COURT OF APPEALS
DECISION
DATED AND FILED

March 21, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP1436-CR **Cir. Ct. No. 2016CM596**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT L. BENTZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Washington County: JAMES K. MUEHLBAUER, Judge. *Affirmed*.

¶1 NEUBAUER, C.J.[1] Robert L. Bentz appeals from a judgment of conviction for operating a vehicle while under the influence of an

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

intoxicant (OWI) and challenges the denial of his motion to suppress evidence on the grounds that police lacked reasonable suspicion to detain him and lacked probable cause to arrest him. We reject his challenges and affirm.

BACKGROUND

¶2 On June 5, 2016, at 2:17 a.m., West Bend Police Officer John Otte observed a vehicle, later identified as being operated by Bentz, traveling on Barton Avenue.[2] About 200 yards before turning onto Harrison Street, the vehicle prematurely activated its turn signal. After making a slightly wide turn, it proceeded down the middle of Harrison Street for a short distance. The vehicle turned into the first residential driveway, parking in the driveway and extinguishing its lights.

¶3 Otte parked his squad down the block and observed. A check on the vehicle's plate revealed a registration to Bentz at an address in Kewaskum, and there was no known relationship between the vehicle and the Harrison Street residence. No one exited or entered the vehicle. After about five minutes, the headlights lit, the car backed out, and it drove toward North Main Street.

¶4 Otte followed as the car turned onto North Main Street. After Otte's marked squad moved up from behind, the car's turn signal went on. After turning onto Jefferson Street, it pulled into the first residential driveway, parking partly on the grass.

[2] The factual background is based on Otte's testimony, which was largely undisputed (no one else testified). When there is a pertinent discrepancy or dispute, we will note it.

¶5 Otte parked in a position to observe because he found it odd that the car pulled into two separate residential driveways. In his report, Otte wrote that the car was "attempt[ing] to have me not follow him." Otte did not identify any relationship between the car and the Jefferson Street residence. No one exited or entered the car. After about five minutes, Otte left the area.

¶6 Otte returned about ten minutes later to check on the car. Bentz was outside, seated, and leaning up against the driver's side front area. The car had not moved.

¶7 Otte parked his squad on the street, without emergency lights or siren, and approached Bentz on foot. Otte asked Bentz "if everything was ok" and "what he was doing." Bentz responded that he was "just chilling," that "[h]e didn't want to drive anymore," and that he was trying to call his son. Otte asked whether he lived at the residence or knew who did, to which Bentz replied in the negative. When asked from where he had come, Bentz said that he "wasn't coming from anywhere." Otte smelled alcohol on Bentz and noted that his speech was slurred and his eyes were bloodshot and glossy. Otte believed Bentz had been consuming intoxicants.

¶8 Otte asked questions to determine a time line of Bentz's whereabouts and, in response, Bentz stated that he parked his vehicle at the Jefferson Street residence three to four hours prior. He said no one else drove his vehicle. Bentz explained that he had been walking around downtown, went to a local festival, walked back, and then just did not want to drive. Bentz claimed that he had been calling his son for hours and showed his phone to Otte as proof. Looking at the phone, Otte saw two outgoing calls to Bentz's son at 2:30 a.m. and at just before 8:00 p.m. the day prior.

¶9 Otte felt the hood, which was warm, indicating the vehicle had been driven recently.[3] Because of his prior observations, Otte knew the vehicle had not been parked in that driveway for three or four hours.

¶10 Otte then "confronted" Bentz about the problems with his account. Bentz then changed his story, stating that a woman had been driving his car and had parked it at its current location.

¶11 A woman then came out of the residence and told Otte that she knew that Bentz's vehicle was not parked at that location around midnight. She also said that she did not know Bentz.

¶12 Next, Bentz maintained that another woman had operated the vehicle, that she was now at home, and he offered his cell phone so Otte could call her and verify his explanation. Otte told Bentz that, before calling her, he wanted to understand Bentz's story. Bentz then admitted that he had parked the vehicle in the driveway. Because of Bentz's admission, Otte did not further inquire about the alleged woman driver.

¶13 Otte asked Bentz whether he had consumed alcohol, which Bentz denied. Upon consent from Bentz, Otte searched the vehicle and found no alcohol.

[3] A discrepancy exists with regard to which officer felt the car hood. Otte first testified that he touched the hood, but then indicated that it may have been Officer Doleschy, who arrived after Otte. The circuit court noted the discrepancy, but referred to Otte's written report, which states that Otte touched the hood and grille. In any event, our analysis and decision are not affected by any such discrepancy.

¶14 Otte then requested Bentz to perform standardized field sobriety tests, which Bentz refused to do. After Otte permitted him to call his lawyer, Bentz refused a second time to take a sobriety test. Otte then arrested him.

¶15 At some point, Otte was assisted at the scene by Officer Doleschy, who arrived in a marked squad without use of emergency lights or siren. Doleschy arrived sometime after Otte's initial contact with Bentz, but prior to the request for sobriety testing. Doleschy initially parked on the street, but then moved his squad onto the driveway in order to record Bentz's performance on the sobriety tests via the squad's camera.

¶16 Bentz was charged with OWI (third offense) and with a prohibited alcohol concentration (third offense). He moved to suppress evidence based on the lack of reasonable suspicion to detain and lack of probable cause to arrest. After an evidentiary hearing and briefing, the circuit court denied the motion. Upon pleading no contest, Bentz was found guilty of OWI (third offense). Bentz appeals.

DISCUSSION

Standard of Review

¶17 When reviewing a motion to suppress evidence on constitutional grounds, we use a two-part standard: we uphold the circuit court's factual findings unless clearly erroneous, and we independently review the application of those facts to the law. ***State v. Pinkard***, 2010 WI 81, ¶12, 327 Wis. 2d 346, 785 N.W.2d 592.

No Seizure Occurred when Otte Approached Bentz

¶18 Bentz contends that there was no reasonable suspicion to support his seizure, which he further contends occurred the moment Otte approached him to investigate his whereabouts. We disagree on both counts.

¶19 Under the Fourth Amendment of the United States Constitution, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." The Wisconsin Constitution contains the same language, and we generally have applied our state constitutional protections in the same way as the United States Supreme Court has applied the protections under the Fourth Amendment. ***State v. Kramer***, 2009 WI 14, ¶18, 315 Wis. 2d 414, 759 N.W.2d 598; ***State v. Young***, 2006 WI 98, ¶30, 294 Wis. 2d 1, 717 N.W.2d 729.

¶20 The protections against unreasonable seizures have bearing only when a government agent "seizes" a person. ***Young***, 294 Wis. 2d 1, ¶23. Not every encounter with police is a seizure under the Fourth Amendment. ***Florida v. Bostick***, 501 U.S. 429, 434 (1991). Courts have recognized two types of seizures: an investigatory or ***Terry*** stop and an arrest. ***County of Grant v. Vogt***, 2014 WI 76, ¶27, 356 Wis. 2d 343, 850 N.W.2d 253; ***Terry v. Ohio***, 392 U.S. 1, 30 (1968). An investigatory stop typically entails only temporary questioning and is constitutional if police have a reasonable suspicion that a crime has been or is about to be committed. ***Young***, 294 Wis. 2d 1, ¶20. An arrest is a more permanent seizure, often leading to a criminal prosecution, and is constitutional if police have probable cause to suspect that a crime has been committed. ***Id.***, ¶22.

¶21 A seizure occurs "when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." ***United***

States v. Mendenhall, 446 U.S. 544, 552 (1980) (quoting ***Terry***, 392 U.S. at 19 n.16). A person has been seized for constitutional purposes "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." ***Mendenhall***, 446 U.S. at 554. ***Mendenhall*** further explained:

> Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.

Id. at 554-55 (citations omitted); ***Vogt***, 356 Wis. 2d 343, ¶23.

¶22 Bentz argues that a reasonable person in his position would have believed that he was no longer free to leave once Otte approached him and Doleschy arrived.[4] The State argues that Bentz was first seized when Otte asked Bentz to perform the sobriety tests. Rejecting both positions, the circuit court concluded that Bentz was seized when, after Bentz gave problematic responses to the initial questions, Otte confronted him with those problems.

¶23 We reject Bentz's position and agree with the circuit court that no seizure took place upon the arrival and approach of the officers. We point to, in

[4] Bentz takes the position that Otte's initial contact with Bentz and Doleschy's arrival were nearly simultaneous. The circuit court specifically rejected this contention, indicating that Doleschy arrived sometime after Otte's initial contact with Bentz. The court noted, however, that the State conceded that Doleschy was on the scene "fairly early on in the investigation." Exactly when Doleschy arrived after Otte began his questioning does not change our analysis or decision.

particular, the following circumstances: Otte's initial contact was not by way of a traffic stop or by otherwise interdicting Bentz's freedom of movement. While Bentz sat on the ground next to his car, Otte parked his squad on the street. He never activated his emergency lights or siren. He approached on foot, never displaying or handling his firearm. There was nothing ominous reported about Otte's tone and his initial questions were nonconfrontational. The arrival and presence of Doleschy were even more low-key. He too initially parked on the street, never activating his emergency lights or siren. He also approached on foot without handling his firearm at any point. Doleschy made no contact with Bentz. These are not circumstances "so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave." ***Vogt***, 356 Wis. 2d 343, ¶24 (quoting ***INS v. Delgado***, 466 U.S. 210, 216 (1984)).

¶24 Bentz argues that he faced a "show of authority" at the outset because the officers arrived in marked squads, wearing uniforms and sidearms. The argument is unpersuasive. Marked squads, uniforms, and sidearms are well-known and common tools of the police profession, such that their presence, without more, does not establish that a reasonable person would have believed he was not free to leave.

¶25 Bentz asserts that Otte's testimony that he intended to "investigate" why Bentz was at the second residence indicates that this was an "investigatory detention" from the outset. But within the context of Otte's testimony, it is clear that "investigate" was just another way of saying "question" or "inquire." "Police questioning, by itself, is unlikely to result in" a constitutional violation. ***Delgado***, 466 U.S. at 216. Moreover, whether a detention occurs is objective, and Bentz

fails to explain how Otte's unspoken subjective intent to investigate could have lead him to believe that he was not free to go.[5] ***State v. Williams***, 2002 WI 94, ¶4, 255 Wis. 2d 1, 646 N.W.2d 834 (we apply an objective reasonable person test to determine whether a seizure has occurred based on the officer's words and actions under the totality of circumstances).

¶26 In his effort to show that the seizure occurred upon Otte's approach, Bentz points to Otte's initial questions, arguing that the inquiries were not indicative of a simple encounter, but were aimed to incriminate, e.g., asking him what he was doing and where he had been. The argument lacks merit. It is unreasonable to suggest that a seizure occurs unless police ask questions that are trivial or pointless. Bentz fails to explain how the substance of the questions made him believe that he was not free to leave. The initial questions were neither accusatory nor intimidating.[6] *See* 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 9.4(a), at 574-77 (5th ed. 2012) (quoted in ***Vogt***, 356 Wis. 2d 343, ¶38 n.17 ("[I]f an officer merely walks up to a person standing or sitting in a public place ... and puts a question to him [or her], this alone does not constitute a seizure.")); ***Vogt***, 356 Wis. 2d 343, ¶26 ("[T]here are countless interactions or encounters among police and members of the community. Not all encounters are seizures."). Moreover, it is reasonable for a conscientious officer to take a look at unusual

[5] Bentz cites to ***State v. Hoffman***, 163 Wis. 2d 752, 472 N.W.2d 558 (Ct. App. 1991), for the proposition that Otte's alleged investigatory intent is a relevant consideration. ***Hoffman*** is inapposite. It had nothing to do with when a seizure occurs or the related constitutional protections; the issue centered on the elements of criminal escape and whether the given jury instructions were defective. ***Id.*** at 760-62.

[6] While Bentz also points to the officer's question as to whether he had consumed alcohol, the record indicates that this question occurred after Otte confronted Bentz with his conflicting stories and before asking for consent to search the car for intoxicants.

behavior "to try to learn more about the situation by engaging [the individual] in a consensual conversation." ***Id.***, ¶51.

¶27 Bentz also points to Doleschy's arrival and presence, which signaled that backup was deemed necessary and that the situation was beyond a simple encounter. We are unpersuaded. ***Mendenhall*** suggested that the number of officers can be a relevant consideration, but specifically focused on whether there was the "threatening presence of several officers." ***Mendenhall***, 446 U.S. at 554. As discussed above, Doleschy's arrival and presence were muted and nonthreatening: No emergency lights, no siren, initially parked on the street, no brandishing of a sidearm, and no physical or verbal interaction whatsoever with Bentz. Doleschy's involvement did not convert the encounter with Bentz into a seizure.

¶28 Bentz points out that, in order to video the sobriety testing, Doleschy moved his squad into the driveway, which would have blocked Bentz's car from leaving. This indicates, Bentz argues, that he was not free to leave. We disagree. We first note that the reparking of the squad occurred sometime after Otte approached Bentz, i.e., it occurred after the point that Bentz contends he was seized. Regardless of exactly when Doleschy moved his squad, it never blocked Bentz himself from leaving. His freedom to walk away was not impaired by a parked vehicle. Indeed, Bentz told Otte that "[h]e didn't want to drive anymore" and was calling his son ostensibly for a ride. *See* ***United States v. Mabery***, 686 F.3d 591, 597 (8th Cir. 2012) (parking a squad in the lot's driveway does not necessarily constitute a seizure of those parked in the lot, nor does it effect a seizure of the *person*, as defendant would "have been free to leave, even if his vehicle had to remain"); *cf.* ***O'Malley v. City of Flint***, 652 F.3d 662, 669 (6th Cir.

2011) ("[P]arking behind a vehicle in a driveway does not inherently send a message of seizure because it is how driveways are routinely used.").

¶29 We therefore agree with the circuit court that no seizure took place upon Otte's approach to Bentz nor even during the initial, nonconfrontational questioning. A reasonable person would believe that he or she was free to leave at least through this point of the encounter. The circuit court further determined that the seizure occurred when Otte "confronted" Bentz about his account, in particular how Bentz's vehicle could have been parked for the past three to four hours when Otte had personally observed it traveling through the city. We agree that, at this point, the nature of the encounter changed and the questions became more probing. But it is unnecessary in this case to pinpoint whether the seizure occurred between that time and the request for the sobriety tests. It is enough that we conclude that the earliest point at which a seizure occurred was when Otte confronted Bentz with accusatory questions challenging the truthfulness of Bentz's account. At that point, as discussed next, reasonable suspicion clearly existed to support the investigatory stop.

Grounds for Reasonable Suspicion Existed at Time of Seizure

¶30 Bentz argues that Otte lacked reasonable suspicion to seize him and conduct an investigatory stop. We disagree.

¶31 An investigatory stop is a slight infringement on personal liberty and, as noted, is constitutional if the officers reasonably suspect that a crime has been committed. ***Young***, 294 Wis. 2d 1, ¶20. Reasonable suspicion must be based on more than an officer's "inchoate and unparticularized suspicion or 'hunch,'" but on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." ***Terry***, 392 U.S. at

21, 27. The totality of the facts and circumstances must be considered. ***State v. Post***, 2007 WI 60, ¶13, 301 Wis. 2d 1, 733 N.W.2d 634.

¶32 By the time that Otte confronted Bentz with the deficiencies in his account, a number of specific facts were known that supported a reasonable suspicion that Bentz had been operating while impaired: the extended period of odd driving behavior, which included a wide turn, driving down the middle of the street, twice turning into the first available residential driveway and twice parking at residences unrelated to the vehicle; Bentz sitting in an admitted stranger's driveway at about 2:30 a.m., leaning up against his vehicle, which he had parked partly on the grass; the odor of intoxicants coming from Bentz, who also exhibited slurred speech and glossy, bloodshot eyes; and Bentz's problematic responses as to his whereabouts and attempts to call his son, and particularly his statement that he had parked the car at that location three to four hours earlier, when Otte had seen within the past twenty minutes the same car being driven and then parked at that location, which was confirmed by a warm hood. These circumstances, and the reasonable inferences that can be drawn from them, are more than sufficient to support a reasonable suspicion that Bentz had been driving the vehicle while impaired, justifying an investigatory detention.

¶33 Bentz asserts that there is no objective evidence linking him to the operation of the vehicle observed by Otte, stressing that Otte could not identify the driver as he followed it. We reject this contention, as Otte observed no one enter or exit the vehicle nor anyone else near it, other than Bentz, who was leaning

against the vehicle registered in his name. To infer that Bentz was likely the driver was reasonable.[7]

¶34 Bentz further argues that Otte's observations about the operation of the vehicle were actually of innocent and lawful behavior, in that there are no allegations that Bentz violated traffic laws and that pulling into a couple of driveways could have simply been a search for a friend's or relative's house. We disagree. "[P]olice officers are not required to rule out the possibility of innocent behavior before initiating a brief stop." ***State v. Anderson***, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990). Moreover, while any one or two of Otte's initial observations may not have been enough, the number and totality of questionable circumstances subsequently observed gave rise to a reasonable suspicion of illegal conduct, warranting a brief stop to investigate whether the conduct was illegal or innocent.

Grounds for Probable Cause Existed at Time of Arrest

¶35 Bentz argues that the officers lacked probable cause to arrest him. In addition to his previously discussed contentions, Bentz especially points to Otte's failure to have continuously observed the vehicle (thereby depriving Otte of knowledge as to the vehicle's status at all times) and to the lack of evidence that Bentz had the keys in his possession. We are unpersuaded.

> Probable cause to arrest is the quantum of evidence within the arresting officer's knowledge at the time of the arrest which would lead a reasonable police officer to believe that

[7] Bentz asserts that we should consider that Otte failed to attempt calling the woman that Bentz had said had been driving. But we have already determined that, before his story about the woman driver, reasonable suspicion to detain Bentz existed. Further, Bentz soon admitted to driving the vehicle, obviating any point in making a call.

> the defendant probably committed or was committing a crime. There must be more than a possibility or suspicion that the defendant committed an offense, but the evidence need not reach the level of proof beyond a reasonable doubt or even that guilt is more likely than not. Probable cause to arrest depends on the totality of the circumstances.

State v. Blatterman, 2015 WI 46, ¶69, 362 Wis. 2d 138, 864 N.W.2d 26 (citations omitted). We apply an objective standard, which considers the facts available at the time and the officer's training and experience. ***State v. Lange***, 2009 WI 49, ¶20, 317 Wis. 2d 383, 766 N.W.2d 551.

¶36 We reject Bentz's lack of probable cause argument, as there was plainly more than sufficient evidence to reasonably believe that Bentz had driven while impaired. In addition to all of the information that supported a reasonable suspicion to seize, Bentz admitted to having driven the vehicle, and he twice refused standardized field sobriety tests. *See* ***State v. Babbitt***, 188 Wis. 2d 349, 363, 525 N.W.2d 102 (Ct. App. 1994) (refusing to submit to a sobriety test may be used as evidence to support probable cause). The admission to driving, among other evidence, obviates Bentz's points about the lack of continuous observation and the lack of evidence showing that he had the keys. Otte had probable cause at the time of the arrest.

By the Court.—Judgment affirmed.

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