COURT OF APPEALS
DECISION
DATED AND FILED

October 15, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP389-CR **Cir. Ct. No. 2010CT382**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD H. HOGENSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for St. Croix County: SCOTT R. NEEDHAM, Judge. *Affirmed*.

¶1 HOOVER, P.J.[1] Richard Hogenson appeals a judgment of conviction for operating while intoxicated, third offense. He also appeals an order denying his motion for postconviction relief. Hogenson argues his trial counsel

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

was ineffective for failing to file a suppression motion that asserted the officer unlawfully prolonged the traffic stop to request field sobriety tests. We reject Hogenson's argument, and affirm.

BACKGROUND

¶2 Officer Alex Jenatscheck testified at trial that, on Saturday, November 13, 2010, at approximately 10:00 p.m., he was on patrol when he observed a vehicle with only one headlamp illuminated. Jenatscheck stopped the vehicle.

¶3 Jenatscheck made contact with Hogenson, who was driving, and told Hogenson one of his headlamps was not illuminated. Hogenson "seemed generally shocked that it was out" and asked if both the "high and low beams were working." Jenatscheck did not know and went to the front of the vehicle to check while Hogenson tested the lights. Neither lamp worked, and Jenatscheck returned to the vehicle to talk to Hogenson.

¶4 While Jenatscheck was talking to Hogenson, Jenatscheck "detect[ed] an odor of intoxicants, coming from the vehicle, from [Hogenson]." Hogenson was the only occupant in the vehicle. Jenatscheck also observed that Hogenson "had some difficulties removing his driver's license from his billfold." Jenatscheck asked Hogenson if he had been drinking, and Hogenson told him he "had a couple."

¶5 Jenatscheck returned to his squad car, and had dispatch check Hogenson's driver's license. Dispatch informed Jenatscheck that Hogenson's driver's license was "cancelled." Jenatscheck was not told why Hogenson's

license was "cancelled." At that point, Jenatscheck returned to Hogenson and asked him to exit his vehicle to perform field sobriety tests.

¶6 On cross-examination, Jenatscheck conceded he did not observe any erratic driving, slurred speech, or glassy eyes. He also stated Hogenson disputed many times that his license was cancelled.[2]

¶7 Ultimately, the jury found Hogenson guilty of operating while intoxicated.[3] Hogenson filed a postconviction motion, alleging his trial counsel was ineffective for failing to bring a suppression motion on the basis that Jenatscheck unlawfully prolonged the traffic stop to request field sobriety tests. Following a ***Machner***[4] hearing, the circuit court determined Hogenson's trial counsel was not deficient for failing to file the motion, and Hogenson was not prejudiced by any deficiency. The court reasoned that, given the facts of the case, there was reasonable suspicion to extend the stop for field sobriety tests.

DISCUSSION

¶8 To succeed on an ineffective assistance of counsel claim, Hogenson must prove (1) his counsel's representation was deficient and (2) he was prejudiced by his counsel's deficient performance. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). If a defendant fails to establish either prong of the

[2] It appears from the record that dispatch may have been incorrect about the status of Hogenson's driver's license.

[3] The jury also found Hogenson guilty of operating with a prohibited alcohol concentration, but the circuit court did not enter judgment on that charge. *See* WIS. STAT. § 346.63(1)(c). The jury acquitted Hogenson of resisting an officer.

[4] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

Strickland test, we need not determine whether the other prong is satisfied. *See* ***id.*** at 697.

¶9 An ineffective assistance of counsel claim is a mixed question of law and fact. ***Id.*** at 698. We accept the circuit court's factual findings unless they are clearly erroneous; however, the ultimate determinations of whether counsel's performance was deficient and whether it prejudiced the defendant are questions of law we review independently. ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999).

¶10 With respect to the "prejudice" prong, the defendant must demonstrate that the alleged defect in counsel's performance had an adverse effect on the defense. *See* ***Strickland***, 466 U.S. at 693. The defendant cannot meet his burden by merely showing that the error had some conceivable effect on the outcome. Rather, the defendant must show there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694.

¶11 Hogenson argues he was prejudiced by counsel's failure to file a suppression motion regarding the extension of the stop for field sobriety tests. He asserts "if counsel had pursued the issue[,] … the evidence would have been suppressed."

¶12 An officer may lawfully extend a traffic stop, if, during the stop, "the officer discover[s] … information ... which, when combined with information already acquired, provide[s] reasonable suspicion that [the defendant] was driving while under the influence of an intoxicant." ***State v. Colstad***, 2003 WI App 25, ¶19, 260 Wis. 2d 406, 659 N.W.2d 394. Reasonable suspicion exists when, 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. It "must be based on more than an officer's 'inchoate and unparticularized suspicion or hunch.'" ***Id.***, ¶10 (citation omitted). 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 [extended] stop." ***Id.*** (citation omitted); *see also* ***State v. Betow***, 226 Wis. 2d 90, 94-95, 593 N.W.2d 499 (Ct. App. 1999).

¶13 Hogenson asserts Jenatscheck lacked reasonable suspicion to extend the stop because Jenatscheck testified he only requested field sobriety tests because of the odor of alcohol and the admission of drinking. Hogenson argues the smell of alcohol and the admission of drinking are not, by themselves, enough to reasonably suspect he was operating while intoxicated. Hogenson also contends Jenatscheck did not observe any other indicia of impairment, such as erratic driving, slurred speech, or glassy eyes.

¶14 While we acknowledge this is a very close case, we emphasize the test for reasonable suspicion is an objective one. *See* ***State v. Waldner***, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996). We are not concerned with Jenatscheck's subjective reasons for requesting the field sobriety tests. *See* ***State v. Buchanan***, 178 Wis. 2d 441, 447 n.2, 504 N.W.2d 400 (Ct. App. 1993) ("[I]t is the circumstances that govern, not the officer's subjective belief.").

¶15 In this case, at the moment Jenatscheck requested that Hogenson participate in field sobriety tests, Jenatscheck knew he had stopped a vehicle at approximately 10:00 p.m. on a Saturday night. *See* ***State v. Lange***, 2009 WI 49,

¶32, 317 Wis. 2d 383, 766 N.W.2d 551 (It is common knowledge "that people tend to drink during the weekend when they do not have to go to work the following morning."); ***Post***, 2007 WI 60, ¶36 (time of night, even 9:30 p.m., "lend[s] some further credence" to impairment determination). Jenatscheck also knew there was an odor of intoxicants emanating from Hogenson's person, Hogenson admitted to consuming alcohol, and Hogenson had difficulties removing his driver's license from his wallet.[5] Based on the facts present in this case and the rational inferences derived from these facts, it would be reasonable for Jenatscheck to suspect that, on a weekend night, a person who smelled of intoxicants, admitted to consuming alcohol, and fumbled with his or her wallet was operating while intoxicated.

¶16 Because Jenatscheck's request to perform field sobriety tests was supported by more than the smell of alcohol and the admission of drinking, the cases Hogenson relies on are distinguishable.[6] Additionally, although Hogenson

[5] In his reply brief, Hogenson appears to object to the fact that Jenatscheck testified at trial Hogenson had difficulties removing his license from his wallet. In a footnote, he emphasizes Jenatscheck did not include this fact in his police report and did not offer this testimony at a suppression hearing challenging the initial stop. Hogenson, however, fails to develop any argument as to why we should disregard Jenatscheck's trial testimony, and we will not consider it further. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988) (court of appeals need not address undeveloped arguments). Moreover, Jenatscheck's testimony about observations he made after the initial stop would have been irrelevant at a suppression hearing challenging the initial stop.

[6] Hogenson relied on ***State v. Goss***, 2011 WI 104, 338 Wis. 2d 72, 806 N.W.2d 918, ***State v. Meye***, No. 2010AP336, unpublished slip op. (WI App July 14, 2010), and ***State v. Resch***, No. 2010AP2321, unpublished slip op. (WI App April 27, 2011). In ***Goss***, our supreme court concluded the officer had probable cause to request a preliminary breath test because the officer not only smelled alcohol on the defendant, but because the officer also knew that the defendant was subject to the .02 prohibited alcohol concentration and that it took very little consumed alcohol to exceed that limit. ***Goss***, 338 Wis. 2d 72, ¶¶26-27. In ***Meye***, we held an officer did not have reasonable suspicion to believe the defendant was intoxicated because "the sole evidence supporting the officer's suspicion … was that he smelled alcohol coming from either [the defendant] or her passenger as they walked past him" after stopping the vehicle at a gas station. (continued)

emphasizes he was not driving erratically and did not have glassy eyes or slurred speech, "police officers are not required to rule out the possibility of innocent behavior before [extending] a … stop." *See* ***Waldner***, 206 Wis. 2d at 59. Jenatscheck's lack of observation of certain indicia of impairment does not negate his observations of other indicia that are sufficient to support a reasonable suspicion determination.

¶17 We conclude that, at the moment Jenatscheck asked Hogenson to participate in field sobriety tests, Jenatscheck had reasonable suspicion to believe Hogenson was impaired by alcohol. *See* ***Post***, 301 Wis. 2d 1, ¶¶10, 13. Because we conclude Jenatscheck had reasonable suspicion to extend the traffic stop to request field sobriety tests, Hogenson was not prejudiced by counsel's purported failure to file a suppression motion on that basis. Accordingly, Hogenson did not receive ineffective assistance of counsel, and we affirm the circuit court's judgment and order.

By the Court.—Judgment and order affirmed.

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

Meye, No. 2010AP336, unpublished slip op., ¶1. In ***Resch***, we held the officer had reasonable suspicion to extend the stop for field sobriety tests because the odor of alcohol was not the only factor relied on in the reasonable suspicion determination. ***Resch***, No. 2010AP2321, unpublished slip op. ¶¶20-23. Other relevant factors included the admission of drinking, the defendant's "nonsensical" statements, and the fact that the vehicle was idling with the headlamps off at a stop sign in a parking lot at 2:30 a.m. ***Id.***