

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 6, 2014

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. 2013AP1510

Cir. Ct. No. 2009TR2617

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN THE MATTER OF THE REFUSAL OF RANDY S. TOMAW:

MARQUETTE COUNTY,

PLAINTIFF-RESPONDENT,

v.

RANDY S. TOMAW,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Marquette County:
RICHARD O. WRIGHT, Judge. *Affirmed.*

¶1 BLANCHARD, P.J.¹ Randy Tomaw appeals a circuit court order determining that Tomaw improperly refused to submit to a chemical test of his

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

breath pursuant to Wisconsin's implied consent law and revoking Tomaw's operating privileges based on his refusal. Tomaw's sole argument on appeal is that his license should not have been revoked for refusing to submit to an evidentiary chemical test of his breath because the investigating police sergeant lacked reasonable suspicion to administer field sobriety tests and, thus, Tomaw's subsequent arrest was unlawful. I conclude that the sergeant had the requisite level of reasonable suspicion to administer field sobriety tests and that Tomaw was lawfully arrested. Accordingly, I affirm the decision of the circuit court revoking Tomaw's operating privileges.

BACKGROUND

¶2 The sole witness at the refusal hearing was the sergeant who stopped Tomaw for speeding and eventually arrested him for Operating While Intoxicated. The sergeant testified to the following undisputed facts. Early one Sunday morning, at approximately 1:21 a.m., the sergeant observed an approaching vehicle traveling 42 miles per hour in a 25 mile-per-hour-zone. The sergeant executed a U-turn in order to follow the vehicle. When the sergeant drove up behind the vehicle to initiate a stop, the vehicle was already in the process of pulling over.

¶3 As the sergeant was pulling up behind the stopped vehicle, he noticed multiple individuals inside and observed Tomaw, the driver of the vehicle, lean "far into" the passenger side of the vehicle. When the sergeant approached the vehicle, the driver's side window was rolled up and the door was shut. The sergeant did not notice any odor of intoxicants outside of the vehicle. The sergeant knocked on the driver's side window, but did not receive a response. The

sergeant began to attempt to open the driver's side door, at which point Tomaw exited the vehicle.

¶4 The sergeant directed Tomaw to walk toward the rear of Tomaw's vehicle. As Tomaw walked, the sergeant noticed that Tomaw's upper body swayed, but he did not stumble or stagger. Once Tomaw was at the rear of his vehicle, the sergeant "detected the strong odor of intoxicants on his breath" and asked him if he had been drinking. Tomaw initially denied that he had been drinking. After the sergeant informed Tomaw that he could smell alcohol on his breath, Tomaw admitted to having one beer. Then Tomaw gave yet another response, which was to say that he had consumed two beers.

¶5 The sergeant decided to further detain Tomaw and have him submit to field sobriety tests. After the sergeant administered the field sobriety tests, he concluded that Tomaw had been operating while under the influence of alcohol and placed him under arrest.

¶6 After placing Tomaw under arrest, the sergeant requested a chemical test of Tomaw's breath using the Wisconsin Department of Transportation Informing the Accused form. Tomaw refused to submit to the test.

¶7 Tomaw requested a refusal hearing. At the hearing, Tomaw argued that his license should not be revoked due to his refusal because the sergeant lacked reasonable suspicion to administer the field sobriety tests and, as a result, Tomaw was not lawfully placed under arrest. Based on the testimony summarized above, the circuit court concluded that the sergeant had reasonable suspicion to

administer the field sobriety tests and that Tomaw's arrest was lawful.² On this basis, the circuit court determined that Tomaw improperly refused to submit to the requested test and that his operating privilege would be revoked.

DISCUSSION

¶8 Tomaw's sole argument on appeal is that the circuit court erred in concluding that the sergeant had the requisite reasonable suspicion that Tomaw was intoxicated necessary to extend Tomaw's initial detention for the purpose of administering field sobriety tests. Tomaw does not argue that, if the sergeant had reasonable suspicion to administer the field sobriety tests, the sergeant still lacked probable cause to arrest Tomaw after conducting those tests. Thus, this appeal turns on whether, based on the uncontested testimony given by the sergeant, he had reasonable suspicion to administer field sobriety testing to Tomaw.

¶9 A driver who refuses to submit to a chemical test that is requested pursuant to Wisconsin's implied consent law is subject to penalties that include revocation of his or her operating privileges. *See* WIS. STAT. § 343.305(9)(a), (10)(a). The driver may request a hearing on his or her refusal at which one issue is whether the driver "was lawfully placed under arrest' for violation of an OWI-related statute" when requested to submit to chemical testing. *See State v. Anagnos*, 2012 WI 64, ¶29, 341 Wis. 2d 576, 815 N.W.2d 675 (quoting § 343.305(9)(a)5.a.). "As part of this inquiry, the circuit court may entertain an

² The circuit court did not explicitly make any findings about the credibility of the testimony of the sergeant, but it appears plain that the court credited his testimony, and Tomaw does not argue to the contrary on appeal. For these reasons, we treat the testimony summarized above as credible and un rebutted.

argument that the arrest was unlawful because the traffic stop that preceded it was not justified by probable cause or reasonable suspicion.” *Id.*, ¶42.

¶10 I understand Tomaw to argue that, under the logic of *Anagnos*, the issue of whether the driver was lawfully arrested also includes a determination about whether the stop was lawfully extended to pursue field sobriety testing. The State does not contest this interpretation of *Anagnos*, and I agree that a determination about whether Tomaw’s arrest was lawful includes an inquiry into whether it was lawful for the sergeant to extend the initial detention by administering field sobriety tests.

¶11 An officer may lawfully extend a valid traffic stop if, during the 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” *State v. Colstad*, 2003 WI App 25, ¶19, 260 Wis. 2d 406, 659 N.W.2d 394 (quoting *State v. Betow*, 226 Wis. 2d 90, 94–95, 593 N.W.2d 499 (Ct. App. 1999)). Thus, the extension of Tomaw’s initial detention was lawful if the sergeant “discovered information subsequent to the initial stop which, when combined with information already acquired, provided reasonable suspicion that [Tomaw] was driving while under the influence of an intoxicant.” *See Colstad*, 260 Wis. 2d 406, ¶19.

¶12 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. Whether undisputed facts amount to

reasonable suspicion is a question of constitutional fact subject to de novo review. *Colstad*, 260 Wis. 2d 406, ¶8.

¶13 Tomaw argues that the information available to the sergeant did not amount to reasonable suspicion that he was intoxicated and, thus, the sergeant unlawfully extended the stop for speeding to administer field sobriety testing. Tomaw bases this argument, in part, on his contention that this case is distinguishable from the facts of *Washburn County v. Smith*, 2008 WI 23, 308 Wis. 2d 65, 746 N.W.2d 243.

¶14 I disagree and conclude that, based on the totality of the facts, the sergeant did have the necessary reasonable suspicion to extend Tomaw's initial detention to administer field sobriety tests. The sergeant observed Tomaw traveling seventeen miles per hour in excess of the posted legal speed limit, at approximately 1:20 a.m. on a Sunday morning. *See Smith*, 308 Wis. 2d 65, ¶36 (speeding is one suspicious factor that a person may be operating while intoxicated); *see also State v. Popke*, 2009 WI 37, ¶27, 317 Wis. 2d 118, 765 N.W.2d 569 (finding that the time of a traffic violation, 1:30 a.m., is a suspicious factor). When the officer approached Tomaw's vehicle, Tomaw did not appear to respond to the sergeant's initial attempt at contact. The sergeant noticed that Tomaw's upper body swayed as he walked to the rear of his vehicle, and detected the "strong odor" of alcohol on Tomaw's breath. *See Jefferson Cnty. v. Renz*, 231 Wis. 2d 293, 298, 603 N.W.2d 541 (1999) (swaying during a field sobriety test, while not "one of the clues in the manual," was considered an indicator of intoxication). Finally, Tomaw made suspiciously inconsistent statements to the sergeant when questioned about his alcohol consumption that evening. *See Smith*, 308 Wis. 2d 65, ¶36 (supplying "inconsistent and equivocal information regarding the amount of alcohol ... consumed" is a suspicious factor). Not only was

Tomaw's initial denial suspicious in itself (given the strong odor of intoxicants), there was a fair inference that Tomaw was only moving *toward* the truth when he first said that he had consumed no drinks, then said one beer, then two.

¶15 Any one of these facts, if taken individually, would not lead to a reasonable suspicion that Tomaw had been driving under the influence of an intoxicant. However, when examining the totality of the facts taken with rational inferences from those facts, I conclude that the sergeant had the requisite reasonable suspicion that Tomaw was intoxicated necessary to extend the traffic stop to administer field sobriety tests. *Post*, 301 Wis. 2d 1, ¶13.

¶16 Tomaw's assertion that *Smith* is distinguishable from the instant case in ways that are favorable to his argument is unpersuasive for two reasons. First, in *Smith*, the question before the court was whether the officer had *probable cause to arrest* the defendant for operating a vehicle while under the influence of an intoxicant. *Smith*, 308 Wis. 2d 65, ¶¶3, 14. That is a higher standard than the reasonable suspicion standard here. See *Renz*, 231 Wis. 2d at 316 (discussing the different standards of "reasonable suspicion," "probable cause to believe" and "probable cause to arrest" in the context of OWI investigations); see also *State v. Waldner*, 206 Wis. 2d 51, 58-59, 556 N.W.2d 681 (1996) (discussing the standards of "reasonable suspicion" to investigate and "probable cause to arrest" in the context of an OWI investigation). I need not decide whether the facts here constitute probable cause.

¶17 Moreover, even after acknowledging this important difference in standards between the two cases, the facts here are not readily distinguishable from *Smith*. The facts in *Smith* were as follows:

At the time of the arrest, the [d]eputy knew that the defendant had been driving well in excess of the speed limit late at night on a two-lane highway; that the defendant delayed pulling over after the deputy activated his emergency lights; that the defendant had twice driven across the centerline before pulling over; that the defendant had an odor of alcohol on his breath; that the defendant had admitted to consuming alcohol over a period of more than ten hours ending just prior to his encounter with the deputy; and that the defendant had supplied inconsistent and equivocal information regarding the amount of alcohol that he had consumed during that period of time.

308 Wis. 2d 65, ¶36. The distinguishable facts in the instant case that support Tomaw's argument are that Tomaw pulled over immediately, was not observed to drive across the centerline, and did not admit to drinking over a lengthy time period. On the other hand, the deputy in *Smith* lacked observation of other significant clues such as a noticeable body sway and an initial denial of drinking, both present here.

CONCLUSION

¶18 For the foregoing reasons, I affirm the order of the circuit court.

By the Court—Order affirmed.

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

