

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 7, 2017

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. 2017AP866-CR

Cir. Ct. No. 2015CT137

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRADLY E. AMMANN,

DEFENDANT-APPELLANT.

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

¶1 FITZPATRICK, J.¹ Bradley Ammann appeals a judgment of conviction for operating a motor vehicle while intoxicated, fourth offense.

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.

Ammann argues that the arresting officer lacked reasonable suspicion to extend the traffic stop and perform field sobriety tests. Ammann also argues that the circuit court erroneously exercised its discretion when it used the incorrect legal standard in determining whether the arresting officer had sufficient evidence to request that Ammann take a preliminary breath test. I reject Ammann's arguments and affirm.

BACKGROUND

¶2 The following facts are gleaned from the record and the circuit court's relevant findings from the suppression hearing and the motion for reconsideration hearing.

¶3 In September 2015, State Trooper Jeffrey Hill stopped Bradley Ammann for driving seventy-four miles per hour in a fifty-five mile-per-hour zone. When Trooper Hill approached the passenger side of the vehicle, Ammann stated that he and his wife had just left a wedding reception. Trooper Hill could smell an odor of intoxicants coming from the vehicle, but could not ascertain if the odor was coming from Ammann or his wife. When Trooper Hill asked Ammann if he had been drinking, Ammann admitted to having had one drink before they left the reception and stated that his wife had more to drink than he did.

¶4 Trooper Hill asked Ammann to exit the vehicle. After Ammann exited the vehicle, Trooper Hill could smell an odor of intoxicants on Ammann. At that point, Ammann amended his story somewhat and said that he had the one drink but it may have been a "stiff one or a double."

¶5 Trooper Hill then had Ammann perform field sobriety tests. Trooper Hill first had Ammann recite the alphabet twice. During the first set, Ammann

recited the alphabet to the letter P and then stopped for a short time before finishing it correctly. During the second recitation, Ammann said “A, B, C, D, L, M, N, O, P” and then finished correctly. Trooper Hill checked Ammann’s eyes for HGN clues and observed four clues of intoxication out of a possible six clues.² After that, Ammann performed the walk and turn test, where Trooper Hill observed two clues of intoxication out of a possible eight clues.³ Finally, Trooper Hill had Ammann do a one-leg stand and did not observe any indications of intoxication from that exercise.

¶6 Following Ammann’s performance on the field sobriety tests, Trooper Hill administered a preliminary breath test which read Ammann’s alcohol concentration at .068. Trooper Hill decided to issue Ammann only a citation for speeding and let him go. Per procedure, Trooper Hill returned to his car and checked Ammann’s driving record. Ammann’s driving record indicated that he had three prior convictions for operating while under the influence of intoxicants, and that he could not legally operate a vehicle with an alcohol concentration of more than .02. Trooper Hill then placed Ammann under arrest for operating a vehicle with a prohibited alcohol concentration.

¶7 Ammann filed a motion to suppress evidence in the circuit court arguing that Trooper Hill did not have reasonable suspicion to extend the traffic stop or conduct field sobriety tests, and Trooper Hill did not have probable cause

² Trooper Hill testified that he observed two clues during smooth pursuit and one clue on each eye.

³ Trooper Hill testified that, during the second set of nine steps, Ammann missed the heel to toe once and, although Ammann was instructed to take nine steps, he counted to nine but took ten steps.

to believe Ammann was operating while intoxicated prior to administering the preliminary breath test. The circuit court denied Ammann's motion to suppress in an oral ruling. The circuit court also denied Ammann's motion for reconsideration. Ammann pled no contest to operating a motor vehicle while intoxicated, fourth offense. The circuit court stayed the sentencing hearing pending a timely appeal. Ammann now appeals the circuit court's denial of his motion to suppress.

¶8 Other pertinent facts will be mentioned in the Discussion section below.

DISCUSSION

¶9 The Fourth Amendment to the United States Constitution and Article 1, §11 of the Wisconsin Constitution protect individuals against unreasonable searches and seizures. Whether police conduct violated this constitutional guarantee is a question of constitutional fact. *State v. Griffith*, 2000 WI 72, ¶23, 236 Wis. 2d 48, 613 N.W.2d 72. This Court reviews the circuit court's findings of historical or evidentiary facts under a clearly erroneous standard, but the circuit court's determination of constitutional fact is reviewed de novo. *Id.*; *State v. Hajicek*, 2001 WI 3, ¶15, 240 Wis. 2d 349, 620 N.W.2d 781.

A. Trooper Hill had reasonable suspicion to extend the traffic stop and have Ammann perform field sobriety tests.

¶10 Ammann argues that Trooper Hill lacked reasonable suspicion to extend the traffic stop by asking Ammann to exit the vehicle and perform field sobriety tests. I disagree.

¶11 A law enforcement officer may stop a vehicle when he or she reasonably believes the driver is violating, or has violated, a traffic law. *E.g. State v. Hogan*, 2015 WI 76, ¶34, 364 Wis. 2d 167, 868 N.W.2d 124; *State v. Betow*, 226 Wis. 2d 90, 93, 593 N.W.2d 499 (Ct. App. 1999). A law enforcement officer may extend the stop if he or she becomes aware of additional factors which “give rise to an articulable suspicion that the person has committed or is committing an offense or offenses” separate from the violation that prompted the officer’s initial investigation. *State v. Colstad*, 2003 WI App 25, ¶19, 260 Wis. 2d 406, 659 N.W.2d 394 (quoting *Betow*, 226 Wis. 2d at 94–95). This extended inquiry must be supported by reasonable suspicion. *Hogan*, 364 Wis. 2d 167, ¶35.

¶12 A determination of whether an officer had reasonable suspicion depends on the totality of the circumstances. *Id.*, ¶36. This is a “common sense test: under all the facts and circumstances present[ed], what would a reasonable police officer reasonably suspect in light of his or her training and experience.” *Colstad*, 260 Wis. 2d 406, ¶8, (quoting *State v. Young*, 212 Wis. 2d 417, 424, 569 N.W.2d 84 (Ct. App. 1997)). “Although officers sometimes will be confronted with behavior that has a possible innocent explanation, a combination of behaviors—all of which may provide the possibility of innocent explanation—can give rise to reasonable suspicion.” *Hogan*, 364 Wis. 2d 167, ¶36.

¶13 Accordingly, the legality of the extension of the traffic stop in this case turns on the presence of factors which collectively amount to reasonable suspicion that Ammann was driving while intoxicated. *See id.*, ¶37.

¶14 Ammann attacks the actions of Trooper Hill, first, by contending that the traffic stop was extended in violation of Ammann’s constitutional rights because Ammann was asked to exit the vehicle. However, a law enforcement

officer may order a driver to exit the vehicle incident to a lawful traffic stop without violating the Fourth Amendment. *State v. Johnson*, 2007 WI 32, ¶23, 299 Wis. 2d 675, 729 N.W.2d 182 (citing *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S. Ct. 330, 54 L.Ed.2d 331 (1977), and *Michigan v. Long*, 463 U.S. 1032, 103 S. Ct. 3469, 77 L.Ed.2d 1201 (1983)). Trooper Hill did not unreasonably extend the stop when he asked Ammann to exit the vehicle.⁴

¶15 Ammann also appears to argue that, even after Ammann stepped out of the vehicle, there was still no reasonable suspicion that he operated the vehicle under the influence of intoxicants because Ammann told Trooper Hill he had only one drink. This argument also goes nowhere because Trooper Hill was not obliged to believe Ammann and stop the investigation. After asking Ammann to exit the vehicle, Trooper Hill could plainly smell an odor of intoxicants on Ammann, who was the driver. Since it did not violate the Fourth Amendment to ask Ammann to exit his vehicle during the traffic stop, the odor of intoxicants unmistakably linked to Ammann after he exited the vehicle can give rise to reasonable suspicion that Ammann was driving under the influence.

¶16 Moreover, Ammann mischaracterizes the nature of the reasonable suspicion analysis. Reasonable suspicion exists even if there could be an alternative, innocent explanation for a factor, and factors are considered in the aggregate. *Hogan*, 364 Wis. 2d 167, ¶¶36-37. Accordingly, the smell of intoxicants

⁴ Ammann, relying on *State v. Secrist*, 224 Wis. 2d 201, 217, 589 N.W.2d 387 (1999), also asserts that, because the odor of alcohol might have come from his wife and not him before he got out of the vehicle, the odor of intoxicants could not have been a basis of reasonable suspicion that he was operating while intoxicated. But, this argument misses the mark because, as shown, the fact that Ammann was told to get out of the car does not violate Ammann's constitutional rights.

combined with Ammann’s admission that he had been drinking at a wedding reception (along with his amendment that the “one drink” may have had a large amount of alcohol in it), and that he was driving almost twenty miles per hour over the speed limit, all contribute to reasonable suspicion that he was operating his vehicle while intoxicated. *See, e.g. State v. Krause*, 168 Wis. 2d 578, 587-88, 484 N.W.2d 347 (Ct. App. 1992); *State v. Valenti*, 2016 WI App 80, unpublished slip op. ¶10 (WI App. Sept. 7, 2016). Therefore, I conclude reasonable suspicion existed for Trooper Hill to extend the traffic stop to have Ammann to perform field sobriety tests.

B. Sufficient facts existed to support a finding that Trooper Hill had probable cause to administer the preliminary breath test.

¶17 Ammann argues next that the circuit court erred when it mistakenly applied the “reasonable suspicion” standard in determining if Trooper Hill could properly administer a preliminary breath test on Ammann. I reject this argument and conclude that the circuit court’s possible application of the incorrect legal standard is not dispositive. An independent review of the facts demonstrates that Trooper Hill had probable cause to administer the preliminary breath test.

¶18 A law enforcement officer may give a preliminary breath test to a driver if the officer has probable cause to believe the driver is operating the vehicle while under the influence of an intoxicant. WIS. STAT. § 343.303. This “‘probable cause to believe’ refers to a quantum of proof greater than the reasonable suspicion necessary to justify an investigative stop ... but less than the level of proof required to establish probable cause for arrest.” *County of Jefferson v. Renz*, 231 Wis. 2d 293, ¶47, 603 N.W.2d 541 (1999)(quoting WIS. STAT. § 343.303).

¶19 It is undisputed that the circuit court enunciated the incorrect standard in making its oral ruling at the suppression hearing. The circuit court stated:

We have got a speeding violation, an admission of drinking, odor of intoxicants, and then asking for the field sobriety test I think at that point the officer did have reason to continue that stop, and because of the clues that were given during the field sobriety test I think that gave [Trooper Hill] *reasonable suspicion* that he could then ask for the PBT.

(Emphasis added.)

¶20 A circuit court erroneously exercises its discretion if it fails to consider relevant factors or “makes an error of law.” *Kenyon v. Kenyon*, 2004 WI 147, ¶10, 277 Wis.2d 47, 690 N.W.2d 251 (quoting *Rohde-Giovanni v. Baumgart*, 2004 WI 27, ¶17, 269 Wis. 2d 598, 676 N.W.2d 452). When a party alleges the circuit court erroneously exercised its discretion by applying the incorrect legal standard, this Court reviews the issue de novo. *Eugene F. Rogers v. Mary Jo Rogers*, 2007 WI App 50, ¶7, 300 Wis. 2d 532, 731 N.W.2d 347. This Court will affirm the circuit court if, when applying the proper legal standard, the facts support the circuit court’s decision. *Id.*

¶21 Initially, I conclude that the most likely scenario is that the circuit judge simply misspoke when he used the phrase “reasonable suspicion” as was just mentioned. I come to that conclusion because, moments before that in his decision from the bench, the circuit judge properly used the phrase “probable cause” in the context of whether there were sufficient facts for Trooper Hill to give the preliminary breath test. As a result, it is highly likely the circuit judge had the correct standard in mind but just said the wrong phrase at that point.

¶22 In addition, even assuming the circuit court applied the incorrect legal standard, this Court reviews the facts independently of the circuit court’s

analysis. Accordingly, I conclude that sufficient facts existed to support a finding that Trooper Hill had probable cause to give Ammann a preliminary breath test.

¶23 Ammann exhibited several indicators of intoxication. Trooper Hill smelled an odor of intoxicants on Ammann, both in his vehicle and when he exited the vehicle. Ammann admitted to drinking at a wedding reception earlier in the evening. Though he initially stated he had had one drink, he later confessed it may have been “a stiff one or a double.” Ammann subsequently had trouble with some of the field sobriety tests, including with the alphabet test, the HGN test, and the walk and turn test.⁵ All these factors gave Trooper Hill probable cause to believe that Ammann may have been operating his vehicle while intoxicated. Therefore, Trooper Hill properly administered the preliminary breath test.⁶

¶24 Furthermore, Trooper Hill was faced with the exact situation in which a preliminary breath test could be useful. *See County of Jefferson*, 231 Wis. 2d 293, ¶¶49-50. Though Ammann exhibited some signs of intoxication, he did not exhibit others. *See id.* The preliminary breath test in this situation was useful in determining whether there was probable cause for an OWI arrest.

¶25 Therefore, although the circuit court may have applied the incorrect legal standard, Trooper Hill nonetheless had probable cause to administer a preliminary breath test.

⁵ Ammann contends that Trooper Hill did not administer some of the sobriety tests correctly but supports this argument with only his counsel’s view of what is required. I will assume this argument was raised in the circuit court and rejected by the circuit court. Ammann produces nothing to show the circuit court’s disdain for this argument was clearly erroneous.

⁶ Ammann also complains that the circuit court referred to the field sobriety “test” rather than “tests” but, in context, it is clear the circuit court was referring to all the roadside testing of Ammann by Trooper Hill.

CONCLUSION

¶26 For those reasons, the circuit court's denial of Ammann's motion to suppress is affirmed, and this matter is remanded to the circuit court for sentencing.

By the Court.—Judgment affirmed.

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

