

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 7, 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. 2016AP662

Cir. Ct. Nos. 2015TR6112
2015TR6113

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN J. VALENTI,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: THOMAS J. GRITTON, Judge. *Affirmed.*

¶1 REILLY, P.J.¹ John J. Valenti appeals the circuit court's denial of his motion to suppress evidence and subsequent conviction for operating under the

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

influence, first offense, contrary to WIS. STAT. § 346.63(1)(a). Valenti argues that the officer lacked reasonable suspicion to extend the traffic stop in order to investigate whether he was under the influence. We affirm.

¶2 The facts of this case are not in dispute. On May 31, 2015, at approximately 5:00 p.m., Inspector Scott Hlinak of the Wisconsin State Patrol was traveling southbound on Highway 41 in an unmarked squad car. Highway 41 has two lanes for southbound travel. After moving into the left-hand lane to pass a slow moving farm vehicle that was driving on the shoulder and in a large portion of the right-hand lane, Hlinak observed another vehicle pass the farm vehicle by trying to “squeeze past or use the right-hand lane only ... while there was also a [vehicle in the left-hand lane].” Hlinak stated that this vehicle, driven by Valenti, “caught [his] attention” because “moving to the left-hand lane [was] probably the only safe option.” Valenti’s vehicle then sped up and passed several vehicles, including Hlinak’s vehicle, in the right lane “at a rate higher than the speed limit.”²

¶3 Hlinak stopped Valenti for traveling 82 miles per hour (mph), which was 17 mph over the posted speed limit of 65 mph. Hlinak approached Valenti’s vehicle on the passenger side, where Valenti’s wife was seated. As soon as Hlinak made contact with the vehicle he “could smell a strong odor of intoxicants coming from inside of the vehicle” through the open window. At the time, Hlinak was unable to ascertain which occupant the odor was coming from, but it was strong enough that he asked whether there were any open intoxicants inside the vehicle,

² Hlinak testified that his vehicle was “equipped with an Applied Concepts same direction moving radar” and he received readings from Valenti’s vehicle of 81 and 82 mph.

which Valenti and his wife denied. Hlinak testified that Valenti's wife "stated she had been drinking wine earlier in the day."

¶4 Hlinak returned to his vehicle and wrote Valenti a citation for speeding.³ When he returned with the citation, Hlinak asked Valenti to move his vehicle further toward the right shoulder for safety due to the heavy traffic. Hlinak then requested that Valenti get out of the vehicle to help him discover who the odor of intoxicants was coming from and "to verify that ... Valenti was okay to drive." Hlinak "smell[ed] a strong odor of intoxicants on [Valenti's] breath." Hlinak performed field sobriety tests on Valenti and subsequently issued him a first offense OWI citation.⁴

¶5 Valenti filed a motion to suppress. At the motion hearing, Hlinak admitted that up to the time of the field sobriety tests, apart from the odor of intoxicants, he noted no other signs of impairment based on Valenti's demeanor or appearance. The circuit court determined that Hlinak had reasonable suspicion to extend the traffic stop to administer field sobriety tests and denied Valenti's motion to suppress evidence. Following a stipulated court trial, Valenti was convicted under WIS. STAT. § 346.63(1)(a) for operating a motor vehicle with a prohibited alcohol concentration. Valenti appeals.

¶6 Valenti does not dispute that Hlinak had probable cause to stop him for speeding. He argues instead that Hlinak lacked specific, articulable facts

³ Valenti does not challenge his speeding conviction on appeal.

⁴ The record on appeal does not indicate whether Valenti failed any or all of the field sobriety tests. We will assume for the purpose of this decision that he failed some or all of the tests. We will also assume that Hlinak performed a breathalyzer test on Valenti as the record notes that Valenti had a BAC of .18 percent.

which would justify expanding the purpose of the stop from speeding to suspicion of operating while under the influence.

¶7 Once a justifiable stop has been made, if additional suspicious factors come to the officer's attention "which are sufficient to give rise to an articulable suspicion that the person has committed or is committing an offense or offenses separate and distinct from the acts that prompted the officer's intervention in the first place, the stop may be extended and a new investigation begun." *State v. Betow*, 226 Wis. 2d 90, 94-95, 593 N.W.2d 499 (Ct. App. 1999). We must, therefore, determine whether Hlinak "discovered information subsequent to the initial stop which, when combined with information already acquired, provided reasonable suspicion" that Valenti was driving while under the influence. *State v. Colstad*, 2003 WI App 25, ¶19, 260 Wis. 2d 406, 659 N.W.2d 394.

¶8 The test for reasonable suspicion is whether, 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; *see also* WIS. STAT. § 968.24. Extension of the stop, however, "must be based on more than an officer's 'inchoate and unparticularized suspicion or 'hunch.''" *Post*, 301 Wis. 2d 1, ¶10 (quoting *Terry v. Ohio*, 392 U.S. 1, 27 (1968)). "Rather, 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." *Post*, 301 Wis. 2d 1, ¶10 (quoting *Terry*, 392 U.S. at 21).

¶9 In this case, Valenti argues that Hlinak lacked reasonable suspicion because the only fact supporting Hlinak’s belief was the general odor of intoxicants. Relying on similarities to the facts in *State v. Meye*, No. 2010AP336, unpublished slip op. ¶¶2-3 (WI App July 14, 2010), Valenti contends that the odor of intoxicants alone cannot establish reasonable suspicion.

¶10 We disagree with Valenti’s assertion that the odor of intoxicants was the only fact supporting Hlinak’s suspicion that Valenti was under the influence. Valenti was speeding—going 17 mph over the posted speed limit—and driving in a manner that Hlinak considered unsafe when Valenti passed the farm vehicle. Both observations, one illegal and one unsafe, demonstrate suspicion of impaired judgment on Valenti’s part, sufficient to warrant further investigation by Hlinak when combined with the odor of intoxicants. *Cf. Post*, 301 Wis. 2d 1, ¶24 (“We therefore determine that a driver’s actions need not be erratic, unsafe, or illegal to give rise to reasonable suspicion.”); *County of Sauk v. Leon*, No. 2010AP1593, unpublished slip op. ¶20 (WI App Nov. 24, 2010) (suggesting that speeding at bar time may support reasonable suspicion). We conclude that the odor of intoxicants, unsafe driving, and speeding create reasonable suspicion under the totality of the circumstances that Valenti was under the influence. *See Town of Grand Chute v. Thomas*, No. 2011AP2702, unpublished slip op. ¶9 (WI App May 30, 2012) (finding reasonable suspicion where defendant was speeding, weaving within his lane, and the officer smelled an odor of intoxicants). Hlinak properly extended the traffic stop to investigate further and administer field sobriety and breathalyzer tests.

By the Court.—Judgment affirmed.

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

