COURT OF APPEALS
DECISION
DATED AND FILED

May 19, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1671-CR **Cir. Ct. No. 2014CT768**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHAD T. KIPPLEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: JOHN W. MARKSON, Judge. *Affirmed.*

¶1 KLOPPENBURG, P.J.[1] Department of Natural Resources Warden Kyle Dilley observed a small vessel, operated by Chad Kippley, approach the dock at Lottes Park in the City of Monona traveling in a bow-up position with a large

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

outboard motor attached to the back. The warden conducted an investigative stop to determine whether the motor attached to the vessel exceeded the maximum horsepower rating for the vessel, in violation of WIS. STAT. § 30.62(2m).[2] Kippley was ultimately convicted of operating a boat while intoxicated as a second offense, based on evidence obtained as a result of the stop initiated by the warden. Kippley appeals the judgment of conviction, arguing that the circuit court erred in denying his motion to suppress evidence obtained as a result of the investigative stop because, according to Kippley, the warden lacked reasonable suspicion for the stop. For the reasons set forth below, I conclude that the stop was supported by reasonable suspicion of an overpowering motor violation, and I affirm the judgment of conviction.

BACKGROUND

¶2 Kippley filed a motion to suppress the evidence obtained as a result of the investigative stop premised upon a suspicion of an overpowering motor violation. At the hearing on the motion, the State presented the testimony of Warden Dilley.

¶3 Warden Dilley testified that at the time of the stop, he had been a conservation warden for approximately four years, he had enforced boating

[2] WISCONSIN STAT. § 30.62(2m) states:

> OVERPOWERING. No person may sell, equip or operate, and no owner of a boat may allow a person to operate, a boat with any motor or other propulsion machinery beyond its safe power capacity, taking into consideration the type and construction of such watercraft and other existing operating conditions.

In this opinion I sometimes refer to a violation of this provision as an overpowering motor violation.

regulations in season during each of those years, he was familiar with boating laws such as motor size for different types of boats, and he had a "[b]etter than average" familiarity with different types of boats and motor sizes and capacities. The warden further testified that on a busy boating day it's "not uncommon for [him] to have upwards of 50 contacts" with individuals, with nine out of ten of those contacts typically for fishing and boating equipment violations.

¶4 On June 7, 2014, as the warden was launching a patrol boat from the Lottes Park dock on the Yahara River in the City of Monona, he saw a vessel traveling upstream on the river with "what appeared to be a large object attached to the back or stern of the vessel." When the vessel approached the dock, the warden observed that the large object was "a large outboard motor attached to the transom [back part] of the vessel," and that the vessel was traveling "at a very slow speed" and "in a bow-[up] position." Based upon his observations, the warden made contact with the operator of the vessel, Kippley, to investigate whether the motor attached to the vessel exceeded the maximum horsepower rating for the vessel. The warden was not able to determine the motor's horsepower capacity from looking at the motor because the motor had been painted over.

¶5 Based on his training and experience, the warden believed that a vessel traveling in the bow-up position indicates either that "the vessel is operating at a speed greater than slow no-wake ... or … that [the] vessel [is] possibly being equipped with a motor that is in excess of its maximum horsepower rating."

¶6 At the motion hearing, Kippley presented his own testimony as well as the testimony of a person who was on the dock when Kippley was stopped and of a person with approximately forty years' experience repairing marine engines

and boats. Kippley testified that when the warden stopped him, the warden explained that "he was suspicious of whether the vessel [Kippley was] operating was rated for an outboard motor with that high of a horsepower." The person on the dock at the time testified that he overheard the warden ask Kippley questions about the size of the motor relative to "the type of craft that the motor was on." The person with experience repairing marine engines and boats testified that whether a boat travels bow-up could depend on how the trim is set on the boat; that you cannot tell the power capacity of Kippley's motor solely by looking at it from a distance; that Kippley's old motor is heavier than newer motors; and that higher horsepower motors are heavier than lower horsepower motors.

¶7 The circuit court found that there is a "reasonable relationship between the motor's horsepower and the size of the motor." The court also found that Warden Dilley "is an experienced warden" and that his testimony was credible as to his observations of Kippley's vessel and his opinion that those observations suggested that the motor may be oversized. The court further found that given the warden's experience, one reasonable inference from the vessel's bow-up position and the painted over motor was that the motor was too powerful for the vessel and, therefore, the warden was entitled to follow up and investigate that inference. Thus, the court ruled that there was "an adequate basis for the stop" and denied Kippley's motion to suppress.

DISCUSSION

¶8 Kippley argues that the circuit court erred in denying his motion to suppress evidence for two reasons: (1) the warden did not have reasonable suspicion of a violation of the overpowering motor statute; and (2) the stop was premised upon an unreasonable mistake of law that the size or weight of the motor

could violate the overpowering motor statute. I address and reject both arguments below.

A. Standard of Review

¶9 The Fourth Amendment of the United States Constitution and article I, section 11 of the Wisconsin Constitution both protect against unreasonable searches and seizures. ***State v. Maddix***, 2013 WI App 64, ¶13, 348 Wis. 2d 179, 831 N.W.2d 778. Our supreme court has recognized two types of seizures—investigatory stops and arrests. ***State v. Young***, 2006 WI 98, ¶¶20, 22, 294 Wis. 2d 1, 717 N.W.2d 729. Investigatory stops must be supported by reasonable suspicion. ***Id.***, ¶20. To execute a valid investigatory stop consistent with the United States and Wisconsin Constitutions, a law enforcement officer must have reasonable suspicion to believe that a crime or traffic violation has been or will be committed. ***State v. Popke***, 2009 WI 37, ¶23, 317 Wis. 2d 118, 765 N.W.2d 569.

¶10 In assessing whether a stop is supported by reasonable suspicion, we consider whether "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" the intrusion of the stop. ***State v. Post***, 2007 WI 60, ¶10, 301 Wis. 2d 1, 733 N.W.2d 634 (quoting ***Terry v. Ohio***, 392 U.S. 1, 21 (1968)). We determine the reasonableness of a stop based on the totality of facts and circumstances. ***Post***, 301 Wis. 2d 1, ¶13. "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." ***Popke***, 317 Wis. 2d 118, ¶23 (quoted source omitted).

¶11 When we review a motion to suppress, we employ a two-step analysis. ***Young***, 294 Wis. 2d 1, ¶17. We uphold the circuit court's factual findings unless they are clearly erroneous. ***Id.*** We review de novo whether an investigatory stop is constitutional based on those facts. *See* ***State v. Patton***, 2006 WI App 235, ¶7, 297 Wis. 2d 415, 724 N.W.2d 347.

B. Reasonable Suspicion of Overpowering Motor Violation

¶12 Kippley argues that the warden did not have reasonable suspicion of a violation of the overpowering motor law here because: (1) there is no reasonable relationship between a vessel's motor size or weight and its horsepower; (2) a vessel traveling bow-up in the water does not necessarily indicate that its motor is overpowered; and (3) the warden did not testify to having any "trainings related to boat equipment." Kippley's argument fails because it ignores the totality of facts and circumstances.

¶13 Here, the circuit court credited the warden's testimony that he observed a small vessel with a large motor travelling very slowly in a bow-up position, that the motor had no visible horsepower markings, and that based on his training and experience those observations indicated that the vessel may be equipped with a motor in excess of the vessel's maximum horsepower rating. Based on these facts, I agree with the circuit court that the warden had reasonable suspicion of an overpowering motor violation and, therefore, reasonable suspicion to conduct the investigative stop.

¶14 Kippley contends that there is no reasonable relationship between a motor's size or weight and its horsepower. Kippley appears to suggest that it was, therefore, unreasonable for the warden to observe the vessel's large motor and infer that it may be overpowered for the vessel. However, Kippley's own

witness—the person with engine repair experience—testified that higher horsepower motors are typically heavier than lower horsepower motors. Thus, Kippley's argument is not persuasive.

¶15 Kippley also contends that a boat traveling bow-up in the water does not necessarily indicate that its motor is overpowered, and that "the setting of trim on the boat will impact" the position of the boat's bow. However, Kippley does not dispute that a boat's bow-up position *could* indicate that its motor is overpowered. The warden is not required to eliminate all possible innocent reasons for the bow's position before conducting an investigative stop. *See generally* ***State v. Griffin***, 183 Wis. 2d 327, 333, 515 N.W.2d 535 (Ct. App. 1994) ("If 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." (quoted source omitted)). The warden testified that traveling in the bow-up position is indicative of either going faster than slow no-wake or being equipped with an overpowered motor. Here, where Kippley's vessel was already traveling very slowly, it was reasonable for the warden to investigate the alternative possibility of an overpowering motor violation, even if there were other potential legal reasons for the bow's position.

¶16 Finally, Kippley contends that the warden lacked training or experience that would render him "capable of judging the standards of the statute" because the warden did not list any "trainings related to boat equipment." However, the record supports the circuit court's reliance on the warden's undisputed experience and familiarity with boating equipment and laws. As noted above, the warden had been a conservation warden for approximately four years and was familiar with boating laws. The warden further testified that on a busy

boating day it's "not uncommon for [him] to have upwards of 50 contacts" with individuals, with nine out of ten of those contacts typically for fishing and boating equipment violations. To the extent that Kippley argues that additional specialized training is necessary in order to form the suspicion that Kippley's vessel was violating the overpowered motor statute, Kippley fails to develop that argument, and I do not consider it further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (appellate court need not address undeveloped arguments).

C. Mistake of Law

¶17 Kippley argues that the warden's "mistaken belief that the size or weight of the motor in relation to the boat could violate the statute is an unreasonable interpretation of the law" and, therefore, the stop was unreasonable. However, Kippley misrepresents the record. The warden did not believe that the size or weight of the motor could violate the statute. Rather, the warden testified that he stopped the vessel to investigate whether the vessel was "in excess of [the] maximum horsepower rating" in violation of Wisconsin statutes, based upon his "observations of [the] vessel while it was on the lake." Those observations included the fact that the vessel was traveling slowly in a bow-up position. Thus, contrary to Kippley's contention, the investigative stop was not premised upon a mistake of law regarding the motor's size or weight violating any statute but, rather, upon reasonable suspicion that Kippley's vessel was equipped with an overpowered motor in violation of WIS. STAT. § 30.62(2m).

CONCLUSION

¶18 For the reasons stated, I conclude that Warden Dilley had reasonable suspicion to stop Kippley and his vessel to investigate a possible overpowering motor violation. I therefore affirm the judgment of conviction.

By the Court.—Judgment affirmed.

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