COURT OF APPEALS
DECISION
DATED AND FILED

June 18, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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. 2014AP2860-CR **Cir. Ct. No. 2014CT459**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY J. RELYEA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: WILLIAM E. HANRAHAN, Judge. *Affirmed*.

¶1 BLANCHARD, P.J.[1] Timothy Relyea appeals a judgment of conviction for operating a motor vehicle with a prohibited alcohol concentration,

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

as a second offense. He also appeals an order denying his motion to suppress evidence obtained following a traffic stop on the ground that the officer who stopped him did not have a reasonable suspicion that Relyea had violated the law. For the following reasons, I affirm the judgment and order.

¶2 The only witness to testify at the suppression hearing was a police officer who testified that he stopped Relyea on suspicion of consuming an alcoholic beverage while in a vehicle on a highway. *See* WIS. STAT. § 346.935(1). This is the stop challenged by Relyea at the suppression hearing. At the close of the hearing, the circuit court made findings that included the following, which implicitly credited all pertinent aspects of the officer's testimony.

¶3 On a clear, sunny day, the officer was driving while on duty on a street with a 25-miles-per-hour speed limit when the officer observed a pick up truck, operated by Relyea, traveling in the opposite direction. The driver's side window of the pick up was down. The officer saw that Relyea was "guzzling" from what appeared to be a bottle of "microbrew" beer.[2]

¶4 While root beer is sometimes sold in bottles that resemble in some respects microbrew beer bottles, that is the case only for "the more expensive [root beer] … not the [root beer] that is commonly seen," and in addition beer bottles typically have a different shape from root beer bottles.

¶5 Based on these findings, the court concluded that the officer reasonably determined from his observations that "there was a reasonable

[2] The officer testified that he thought the bottle was a microbrew beer bottle because it had a darker tint than the officer thought was normally used in bottles containing non-microbrew beers.

likelihood that" "the substance from the bottle" "is alcohol," and "it's being consumed while driving a vehicle, in violation of Wisconsin law."

¶6 "[W]hen a police officer observes lawful but suspicious conduct, if a reasonable inference of unlawful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, police officers have the right to temporarily detain the individual for the purpose of inquiry." ***State v. Waldner***, 206 Wis. 2d 51, 60, 556 N.W.2d 681 (1996); *see also* WIS. STAT. § 968.24. "Police officers are not required to rule out the possibility of innocent behavior before initiating a brief stop." ***Waldner***, 206 Wis. 2d at 60. It is sufficient that "a reasonable inference of unlawful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn." ***Id***.

¶7 I review de novo whether the circuit court's findings of historical fact support a reasonable suspicion to make an investigative stop. *See* ***State v. Williams***, 2001 WI 21, ¶18, 241 Wis. 2d 631, 623 N.W.2d 106.

¶8 Relyea does not challenge any fact found by the circuit court, and in any case he could not challenge the court's implicit credibility findings regarding the officer's testimony. Instead, Relyea points to the lack of evidence that, before the stop, Relyea exhibited to the officer any behavior indicating that Relyea was impaired. Relyea suggests from this that the officer lacked reasonable suspicion to stop Relyea for any offense. Relyea argues as follows:

> Drinking out of a brown unidentified bottle while driving cannot, in and of itself, rise to the level of reasonable inference under the totality of the circumstances that criminal activity is afoot or that an ordinance violation has

> been or is being broken just like weaving within a single traffic lane does not alone rise to reasonable suspicion. Post.[3]

¶9 However, this argument ignores the basis for circuit court's ruling. The officer did not testify, and the court did not find, that there was any sign that Relyea was driving while impaired. Instead, the court concluded that there was an obvious basis for the officer to conclude that Relyea was violating a non-criminal traffic law, namely, consuming an alcoholic beverage while he was in a vehicle on a highway. This is not a criminal offense, but its violation is a permissible basis for a stop. *See* ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 310, 603 N.W.2d 541 (1999) ("[A]n officer may make an investigative stop if the officer 'reasonably suspects' that a person has committed or is about to commit a crime, or reasonably suspects that a person is violating the non-criminal traffic laws ...." (footnote, citations, and quoted source omitted)).

¶10 Relyea also may mean to argue that the officer's observation that Relyea was drinking out of a bottle that appeared to be a beer bottle is insufficient to support a reasonable suspicion that he was violating Wisconsin law by consuming an alcoholic beverage while in a vehicle on a highway. Relyea states that "many people drink legal beverages from bottles and cans in their cars." It is true that people frequently drink non-alcoholic beverages from containers such as bottles while riding in vehicles. However, as the State aptly argues, "A reasonable inference after seeing someone drinking out of a bottle that looks like a beer bottle is that the person is, in fact, drinking out of a beer bottle." A reasonable officer in

[3] This is a reference to ***State v. Post***, 2007 WI 60, 301 Wis. 2d 1, 733 N.W.2d 634, in which our supreme court held in part that a motorist's following a discernable but smooth S-type pattern within a single lane of traffic, by itself, does not establish reasonable suspicion to believe that the motorist is operating while impaired.

the position of the officer here could have drawn alternative, innocent inferences, but this does not matter under the legal standards stated above.

¶11 In a variation on this argument, Relyea takes issue with the fact that, as Relyea puts it, the officer "determined that Relyea violated the law without knowing whether he was drinking from a bottle of root beer or a bottle of beer." This argument fails to come to terms with the fact that the reasonable suspicion standard does not require an officer to know with certainty that a suspect is violating the law in order to conduct a lawful investigative stop.

¶12 In his reply brief, Relyea suggests that under such precedent as ***Waldner***, there needs to be an accumulation of multiple facts that, when considered together, support reasonable suspicion, not a single fact, here the observation of a motorist drinking from a suspected beer bottle. Relyea's suggested argument misreads the precedent. It is true that courts are to consider the totality of the circumstances and that many factors can be relevant to the analysis, depending on the facts and potentially applicable violations of law. However, in considering the totality of the circumstances here, what ends up mattering is a single, simple observation, which supported reasonable suspicion that a single, simple offense had been committed. Put differently, it is not the number of suspicious facts that matter, but their significance when considered in light of the circumstances as a whole.

By the Court.—Judgment and order affirmed.

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