COURT OF APPEALS
DECISION
DATED AND FILED

August 30, 2016

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. 2015AP901-CR

Cir. Ct. No. 2013CT1249

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PAUL R. VANDERLINDEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: MITCHELL J. METROPULOS, Judge. *Reversed and cause remanded with directions.*

¶1 STARK, P.J.[1] Paul Vanderlinden[2] appeals a judgment of conviction for second-offense operating a motor vehicle while intoxicated (OWI). He argues

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

the arresting officer did not have reasonable suspicion to conduct a traffic stop, and, as a result, the circuit court should have granted his motion to suppress evidence. We agree and reverse the judgment.

BACKGROUND

¶2 Vanderlinden was charged with second-offense OWI and second-offense operating with a prohibited alcohol concentration (PAC). He subsequently filed: (1) a "Motion to Dismiss Unlawful Arrest"; (2) a "Motion to Dismiss or Suppress Fruits of Illegal Arrest for No Probable Cause"; (3) a "Motion to Suppress Results of Test"; and (4) a "Motion to Suppress" "all evidence produced after the arrest." At the August 15, 2014 motion hearing, Vanderlinden clarified he was challenging only the initial stop of his vehicle.

¶3 City of Appleton police officer William Krieg was the only witness to testify at the August 15, 2014 hearing. Krieg testified that on October 8, 2013, at 11:50 p.m., he was assisting another officer with a traffic stop when he heard over his radio that "there was a vehicle leaving the movie theater and there was possibly an intoxicated driver behind the wheel." The dispatch report contained a description of the vehicle, including the vehicle's license plate number and that the vehicle had a "white Muncheez" delivery top on it. Krieg explained that as he continued to assist with the traffic stop, he observed a vehicle matching that description travel past his location. Krieg subsequently stopped the vehicle. The driver was later identified as Vanderlinden.

---

[2] Paul Vanderlinden is also referred to in the record as Paul Vander Linden and Paul VanderLinden. We elect to use the spelling/capitalization reflected in the case caption.

Vanderlinden appears pro se on appeal.

¶4 When asked at the hearing what information he had "about ... why this vehicle was being looked at[,]" Krieg testified that a witness had reported to dispatch observing a person drinking beers at a movie theater, and that the person left the theater with a beer in his pocket and got behind the wheel of a white vehicle. Krieg confirmed with dispatch before he conducted the traffic stop that there were two witnesses and that they had been identified.[3] No other evidence was provided as to the basis for dispatch's report of "an intoxicated driver behind the wheel." Krieg also stated that he had observed "some items hanging from the [vehicle's] rear-view mirror." According to Krieg, he stopped the vehicle "based on the view of obstruction, as well as the information provided by the witnesses." He later clarified, however, that his decision to stop the vehicle was based on "primarily the report of the drinking beer."

¶5 Krieg explained that he did not immediately approach Vanderlinden after conducting the traffic stop; instead, he contacted the female witness to "clarify what she had seen[.]" Krieg testified the female witness reported to him that she observed Vanderlinden consume two beers and place one in his pocket. Krieg also testified that he spoke with an officer, who had obtained a statement from the male witness. That officer relayed to Krieg that the male witness reported seeing Vanderlinden consume two beers, "chugging one" of the two, and leave the theater with one in his pocket. Krieg indicated that after he obtained this information he then approached Vanderlinden.

---

[3] The motion hearing transcript does not contain the names of the witnesses; however, the information in the transcript reflects that two citizen witnesses, a male and a female, made statements to the police. Krieg indicated that he believed the witnesses were together.

¶6 The circuit court ultimately concluded Krieg had reasonable suspicion to stop Vanderlinden and, therefore, denied Vanderlinden's motion. The court first found the witnesses had been identified, and, therefore, it was "not concerned about this being an anonymous tip where the officer would have had to then independently verify a basis for the stop above and beyond an anonymous tip[.]"[4] The court next explained:

> There are a number of inferences that can be taken from the reporting that someone's been drinking before driving. One reasonable inference is that the person's consumed alcohol, but has not risen to the level of being intoxicated, and I think the officer under these circumstances has the authority then to stop a vehicle to determine if the person's intoxicated. If not, then a person can move on. The other reasonable inference is he possibly could be intoxicated. The observations made that there were two beers consumed, one beer in the pocket, I think the reasonable inference of that is that that beer's going to be consumed in short order. The other reasonable inference is that although there had been two observed consumptions of beer, especially when one is being slugged in the parking lot, that is reasonable to assume that the person had had more beer, perhaps more alcohol, prior to that, so I do think it's reasonable for this officer to at least investigate as to whether or not this person was, indeed, intoxicated while driving, so I am going to find that the stop was lawful ....[5]

---

[4] Neither party on appeal argues the circuit court's conclusions in this regard were erroneous.

[5] During its oral ruling, the circuit court observed, "[Krieg] also indicated that while he was following that vehicle that he observed a possible obstruction hanging from the rearview mirror." However, the court indicated, "The officer went on during cross-examination to testify that he primarily stopped the defendant because of the drinking report." The court, therefore, determined the question before it was "whether or not *what had been reported* was enough to allow the officer to stop the vehicle and then do an independent investigation ...." (Emphasis added.) On appeal, the State does not argue that Krieg lawfully stopped Vanderlinden based on the items hanging from Vanderlinden's rearview mirror. *See* ***Industrial Risk Insurers v. American Eng'g Testing, Inc.***, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82 ("we will not abandon our neutrality to develop arguments" for a party). Further, although the witnesses stated Vanderlinden left the theater with a beer in his pocket, there was no indication Krieg relied upon a possible open container violation as a basis for the stop.

¶7 Vanderlinden subsequently retained new counsel, who also filed a motion to suppress evidence. At a December 22, 2014 motion hearing, the circuit court determined Vanderlinden had previously filed motions attacking the stop, which had already been heard and denied. The court further indicated it would not address the most recent motion until Vanderlinden produced a transcript from the August 15, 2014 hearing and identified an issue that had not yet been addressed. On January 28, 2015, Vanderlinden filed a motion for reconsideration, asking the court to reconsider its August 15, 2014 ruling. The court denied the motion. Vanderlinden pled no contest to second-offense OWI, and the PAC charge was dismissed. He now appeals the circuit court's denial of his motion to suppress evidence.

DISCUSSION

¶8 On appeal, Vanderlinden again challenges the constitutionality of the initial traffic stop. He contends a report from witnesses that he was "seen indulging in what is undisputedly lawful behavior" could not give rise to reasonable suspicion that he was committing a crime. (Formatting changed.) He also asserts that "there [wa]s no indicia that would allow the [c]ourt to extrapolate any facts necessary to justify the stop by the police."

¶9 Whether a traffic stop was reasonable is question of constitutional fact to which we apply a two-step standard of review. ***State v. Post***, 2007 WI 60, ¶8, 301 Wis. 2d 1, 733 N.W.2d 634. "We review the circuit court's findings of historical fact under the clearly erroneous standard, and we review independently the application of those facts to constitutional principles." ***Id.***

¶10 "A traffic stop is a form of seizure triggering Fourth Amendment protections from unreasonable searches and seizures." ***State v. Gammons***, 2001

WI App 36, ¶6, 241 Wis. 2d 296, 625 N.W.2d 623. Prior to conducting a traffic stop, "[t]he police must have a reasonable suspicion, grounded in specific articulable facts and reasonable inferences from those facts, that an individual is violating the law." ***Id.*** "The determination of reasonableness is a common sense test. 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," ***Post***, 301 Wis. 2d 1, ¶13, or engage in wrongful conduct, ***State v. Anderson***, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990). An officer's "inchoate and unparticularized suspicion or 'hunch'" will not give rise to reasonable suspicion. ***Post***, 301 Wis. 2d 1, ¶10 (quoting ***Terry v. Ohio***, 392 U.S. 1, 27 (1968)).

¶11 With these legal principles in mind, we conclude Krieg did not have reasonable suspicion to stop Vanderlinden. First, the circuit court's reliance on the witnesses' statements that Vanderlinden consumed two beers, one of which he "slugged," is misplaced. While the circuit court's findings in this regard are not clearly erroneous, and neither party disputes these findings, Krieg did not have the benefit of this information when he initiated the traffic stop. *See supra* ¶¶4-5. Rather, the undisputed testimony from Krieg reflects that Krieg learned that information after the traffic stop, before approaching Vanderlinden. The only information available to Krieg at the time he initiated the traffic stop was that two witnesses had reported observing Vanderlinden "drinking beers, as well as leave the [theater] with one beer in his pocket[.]" *See supra* ¶4.

¶12 Second, the circuit court relied upon an incorrect statement of the law in determining there was reasonable suspicion to stop Vanderlinden's vehicle based upon the facts known to the officer prior to the stop. The court stated, "One

reasonable inference is that the person's consumed alcohol, but has not risen to the level of being intoxicated, and I think the officer under these circumstances has the authority then to stop a vehicle to determine if the person's intoxicated. If not, then a person can move on."

¶13 We conclude the facts available to Krieg would not warrant a reasonable police officer, in light of his or her training and experience, to suspect that Vanderlinden had committed, was committing, or was about to commit a crime or engage in wrongful conduct. WISCONSIN STAT. § 346.63(1)(a) does not prohibit a person from operating a motor vehicle after consuming alcohol. *See **id.*** Rather, § 346.63(1)(a) prohibits a person from driving or operating a motor vehicle while "[u]nder the influence of an intoxicant ... to a degree which renders him or her incapable of safely driving[.]" ***Id.***; *see also* WIS JI—CRIMINAL 2663 (2006) ("Not every person who has consumed alcoholic beverages is 'under the influence' ...." Instead, "[w]hat must be established is that the person has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.").

¶14 The information available to Krieg when he stopped Vanderlinden was that Vanderlinden had been observed at night "drinking beers" and that he left a theater with a beer in his pocket. On cross-examination, Krieg confirmed the dispatch report he received did not state that Vanderlinden had displayed signs of intoxication or that Vanderlinden had acted in a disorderly manner at the theater. Similarly, Krieg testified that while he was following Vanderlinden, he did not observe Vanderlinden speeding or weaving. Likewise, Krieg agreed he did not observe any other signs of intoxication that would have drawn his attention to the vehicle and made him think Vanderlinden was intoxicated. A statement that an

individual was observed at night drinking an unspecified number of beers, during an unspecified amount of time, and leaving a theater with a beer in his pocket is not sufficient to give rise to a reasonable suspicion that criminal or wrongful activity is afoot.

¶15 Finally, we reject the other "reasonable inference" that the court relied upon in denying Vanderlinden's suppression motion. "[A] reasonable inference is a conclusion reached on the basis of evidence and reasoning, not imagination or speculation." ***Water Well Sols. Serv. Grp. Inc. v. Consolidated Ins. Co.***, 2016 WI 54, ¶38, 369 Wis. 2d 606, 881 N.W.2d 285. Here, the court inferred "that although there had been two observed consumptions of beer, especially when one is being slugged in the parking lot, that is reasonable to assume that the person had had more beer, perhaps more alcohol, prior to that …." However, the August 15, 2014 hearing transcript is void of any evidence that the movie theater sold alcohol, that Vanderlinden had access to additional alcohol at that location, or that Vanderlinden had been at a different location where alcohol was served prior to him arriving at the theater. The inference drawn by the circuit court is not based on the evidence that was presented during the motion hearing, but rather based only on speculation.

¶16 The State correctly argues that a police officer who lacks probable cause to arrest is not required to simply shrug his or her shoulders, and police officers are not required to rule out the possibility of innocent behavior before initiating a brief traffic stop. *See* ***State v. Waldner***, 206 Wis. 2d 51, 59, 556 N.W.2d 681 (1996). Indeed, "[t]he law allows a police officer to make an investigatory stop based on observations of lawful conduct so long as the reasonable inferences drawn from the lawful conduct are that criminal activity is afoot." ***Id.*** at 57; *see also* ***Anderson***, 155 Wis. 2d at 84 ("[I]f any reasonable

inference of wrongful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, the officers have the right to temporarily detain the individual for the purpose of inquiry."). Here, however, Krieg simply did not have sufficient facts available at the time of the stop to reasonably infer that Vanderlinden was operating a motor vehicle while intoxicated or committing any other unlawful activity.

¶17 We recognize the strong public interest in prosecuting and deterring intoxicated drivers. *See* ***Strenke v. Hogner***, 2005 WI App 194, ¶21, 287 Wis. 2d 135, 704 N.W.2d 309 ("The state's interest in punishing and deterring drunk driving within its own jurisdiction is powerful and well-established."); ***State v. Carlson***, 2002 WI App 44, ¶23, 250 Wis. 2d 562, 641 N.W.2d 451 (2001) ("It is clear that a serious threat to human life and well-being is posed by drunk drivers. Drunk driving and its consequences represent one of our society's gravest problems."); ***State v. Krause***, 168 Wis. 2d 578, 590, 484 N.W.2d 347 (Ct. App. 1992) ("Wisconsin also recognizes that drunk driving is a problem with significant social costs and, often, innocent victims. Therefore, the state has a substantial interest in apprehending, punishing and deterring drunk drivers." (citation omitted)). Nevertheless, the Fourth Amendment requires an officer to have reasonable suspicion of criminal or wrongful activity before initiating an investigatory traffic stop. *See* ***Gammons***, 241 Wis. 2d 296, ¶6.

¶18 If we were to hold Krieg had reasonable suspicion to stop Vanderlinden under the facts of this case, law enforcement officers would have reasonable suspicion to stop any vehicle to rule out the possibility of intoxicated driving based solely upon a complaint or observation of the driver's consumption of alcohol. The Fourth Amendment requires more. For the foregoing reasons, we reverse and remand with directions that the circuit court grant Vanderlinden's

suppression motion and hold such further proceedings as are necessary to resolve the case.

By the Court.—Judgment reversed and cause remanded with directions.

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