COURT OF APPEALS
DECISION
DATED AND RELEASED

April 30, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-2887-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

THOMAS M. BREARLEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County: JOHN R. RACE, Judge. *Affirmed.*

NETTESHEIM, J. Thomas M. Brearley appeals from a judgment of conviction for operating a motor vehicle while intoxicated (OWI) pursuant to § 346.63(1)(a), STATS.[1] On appeal, Brearley renews three challenges which the trial court rejected: (1) the arresting officer did not have reasonable

[1] An accompanying charge of operating a motor vehicle with a prohibited blood alcohol concentration was dismissed.

suspicion to stop Brearley's vehicle; (2) the officer improperly expanded the investigation beyond the limits and purpose of the temporary stop; and (3) the officer did not have probable cause to arrest Brearley. We reject these arguments and we affirm the judgment.

FACTS

On April 5, 1997, at approximately 7:20 p.m., Officer Daniel Bradford of the City of Whitewater Police Department observed a red Dodge motor vehicle heading west on East Milwaukee Street. As the vehicle made a wide turn onto North Newcomb, it came very close to the curb. As Bradford followed the vehicle, he observed it veer to the left, touch the center line, recover, again veer to the left and again touch the center line. Bradford then activated the emergency lights on his police squad and he stopped the vehicle.

Bradford approached the driver and asked for identification. The driver, later identified as Brearley, said he thought he had left his driver's license at home, but that he had a checkbook with him. He then began looking through the checkbook. Bradford stated that Brearley did this in an awkward manner, getting about halfway through the checkbook, dropping some documents to the floor and then starting over.

Bradford also stated that he noticed an odor of intoxicants and that Brearley's speech was slurred. Bradford asked Brearley if he had been drinking and Brearley replied that he had consumed Captain Morgan rum cocktails during dinner at a supper club.

Bradford then asked Brearley to step out of the vehicle. Brearley complied and Bradford noticed that he swayed slightly as he walked. Bradford then administered three field sobriety tests to Brearley: (1) the horizontal gaze

nystagmus test, which measures for pronounced involuntary jerking of the eyes; (2) the heel-to-toe walking test, which tests for balance and the ability to follow directions; and (3) the one-leg-stand test, which also measures for balance and the ability to follow directions. Bradford stated that Brearley's performance on all three tests indicated a likelihood of intoxication. Based on these observations, Bradford arrested Brearley and, in due course, the State charged Brearley with OWI.

By pretrial motion, Brearley challenged Bradford's initial stop of his vehicle, arguing that Bradford did not have a reasonable suspicion to detain him. Brearley also argued that even if the initial stop was valid, Bradford had improperly expanded the investigation beyond the purpose of the initial stop. Finally, Brearley argued that Bradford did not have probable cause to arrest him.

The trial court rejected all of these arguments. Brearley then pled no contest and he was convicted. He renews his trial court arguments on appeal.

DISCUSSION

Temporary Stop and Detention

Brearley first argues that Bradford did not have a reasonable suspicion to stop his vehicle.

In ***Terry v. Ohio***, 392 U.S. 1 (1968), the United States Supreme Court held that "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." ***Id.*** at 22. This level of suspicion requires that the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. *See* ***id***. at 21. The question under

this test is whether the facts available to the officer at the moment of the seizure or the search would warrant a man of reasonable caution in the belief that the action taken was appropriate. *See* ***id.*** at 22. Despite adopting this lesser level of suspicion, the Court also reminded that "notions which underlie both the warrant procedure and the requirement of probable cause remain fully relevant in this context." ***Id.*** at 20. We take this statement to mean that all of the legal principles which underpin probable cause apply to a ***Terry*** stop.

We now restate these principles in terms of the reasonable suspicion test under ***Terry***. Reasonable suspicion exists where the officer, at the time of the detention, has knowledge of facts and circumstances sufficient to warrant a person of reasonable prudence to suspect that the person may be committing or has committed an offense. *See* ***County of Dane v. Sharpee***, 154 Wis.2d 515, 518, 453 N.W.2d 508, 510 (Ct. App. 1990). Reasonable suspicion does not involve a technical analysis; rather, it invokes the factual and practical considerations of everyday life on which reasonable and prudent persons, not legal technicians, act. *See* ***id.*** A court must look to the totality of the circumstances to determine whether the officer reasonably suspected that the defendant had committed an offense. *See* ***id***. Brearley cites to all of the probable cause/reasonable suspicion principles we have stated. However, whether by design or oversight, he fails to cite to one additional consideration: the test is also one of commonsense. *See* ***id.*** at 518, 453 N.W.2d at 510.

The test for a ***Terry*** stop is reasonableness. *See* ***State v. Guzy***, 139 Wis.2d 663, 675, 407 N.W.2d 548, 554 (1987). This test seeks to balance the individual's protection against unwarranted government intrusion against the societal interest in enabling police officers to solve crimes. *See* ***id***. at 675-76, 407 N.W.2d at 554. "Nevertheless, the law must be sufficiently flexible to allow law

enforcement officers under certain circumstances, the opportunity to temporarily freeze a situation, particularly where failure to act will result in the disappearance of a potential suspect." ***Id***.

Here, we conclude that Bradford observed specific and articulable facts which, taken together with reasonable inferences therefrom, raised a reasonable suspicion that the operator of the vehicle he observed might be intoxicated. Erratic driving is an evidentiary fact which is present in most drunk driving cases. Commonsense teaches that drunk drivers often operate motor vehicles in an erratic fashion without violating a particular rule of the road. An OWI conviction does not require proof of a violation of the vehicle code. Nor does it require that the driver's impairment be demonstrated by particular acts of unsafe driving. *See* WIS J I—CRIMINAL 2663. If proof of those facts is not required for purposes of obtaining a conviction, they obviously are not required for purposes of a reasonable suspicion under ***Terry***.

Brearley makes much of the fact that the trial court opined that Brearley's operation of his vehicle might also have been the result of innocent conduct. We agree with the trial court's observation. But the prospect of innocent conduct does not bar an officer from effectuating a ***Terry*** stop if the officer otherwise has a reasonable basis for suspecting that illegal activity is afoot. *See* ***State v. Krier***, 165 Wis.2d 673, 678, 478 N.W.2d 63, 65 (Ct. App. 1991).

The trial court correctly ruled that Bradford's initial stop of Brearley's vehicle was a valid ***Terry*** detention.

INVESTIGATION AFTER THE *TERRY* STOP

Next, Brearley argues that Bradford improperly expanded the scope of the investigation beyond the purpose of the ***Terry*** stop. We disagree.

The premise of Brearley's argument is that Bradford stopped his vehicle to investigate a possible lane deviation traffic offense. He therefore concludes that any investigation about possible drunk driving was improper. However, the premise of Brearley's argument is wrong. Brearley's driving conduct, while erratic, did not constitute a violation of § 346.13(1), STATS., and Bradford did not state that he stopped the vehicle for purposes of investigating or issuing a citation for that offense.

Rather, Bradford stopped the vehicle to investigate the reasons for the erratic driving which he had observed. We have held in the preceding discussion that those facts entitled Bradford to temporarily freeze the situation in order to further probe the reasons for that driving behavior. And that is exactly what Bradford did. He first attempted to establish the identity of the driver. In the course of this effort, Bradford began to observe the first symptoms of possible intoxication as Brearley awkwardly shuffled through his checkbook, repeated the process, dropped items on the floor, and started the process over. Bradford also detected the odor of intoxicants and noted that Brearley's speech was slurred. Only after making these observations did Bradford ask Brearley whether he had been drinking[2] and proceed to administer the field sobriety tests.

[2] Thus, Brearley is wrong when he says that Bradford's detection of the odor of intoxicants was the only factor suggesting intoxication before Bradford asked Brearley whether he had been drinking.

We uphold the trial court's ruling that all of the postdetention investigation was well within the purposes of the initial stop.

PROBABLE CAUSE TO ARREST

Brearley's final challenge is to the probable cause to support his arrest. His argument focuses on the field sobriety tests, and he points to certain portions of evidence which he contends impugn or impeach either the manner in which Bradford conducted the tests or his reading of the results.

However, we conclude that Brearley's arguments go to the credibility and weight which the trial court obviously chose to give Bradford's testimony. That, of course, is a matter for the court as the fact finder, and we see nothing clearly erroneous in the court's decision to place credence in Bradford's testimony. *See* § 805.17(2), STATS. Here, Bradford delineated how he administered the tests and he opined that as to each test Brearley exhibited signs or clues of likely intoxication.

Brearley also weaves arguments based on ***State v. Seibel***, 163 Wis.2d 164, 471 N.W.2d 226 (1990), and ***State v. Swanson***, 164 Wis.2d 437, 475 N.W.2d 148 (1991), into certain of his issues. We disagree that either case governs this case. ***Seibel*** was a search incident to arrest case. *See* ***Seibel,*** 163 Wis.2d at 166, 471 N.W.2d at 227. The issue was the standard for allowing the police to withdraw blood from the suspect after he had been arrested. *See* ***id***. The supreme court held that "reasonable suspicion" was the standard, *see* ***id***. at 179, 471 N.W.2d at 233, and then examined whether the facts of the case satisfied that standard, *see* ***id***. at 180-83, 471 N.W.2d at 233-35. Likewise, in ***Swanson***, the issue was whether the defendant was in custody for purposes of a search under the Fourth Amendment. *See* ***Swanson,*** 164 Wis.2d at 441, 475 N.W.2d at 150. We

see no controlling correlation between the level of probable cause or reasonable suspicion in those search settings and the question of reasonable suspicion or probable cause to arrest Brearley in this case.

Brearley also points to the ***Swanson*** court's footnote statement which we recite in the accompanying footnote.[3] We do not dispute that this language facially supports Brearley's argument in this case. However, ***Swanson*** has been limited in its application. In ***State v. Wille***, 185 Wis.2d 673, 684, 518 N.W.2d 325, 329 (Ct. App. 1994), the court stated, "The ***Swanson*** footnote does not mean that under all circumstances the officer must first perform a field sobriety test, before deciding whether to arrest for operating a motor vehicle while under the influence of an intoxicant."

[3] The supreme court said:

> Unexplained erratic driving, the odor of alcohol, and the coincidental time of the incident [with bar closing] form the basis for a reasonable suspicion but should not, in the absence of a field sobriety test, constitute probable cause to arrest someone for driving while under the influence of intoxicants. A field sobriety test could be as simple as a finger-to-nose or walk-a-straight-line test. Without such a test, the police officers could not evaluate whether the suspect's physical capacities were sufficiently impaired by the consumption of intoxicants to warrant an arrest.

State v. Swanson, 164 Wis.2d 437, 453 n.6, 475 N.W.2d 148, 155 (1991).

The ***Swanson*** court also said that the various indicia of intoxication recited in ***Seibel*** added up to reasonable suspicion but not probable cause. That, however, is not a correct recapturing of ***Seibel***. What the ***Seibel*** court said was, "While none of these indicia alone would give rise to a reasonable suspicion that the defendant's driving was impaired by alcohol, taken together they gave the police reason to suspect that the defendant's driving was impaired by alcohol." ***State v. Seibel,*** 163 Wis.2d 163, 183, 471 N.W.2d 226, 235 (1990). The ***Seibel*** court did not say how those collective indicia measured up against a probable cause standard.

We agree with the trial court's ruling that probable cause supported Brearley's arrest.

By the Court.—Judgment affirmed.

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