COURT OF APPEALS
DECISION
DATED AND FILED

September 26, 217

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2017AP61 **Cir. Ct. No. 2016TR9717**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SARAH ANN WALLK,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEAN M. KIES, Judge. *Affirmed*.

¶1 BRENNAN, P.J.[1] Sarah Ann Wallk appeals an order finding her refusal to submit to an evidentiary chemical test of her blood unreasonable. Wallk argues that the odor of alcohol from inside the vehicle and a driver's admission of

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

drinking several hours earlier does not constitute "information [discovered] subsequent to the initial stop [that], when combined with information already acquired, provided reasonable suspicion" sufficient to continue a traffic stop for the purpose of performing field sobriety tests. *See* ***State v. Colstad***, 2003 WI App 25, ¶¶11, 19, 260 Wis. 2d 406, 659 N.W.2d 394. We disagree and affirm.

BACKGROUND

¶2 This case concerns a routine traffic stop conducted at approximately 2:20 a.m. on April 16, 2016. A sheriff's deputy on patrol on I-94 in Milwaukee was driving westbound behind a group of vehicles traveling near each other in an area with a speed limit of fifty miles per hour. He observed one light-colored vehicle speed up and "pull away" from his vehicle and the other cars. He estimated his own speed prior to that moment as "55, 60." He followed the light-colored vehicle, and he accelerated to "between 65 and 70." He did not use a radar gun or pace the car with his vehicle.[2] He testified that he would instead "match the speed" as he followed a vehicle, and that in this case he matched the speed of the vehicle at "approximately 65 miles per hour."

¶3 The deputy pulled the vehicle over. He approached the vehicle on the passenger side. He did not speak to the two passengers. He requested a driver's license from the driver and identified her as Wallk. He informed her that he had pulled her over for exceeding the speed limit, and she answered that she was sorry.

[2] The deputy testified that the reason he did not pace the vehicle was that his vehicle did not have a certified speedometer.

¶4 His testimony was that "when she said that, when she gave [him] that response," that was the moment that he "detected the odor of alcoholic beverage from that side of the vehicle." He then "left the passenger side and walked to the driver's side." He told Wallk that he "smelled alcoholic beverage emitting from inside the vehicle" and asked if she had been drinking. She said that she had consumed alcohol "before dinner," which she said was "about nine, nine-thirty." The deputy then asked Wallk to perform field sobriety tests. Based on her performance on the field sobriety tests, the deputy believed she had had "more than two apple beers" and was impaired. When Wallk was then asked to do a preliminary breath test, she refused. She was arrested.

¶5 Wallk filed a timely request for a refusal hearing, which was held December 21, 2016. At the refusal hearing, Wallk stipulated that she was read the informing the accused form and that she refused; the sole basis for the challenge to the refusal was whether reasonable suspicion existed to support the stop and continued detention. Wallk argued that the refusal was reasonable because her stop and continued detention were unlawful—specifically, that there was not reasonable suspicion for the traffic stop and that the evidence was not sufficient to continue to detain her for field sobriety tests. The circuit court concluded that the deputy had reasonable suspicion for the stop based on his observation of his own vehicle's speed as he followed Wallk's vehicle. The circuit court also concluded that the odor of alcohol the deputy noticed when he spoke to Wallk from the passenger side of the car and Wallk's admission of drinking alcohol earlier in the evening provided a sufficient legal basis to continue the detention. The circuit court therefore concluded that Wallk's refusal was unreasonable.

¶6 Wallk timely appealed. On appeal, Wallk focuses solely on whether the deputy had the reasonable suspicion necessary to "continue the detention" for field sobriety testing.

DISCUSSION

I. The odor of alcohol from the vehicle and the driver's admission of drinking earlier in the evening provided additional information that supported the continued detention.

A. Standard of review and relevant legal principles.

¶7 "[A]n officer may perform an investigatory stop of a vehicle based on a reasonable suspicion of a non-criminal traffic violation." ***Colstad***, 260 Wis. 2d 406, ¶11 (citation omitted). "If, during a valid traffic stop, the officer becomes aware of additional suspicious factors 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). "The validity of the extension is tested in the same manner, and under the same criteria, as the initial stop." ***Id.***

¶8 When presented with a challenge to a continued detention following a traffic stop, "[w]e must determine whether the officer discovered information subsequent to the initial stop which, when combined with information already acquired, provided reasonable suspicion that [the defendant] was driving while under the influence of an intoxicant." ***Colstad***, 260 Wis. 2d 406, ¶19.

¶9 The question of whether a traffic stop is reasonable is a question of constitutional fact. ***State v. Knapp***, 2005 WI 127, ¶19, 285 Wis. 2d 86, 700

N.W.2d 899. A question of constitutional fact is a mixed question of law and fact to which we apply a two-step standard of review. ***State v. Martwick***, 2000 WI 5, ¶16, 231 Wis. 2d 801, 604 N.W.2d 552. 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. ***State v. Payano-Roman***, 2006 WI 47, ¶16, 290 Wis. 2d 380, 714 N.W.2d 548.

B. The circuit court's factual finding is not clearly erroneous.

¶10 Wallk asserts that the circuit court made a clearly erroneous factual finding when it stated the following:

> As the deputy was talking to Ms. Wallk he indicated that she was speeding and she said oh, I'm sorry. At that point in time [the Deputy] again smelled the odor of intoxicants now on the driver was his testimony. While Ms. Wallk was calm and cooperative, he asked her whether or not she had been drinking and she said yes, I had been drinking around dinner at 9 to 9:30 p.m. So she admitted having some drinks.
>
> Based upon that conversation I think it was appropriate for him to ask Ms. Wallk to actually get out of the vehicle and perform the field sobriety tests.

¶11 Wallk argues that the circuit court's finding that the deputy smelled an odor "on the driver" is inconsistent with the deputy's testimony that he could not determine from whom the odor was coming. We disagree. The deputy's testimony on direct was as follows:

> I made the passenger side approach …. I asked for her driver's license. She gave me her I.D.… She said oh, I'm sorry….[W]hen she said that, when she gave me that response, that's when I detected the odor of alcoholic beverages from *that side of the vehicle*. So then I just left the passenger side and walked *to the driver side*. (Emphasis added.)

On cross-examination, the deputy was asked about the point at which he walked up to the passenger door:

> [Trial counsel]: And you observed an odor of intoxicants emitting from inside the vehicle, correct?
>
> [Deputy]: Yes, that's correct.
>
> [Trial counsel]: Would you agree that from the odor of intoxicants you can't tell first off which person in the vehicle was drinking at that point, correct?
>
> [Deputy]: That's correct.

¶12 Wallk mischaracterizes the deputy's testimony. The deputy testified first that from his vantage point on the passenger side of the car, he spoke to the driver and that when she answered him, he noticed an odor of alcohol from "that side of the vehicle." He specifically testified that he did not speak to the passengers. Although he conceded on cross-examination that smelling the odor from that side of the vehicle did not necessarily tell him which person was drinking, he did not back off from his prior testimony. The choice of words on cross-examination regarding the location of the odor—generally "inside the vehicle"—was defense counsel's, not the deputy's.

¶13 Based on this review of the deputy's testimony, we reject Wallk's argument that the circuit court's finding was clearly erroneous.

C. The circuit court correctly found that reasonable suspicion supported the continuation of the stop for field sobriety tests.

¶14 The question presented is whether the continued detention of Wallk was supported by reasonable suspicion, and that depends on whether "the officer [became] aware of additional suspicious factors which are sufficient to give rise to an articulable suspicion that the person has committed or is committing an offense

… separate and distinct from the acts that prompted the officer's intervention in the first place[.]" *See* ***Betow***, 226 Wis. 2d at 94-95. The test for reasonable suspicion is a totality of the circumstances test. ***State v. Waldner***, 206 Wis. 2d 51, 58, 556 N.W.2d 681 (1996). It is well established that the existence of alternative innocent explanations do not invalidate reasonable suspicion:

> Suspicious conduct by its very nature is ambiguous, and the principal function of the investigative stop is to quickly resolve that ambiguity. Thus, when 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. Police officers are not required to rule out the possibility of innocent behavior[.]

Waldner, 206 Wis. 2d at 60 (citation omitted).

¶15 Wallk argues that "the information acquired after the stop would not have led a reasonable officer to conclude that [she] was driving her vehicle while under the influence of an intoxicant." Wallk contends that the "only specific fact that [the deputy] possessed regarding [her] alcohol consumption was that she had consumed two drinks with dinner hours earlier." Wallk contends that because the odor of alcohol from inside the car might not have come from her but rather from her passengers, it cannot be the basis of reasonable suspicion.

¶16 Wallk misunderstands the limited demands of reasonable suspicion. As noted above, where specific articulable facts give rise to suspicion, an officer has the right to investigate "notwithstanding the existence of other innocent inferences that could be drawn." That is the case here. The odor of intoxicants and the admission from the driver of drinking earlier in the evening was "information [discovered] subsequent to the initial stop[.]" This information, "[c]ombined with information already acquired"—namely, the fact that the driver

was speeding at 2:22 a.m.—created "a reasonable inference of unlawful conduct [that] can be objectively discerned." *See* ***id.*** Therefore reasonable suspicion existed to continue the detention of Wallk for field sobriety tests. We therefore affirm the circuit court's order finding Wallk's refusal unreasonable.

By the Court.—Order affirmed.

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