
>
> The combination of that weaving within the lane, which was very distinctive, and frankly to me would have

> made me suspicious that … the driver was either consuming alcohol or for some reason not paying very close attention to his driving; and so I find that – based on those facts that the officer had reasonable suspicion to stop the defendant's vehicle.

¶6 At the conclusion of the trial, Seward objected to jury instructions which provided that the jury could presume the defendant's guilt if it found that the defendant's blood alcohol level was above 0.08 grams of alcohol per 210 liters of the defendant's breath.[2] Seward argued that the City failed to meet its burden of showing that Seward was informed of his rights because the Informing the Accused form was not entered into evidence. The circuit court overruled the objection, finding that the City met its burden because the officer testified that she read Seward the Informing the Accused form and Seward could have cross-examined the officer on the issue. The jury ultimately found Seward guilty of

---

[2] The jury instructions challenged are the "How to Use the Test Result Evidence" sections of WIS JI—CRIMINAL 2660A and 2663A. The pertinent section of WIS JI—CRIMINAL 2660A states:

> If you are satisfied to a reasonable certainty by evidence which is clear, satisfactory, and convincing that there was .08 grams or more of alcohol in 210 liters of the defendant's breath at the time the test was taken, you may find from that fact alone that the defendant had a prohibited alcohol concentration at the time of the alleged (driving) (operating), but you are not required to do so.

The pertinent section of WIS JI—CRIMINAL 2663A states:

> If you are satisfied to a reasonable certainty by evidence which is clear, satisfactory, and convincing that there was .08 grams or more of alcohol in 210 liters of the defendant's breath at the time the test was taken, you may find from that fact alone that the defendant was under the influence of an intoxicant at the time of the alleged (driving) (operating), but you are not required to do so.

operating a motor vehicle while under the influence of an intoxicant and of operating a motor vehicle with a prohibited alcohol concentration.

DISCUSSION

¶7 On appeal, Seward renews both of his arguments. Seward first argues that the circuit court erred in denying Seward's motion to suppress evidence obtained following the traffic stop, because the stop lacked probable cause as well as reasonable suspicion. Seward also argues that the circuit court erred in finding that the officer complied with the implied consent law and, therefore, erred in allowing the breath test to be automatically admitted and in allowing jury instructions that included the statutory presumption of intoxication. Specifically, Seward contends that the City failed to meet its burden of showing that Seward was informed of his rights under the implied consent law, because a copy of the Informing the Accused form was not entered into evidence. As explained below, I conclude that the circuit court did not err in finding that the stop was supported by reasonable suspicion and in finding that the City met its burden of showing that the officer complied with the implied consent law.

Reasonable Suspicion for the Stop

¶8 This court analyzes the denial of a suppression motion under a two-part standard of review: we uphold the circuit court's findings of fact unless they are clearly erroneous, but we independently review whether those facts warrant suppression. ***State v. Conner***, 2012 WI App 105, ¶15, 344 Wis. 2d 233, 821 N.W.2d 267. "Whether there is probable cause or reasonable suspicion to stop a vehicle is a question of constitutional fact." ***State v. Popke***, 2009 WI 37, ¶10, 317 Wis. 2d 118, 765 N.W.2d 569. In other words, the ultimate question of "whether

the facts as found by the [circuit] court meet the constitutional standard" is reviewed de novo. ***State v. Hindsley***, 2000 WI App 130, ¶22, 237 Wis. 2d 358, 614 N.W.2d 48.

¶9 The Fourth Amendment of the United States Constitution and Article I, Section 11 of the Wisconsin Constitution offer protection against unreasonable searches and seizures.[3] "'The temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a seizure of persons within the meaning of the Fourth Amendment.'" ***Popke***, 317 Wis. 2d 118, ¶11 (quoted source omitted). Therefore, the "stop must not be unreasonable under the circumstances." ***Id.*** A traffic stop is reasonable if supported by probable cause that a traffic violation has occurred or by reasonable suspicion that a violation has been or will be committed. ***Id.***

¶10 The dispositive issue here is whether Officer Helgerson's stop of Seward's vehicle was supported by reasonable suspicion that Seward was driving while intoxicated. In ***State v. Post***, 2007 WI 60, 301 Wis. 2d 1, 733 N.W.2d 634, our supreme court held that the determination of whether a driver "weaving within a single lane gives rise to reasonable suspicion requires an examination of the totality of the circumstances." ***Id.***, ¶27. The ***Post*** court refused to adopt a bright-line rule that weaving within a single lane by itself gives rise to reasonable

---

[3] The Fourth Amendment of the United States Constitution states: "The right of the people to be secure in their persons … against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause …." Article I, Section 11 of the Wisconsin Constitution provides: "The right of the people to be secure in their persons ... against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause …."

suspicion, but it also rejected the bright-line rule that weaving within a single lane must be "erratic, unsafe, or illegal to give rise to reasonable suspicion." ***Id.***, ¶26. Instead, the court required that the State "show[] that there were 'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant' the intrusion of the stop." ***Id.***, ¶27 (quoted source omitted).

¶11 The ***Post*** court found that reasonable suspicion existed when the officer observed the vehicle veering in an S-pattern within a single lane several times for two blocks at around 9:30 p.m. ***Id.***, ¶¶36-37. The court pointed out that other jurisdictions considered factors such as "prolonged weaving or other suspicious aspects of driving" to support a finding of reasonable suspicion. ***Id.***, ¶25 (footnotes omitted). The court emphasized: "[I]t is clear that driving need not be illegal in order to give rise to reasonable suspicion." ***Id.***, ¶24.

¶12 Turning to the case at hand, I conclude that the circuit court did not err in finding that the totality of the circumstances demonstrated that Officer Helgerson had reasonable suspicion to conduct the traffic stop. Helgerson testified that Seward's vehicle veered continuously within its lane for approximately one mile. Upon review of the recorded video from Helgerson's squad car, the circuit court found that the veering was "quite distinctive and noticeable." As mentioned above, our supreme court in ***Post*** noted that other jurisdictions have looked at prolonged weaving as a factor supporting reasonable suspicion. ***Id.***, ¶25. In addition, in this case, the prolonged veering took place at around 11:34 p.m., and as the circuit court noted: "While that's not the time that the bars close, it's a time of night that someone driving at that time of night might raise at least some suspicion in the middle of the week that the person might be drinking." *See* ***id.***, ¶36 (noting that incident took place at 9:30 p.m. which is not "'bar time'" but

"does lend some further credence to [the officer's] suspicion that [the defendant] was driving while intoxicated"); *see also* ***Popke***, 317 Wis. 2d 118, ¶27 (considering the fact that the incident took place at 1:30 a.m. to support a finding of reasonable suspicion under the totality of the circumstances).

¶13 Seward attempts to distinguish this case from ***Post*** and argues that ***Post*** "illustrates the outer limit of what can serve as reasonable suspicion in cases such as these." Indeed, the ***Post*** court acknowledged that its decision was a close call. ***Post***, 301 Wis. 2d 1, ¶27. However, the facts of this case do not give rise to a close call. In ***Post***, the defendant's vehicle veered in its lane for only two blocks before the officer conducted the traffic stop. ***Id.***, ¶36. Here, Seward's vehicle veered continuously for approximately one mile before Officer Helgerson conducted the traffic stop. In ***Post***, the incident occurred at approximately 9:30 p.m., which the court found was not bar time but still an important factor supporting the finding of reasonable suspicion. ***Id.*** Here the incident occurred later at night, around 11:34 p.m., which the circuit court found was not bar time but nonetheless an important factor that "might raise at least some suspicion." Thus, given the totality of the circumstances in this case, I conclude that the circuit court did not err in its finding that there was reasonable suspicion supporting the traffic stop.

Compliance With the Implied Consent Law

¶14 Seward next asserts that the circuit court erred in finding that the City met its burden of establishing that the officer complied with the implied consent law. Seward further argues that because the City did not meet its burden, the circuit court erred in allowing the breath test to be automatically admitted and in giving jury instructions that included the statutory presumption of intoxication,

as provided under WIS. STAT. §§ 343.305(5)(d) and 885.235. The sole basis for Seward's argument is the fact that the City did not enter into evidence the Informing the Accused form that Officer Helgerson testified she read to Seward. As explained below, I conclude that the circuit court did not err when it found that the City met its burden and, therefore, did not err in automatically admitting the breath test and in allowing the statutory presumption of intoxication to be included in the jury instructions.

¶15 Application of the implied consent statute to an undisputed set of facts, like any statutory construction, is a question of law that this court reviews de novo. ***State v. Reitter***, 227 Wis. 2d 213, 223, 595 N.W.2d 646 (1999). The ultimate question of "whether the facts as found by the trial court meet the constitutional standard" is also reviewed de novo. ***Hindsley***, 237 Wis. 2d 358, ¶22. However, a "'circuit court has broad discretion in deciding whether to give a requested jury instruction.'" ***State v. Hubbard***, 2008 WI 92, ¶28, 313 Wis. 2d 1, 752 N.W.2d 839 (quoted source omitted). "'If the overall meaning communicated by the instructions was a correct statement of the law, no grounds for reversal exist.'" ***Id.***, ¶27 (quoted source omitted).

¶16 "Wisconsin's implied consent law is intended to facilitate the ability of police to secure evidence of intoxication or controlled substances by persuading drivers to consent to a requested chemical test by attaching a penalty for refusal to do so." ***State v. Padley***, 2014 WI App 65, ¶24, 354 Wis. 2d 545, 849 N.W.2d 867. "[A]ll persons accept [their implied consent] as a condition of being licensed to drive a vehicle on Wisconsin public road ways." ***Id.***, ¶26; WIS. STAT. § 343.305(2). Section 343.305(4) of the implied consent law provides the information that must be read to the driver prior to the performance of a chemical

test in order to advise the driver of his or her rights under the implied consent law, and this language is set forth in the Informing the Accused form issued by the Wisconsin Department of Transportation. ***State v. Zielke***, 137 Wis. 2d 39, 43, 403 N.W.2d 427 (1987). If a chemical test is conducted in compliance with the implied consent law, the test result is automatically admissible and afforded the presumption of intoxication. WIS. STAT. §§ 343.305(5)(d) and 885.235.[4]

¶17 At the conclusion of trial, Seward objected to the judge reading the "How to Use the Test Result Evidence" portions of WIS JI—CRIMINAL 2660A and 2663A. As quoted above, the pertinent parts of these instructions inform the jury that the jury may find, based on the chemical test results alone, that the defendant was driving while under the influence of an intoxicant and with a prohibited alcohol concentration.

¶18 Seward is correct in stating that an officer's noncompliance with the statutory requirement to provide the implied consent warnings may result in the loss of these presumption privileges. ***State v. Piddington***, 2001 WI 24, ¶67, 241

[4] WISCONSIN STAT. § 343.305(5)(d) states:

> [T]he results of a test administered in accordance with this section are admissible on the issue of whether the person was under the influence of an intoxicant … to a degree which renders him or her incapable of safely driving … or any issue relating to the person's alcohol concentration. Test results shall be given the effect required under s. 885.235.

WISCONSIN STAT. § 885.235(1g)(c) states:

> The fact that the analysis shows that the person had an alcohol concentration of 0.08 or more is prima facie evidence that he or she was under the influence of an intoxicant and is prima facie evidence that he or she had an alcohol concentration of 0.08 or more.

Wis. 2d 754, 623 N.W.2d 528. Seward is also correct in stating that the City had the burden of showing, by a preponderance of the evidence, that Seward was given the statutorily required warnings under the implied consent law prior to the breath test. *See* ***id.***, ¶22 (noting that the "State has the burden of proof of showing, by a preponderance of the evidence, that the methods used would reasonably convey the implied consent warnings").

¶19 However, the implied consent law does not require that the actual text of the warnings be admitted into evidence to satisfy that burden. In general, the officer can satisfy WIS. STAT. § 343.305(4) by reading the Informing the Accused form to an accused driver. *See* ***County of Ozaukee v. Quelle***, 198 Wis. 2d 269, 284, 542 N.W.2d 196 (Ct. App. 1995) ("[A]n officer only has a duty to provide the information on the form."), *abrogated on other grounds by* ***Washburn Cnty. v. Smith***, 2008 WI 23, 308 Wis. 2d 65, 746 N.W.2d 243. Thus, the burden of showing, by a preponderance of the evidence, that a defendant was provided the statutorily required warnings under the implied consent law may be met when the officer testifies that he or she read the defendant the Informing the Accused form.

¶20 At trial, Helgerson testified that she read Seward the Informing the Accused form prior to performing the breath test. Seward did not at trial establish, and does not on appeal argue, that the Informing the Accused form to which Helgerson referred did not comply with WIS. STAT. § 343.305(4).[5] In light of Helgerson's unchallenged testimony at trial, it was reasonable for the circuit court to infer as a factual matter that the officer read from a form in compliance with

[5] Seward speculates only that Helgerson may have used an outdated form, but cites to no authority to support his speculation that the form used by Helgerson may not have contained the statutorily required information.

§ 343.305(4). Accordingly, I conclude that the circuit court did not err in finding that the City met its burden of showing that the officer complied with the implied consent law, and, therefore, the circuit court did not err in automatically admitting the breath test result and in giving jury instructions that included the presumption of intoxication.

CONCLUSION

¶21 For the reasons set forth above, I reject Seward's arguments that the circuit court erred in denying his motion to suppress evidence and in finding that the City met its burden of showing that the officer complied with the implied consent law, and, therefore, I affirm the judgment.

By the Court.—Judgment affirmed.

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