COURT OF APPEALS
DECISION
DATED AND FILED

May 8, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2585-CR **Cir. Ct. No. 2013CM176**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GUMERSINDA M. GONZALEZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Wood County: GREGORY J. POTTER, Judge. *Reversed and cause remanded with directions*.

¶1 LUNDSTEN, J.[1] Gumersinda Gonzalez appeals the circuit court's judgment convicting her of possession of THC. An officer found evidence of this

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

crime after stopping Gonzalez for a defective headlight, detecting an odor of intoxicants coming from Gonzalez's vehicle, and extending Gonzalez's detention to conduct field sobriety tests. Gonzalez pled no contest after the circuit court denied her suppression motion, and she now challenges the circuit court's suppression ruling. Gonzalez argues that the officer lacked reasonable suspicion of intoxicated driving to justify the extension of her detention to conduct the field sobriety tests. This case presents a close call. However, based on persuasive authority in the form of unpublished opinions, I agree with Gonzalez that reasonable suspicion was lacking here. I reverse the judgment and remand for the circuit court to suppress the evidence against Gonzalez obtained as a result of her unlawful detention.

Background

¶2 In her suppression motion, Gonzalez argued that the officer who stopped her extended her detention unlawfully by conducting field sobriety tests without reasonable suspicion that she was driving while intoxicated. Gonzalez asserted that the only evidence of intoxication that the officer had at that point was an odor of intoxicants coming from her vehicle. Gonzalez argued that the drug evidence against her was obtained during the extended detention and must be suppressed. The State contended that the officer's extension of Gonzalez's detention was lawful.

¶3 The officer who arrested Gonzalez was the sole witness at the suppression hearing. He testified that he stopped Gonzalez on March 14, 2013, at approximately 10:07 p.m. for a defective headlight. The officer had been following Gonzalez for a couple of blocks or so and, during that time, did not observe Gonzalez engaging in any "bad driving" behaviors.

¶4 In the course of an initial one- or two-minute conversation with Gonzalez, the officer smelled an odor of intoxicants "coming from [Gonzalez's] vehicle." The officer did not recall Gonzalez's speech being slurred, and did not notice that Gonzalez had red eyes or "anything like that." The officer testified that he observed no indicators of intoxicated driving other than the odor of intoxicants coming from the vehicle.

¶5 The officer returned to his squad car to run Gonzalez's information. He then returned to Gonzalez's vehicle and informed Gonzalez that he detected an odor of intoxicants coming from the vehicle. Gonzalez told the officer that she had not been drinking but had been transporting friends who had been drinking.

¶6 The officer asked Gonzalez to step out of the vehicle to perform field sobriety tests. Gonzalez complied, and, as the officer began explaining a test to her, he detected an odor of intoxicants coming from Gonzalez's breath. He proceeded with the field sobriety tests. The officer's testimony essentially ends there, but it appears undisputed that, as the criminal complaint alleged, the field sobriety tests led to additional investigation, Gonzalez's arrest for intoxicated driving, and the drug evidence against Gonzalez.

¶7 The circuit court denied Gonzalez's suppression motion. The court indicated that the issue was whether there were any factors providing reasonable suspicion of intoxicated driving so that the officer could lawfully request that Gonzalez perform field sobriety tests. The circuit court concluded that the officer had reasonable suspicion of intoxicated driving.[2] The court explained:

[2] The circuit court referred to probable cause instead of reasonable suspicion, but I assume that the court meant reasonable suspicion. In any event, reasonable suspicion is all that (continued)

> When [the officer] approached the vehicle, he testified that he spoke to her and at that time he smelled an odor of an intoxicant. Granted the defendant stated that she had been transporting some people; but again, she was the only one in the car. On top of that, I find that the odor was subsequently corroborated because the officer went back again, asked her to step out of the vehicle and when she did so, he testified that the smell of intoxicants was coming from her. Additionally, she originally had indicated she had not been consuming any alcohol so you have an untruth.
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> … [So], you had an odor.… [Y]ou had a second smell of an odor of intoxicants coming directly from her which contradicted the statements she had made and I think that's rather important, plus she made the statement she had not been drinking so you have a second contradiction ....

Discussion

¶8 An officer may lawfully continue 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 (quoted source omitted). Thus, the continuation of Gonzalez's detention was lawful if the officer here "discovered information subsequent to the initial stop which, when combined with information already acquired, provided reasonable suspicion that [Gonzalez] was driving while under the influence of an intoxicant." *See* ***id.*** Whether undisputed facts amount to reasonable suspicion is a question for de novo review. ***Id.***, ¶8.

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was required for the officer here to continue Gonzalez's detention in order to administer field sobriety tests. *See* ***State v. Colstad***, 2003 WI App 25, ¶19, 260 Wis. 2d 406, 659 N.W.2d 394 (applying reasonable suspicion standard in deciding whether officer was justified in continuing detention to administer field sobriety tests).

¶9 The parties agree that the issue is as the circuit court stated it, whether the officer had reasonable suspicion to extend Gonzalez's detention and conduct field sobriety tests after the officer returned to Gonzalez's vehicle. Gonzalez argues, however, that the circuit court considered circumstances arising *after* the officer returned to Gonzalez's vehicle and extended her detention by telling Gonzalez about the odor he detected and asking her to step out of the vehicle. Gonzalez contends that, when subsequent circumstances are not considered, the officer lacked reasonable suspicion to extend her detention. I agree.

¶10 As the circuit court's statement of the issue acknowledged, there is no dispute that the extended seizure began no later than when Gonzalez complied with the officer's request to step out of her vehicle to perform field sobriety tests. However, the circuit court considered circumstances arising after that point in time, namely, the officer's detection of the odor of intoxicants on Gonzalez's breath and the way this contradicted Gonzalez's explanation for the initial odor the officer detected coming from Gonzalez's vehicle. I agree with the circuit court's assessment that the officer's detection of the odor on Gonzalez's breath and the fact that this showed that Gonzalez lied to the officer when previously attempting to explain the odor were "rather important."

¶11 The State seemingly concedes that reasonable suspicion may not be based on the indicators of intoxication that the officer detected after asking Gonzalez to step out of her vehicle. That is, the State does not develop an argument supporting the circuit court's consideration of such circumstances. Rather, the parties appear to agree that the analysis should focus on the circumstances as they existed when Gonzalez complied with the officer's request to exit the vehicle. The pertinent facts at that point were that the officer smelled

an odor of intoxicants of unspecified strength coming from Gonzalez's vehicle, Gonzalez was the only person in the vehicle, and Gonzalez explained the odor by stating that she had not been drinking but had been transporting friends who were drinking.

¶12 Gonzalez concedes that these facts support a reasonable inference that the odor of intoxicants was coming from her. Gonzalez argues, however, that this is not enough to provide reasonable suspicion that she was driving while intoxicated. The State argues, in contrast, that the odor of intoxicants the officer initially detected coming from Gonzalez's vehicle is enough. The State argues:

> Although Gonzalez did not admit to drinking, the odor of alcohol was reasonably attributed to her as the only occupant of the vehicle. The odor of alcohol was enough to have the defendant perform field sobriety tests.

¶13 I begin my analysis by repeating the point made by a standard jury instruction: "Not every person who has consumed alcoholic beverages is 'under the influence' ...." WIS JI—CRIMINAL 2663. Instead, reasonable suspicion of intoxicated driving generally requires reasonable suspicion that the suspect is "[u]nder the influence of an intoxicant … to a degree which renders him or her incapable of safely driving." *See* WIS. STAT. §§ 346.63(1)(a) and 346.01(1).

¶14 Turning to the facts here, the officer's observation of Gonzalez, including following her vehicle for at least two blocks, did not reveal any behaviors that would contribute to a reasonable suspicion that she was driving under the influence of alcohol to a degree that rendered her incapable of safely driving. Apart from the odor of intoxicants, the officer observed no physical indicators of intoxication, such as slurred speech or bloodshot eyes. Gonzalez did not admit to consuming any alcoholic beverages.

¶15 It is true that the officer was not required to accept Gonzalez's explanation for the odor. *See* ***Colstad***, 260 Wis. 2d 406, ¶21 (officer not required to accept drunk driving suspect's explanation for why accident occurred). Indeed, my decision here assumes that the officer could reasonably conclude that Gonzalez's explanation for the odor was suspicious. However, I do not view Gonzalez's explanation as being as inculpatory as the information learned after the stop was extended—that the odor was coming from Gonzalez's breath and that she was lying when she asserted that she had not been drinking.

¶16 I also note the time of day. The stop occurred just after 10:00 p.m. The State does not on appeal argue that this factor matters, and the circuit court did not mention this fact when ruling. Common sense suggests to me that this adds little to reasonable suspicion here. It seems sensible to assume that most social drinking that does not result in a blood alcohol level that exceeds the legal limit occurs in the evening hours. Most cases addressing the time of day factor involve stops around midnight or later, when there is a stronger inference that a higher percentage of people driving are intoxicated. The earlier in the evening the stop, the less this factor matters. Here, even if I assume that the time of day adds to reasonable suspicion, that addition is slight.

¶17 To summarize, the indicators of intoxication were 1) an odor of alcohol of an unspecified intensity "coming from [the] vehicle," 2) Gonzalez's explanation that the odor was the result of friends she was transporting, not her, and 3) the time of the stop, just after 10:00 p.m. In my view, this amounts to evidence just a bit more suspicious than merely detecting an odor of alcohol coming from the person of the driver of a vehicle. For the reasons that follow, I conclude that this is not enough.

¶18 There appears to be no published case law addressing reasonable suspicion on similar facts. As to the odor of intoxication alone, neither Gonzalez nor the State cites a published case addressing whether the smell of alcohol coming from a driver is sufficient to provide reasonable suspicion of intoxicated driving.[3] Gonzalez does, however, identify two unpublished cases that support the conclusion that the odor of alcohol alone is not enough: ***State v. Meye***, No. 2010AP336-CR, unpublished slip op. (WI App July 14, 2010), and ***County of Sauk v. Leon***, No. 2010AP1593, unpublished slip op. (WI App Nov. 24, 2010). Both cases, in terms of the odor of alcohol and the time of day, are as suspicious or more suspicious than the facts here.

¶19 In ***Meye***, at 3:23 a.m., a police officer detected a "strong" odor of intoxicants coming from two individuals who had just exited a vehicle, but the officer could not determine whether the odor was coming from the driver or the passenger. ***Meye***, No. 2010AP336-CR, ¶2. The officer initiated an investigatory stop of the driver on this basis. *See* ***id.***, ¶¶2-3. The court in ***Meye*** rejected the proposition that the odor was enough to provide reasonable suspicion. ***Id.***, ¶6. The court indicated that there were no cases, published or unpublished, in which a court has held that "reasonable suspicion to seize a person on suspicion of drunk driving arises simply from smelling alcohol on a person who has alighted from a vehicle after it has stopped." ***Id.***; *see also* ***State v. Resch***, No. 2010AP2321-CR, unpublished slip op., ¶19 (WI App Apr. 27, 2011) ("In ***Meye***, this court held that

[3] The situation would be different if an officer knows that the suspect is subject to a blood alcohol concentration limit of 0.02. *See* ***State v. Goss***, 2011 WI 104, ¶¶25-27, 338 Wis. 2d 72, 806 N.W.2d 918 (odor of intoxicants on driver that officer knew was subject to 0.02 prohibited alcohol concentration limit provided level of probable cause that is required for a preliminary breath test because officer knew that suspect "could drink only a very small amount" before exceeding the legal limit).

the mere odor of intoxicants does not constitute reasonable suspicion that a driver is intoxicated ....”). So far as I can tell, the ***Meye*** court’s decision did not hinge on the ambiguity of whether the odor was coming from the driver or passenger. Rather, the court concluded that this ambiguity “exacerbated” “[t]he weakness of this seizure.” *See* ***Meye***, No. 2010AP336-CR, ¶9.

¶20 In ***Leon***, at approximately 11:00 p.m., a police officer detected alcohol on the breath of a suspect who admitted to consuming one beer with dinner an hour or two earlier. *See* ***Leon***, No. 2010AP1593, ¶¶2, 9-10. The court in ***Leon*** concluded that the “admission of having consumed one beer with an evening meal, together with an odor [of intoxicants] of unspecified intensity,” was not sufficient to provide reasonable suspicion of intoxicated driving. ***Id.***, ¶28.

¶21 While acknowledging that there is a bit more here, I see no meaningful difference between the evidence against Gonzalez and the dispositive facts in the above cases. And, the cases the State directs my attention to are further afield.

¶22 The State relies on ***State v. Waldner***, 206 Wis. 2d 51, 556 N.W.2d 681 (1996), for the proposition that “building blocks of fact accumulate[,] [a]nd as they accumulate, reasonable inferences about the cumulative effect can be drawn.” *See* ***id.*** at 58. The State argues that an odor of intoxicants is “a building block for reasonable suspicion,” but does not explain what other “building blocks” there might be here.

¶23 The State also relies on ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 603 N.W.2d 541 (1999). The State points out that the background facts in ***Renz*** show that the officer there administered field sobriety tests after detecting an odor of intoxicants on a driver who admitted to drinking three beers. *See* ***id.*** at

296. There was, however, no issue in ***Renz*** as to whether these facts were sufficient to provide reasonable suspicion of intoxicated driving and, therefore, no holding that the odor of intoxicants on the driver was sufficient to supply reasonable suspicion. Regardless, ***Renz*** obviously includes the additional fact, not present here, of an admission to drinking three beers.

¶24 Finally, the State relies on ***State v. Secrist***, 224 Wis. 2d 201, 589 N.W.2d 387 (1999). In ***Secrist***, the court held that "the odor of a controlled substance may provide probable cause to arrest when the odor is unmistakable and may be linked to a specific person or persons because of the particular circumstances." ***Id.*** at 217-18. But the obvious problem with the State's reliance on ***Secrist*** is that possession of even the smallest amount of marijuana is illegal in Wisconsin whereas the same cannot be said for consuming alcohol and driving. The State does not argue that either the odor of alcohol initially detected here or any other circumstances support a reasonable inference as to the amount of alcohol Gonzalez may have consumed.

¶25 One final comment. I considered the possibility of holding that Gonzalez's argument on appeal—that there needed to be reasonable suspicion *before* the officer extended the stop by asking Gonzalez to step out of her car—was forfeited. I considered this possibility because Gonzalez's counsel did not object when the circuit court expressly relied on the officer detecting the odor of alcohol coming from Gonzalez's breath after she got out of the car and, therefore, improperly considered the evidence showing that Gonzalez lied when she asserted she had not been drinking. Plainly, this was a fact that weighed heavily in the circuit court's decision. However, the argument made by Gonzalez's counsel just prior to the circuit court's oral ruling plainly takes the position that the only evidence that matters is the smell of alcohol coming from Gonzalez's vehicle and

her explanation for that odor. I do not believe that forfeiture case law requires that an attorney additionally complain, during or after a circuit court's ruling, that the court did not follow the attorney's proposed reasoning.

Conclusion

¶26 In sum, for the reasons stated, I reverse the judgment of conviction and remand for the circuit court to suppress the evidence resulting from Gonzalez's unlawful detention.

By the Court.—Judgment reversed and cause remanded with directions.

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