COURT OF APPEALS DECISION DATED AND FILED

September 17, 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. 2014AP220

Cir. Ct. No. 2012TR10424

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WALTER J. KUGLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: DONALD J. HASSIN, JR., Judge. *Modified and as modified, affirmed, and cause remanded with directions*.

¶1 GUNDRUM, J.[1] Walter Kugler appeals his judgment of conviction for operating while intoxicated-first offense following a jury trial and the circuit

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[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.

court's denial of his motions to suppress evidence. For the following reasons, we affirm.[2]

Background

¶2 The Wisconsin State Patrol trooper who arrested Kugler for OWI was the only witness to testify at the hearing on Kugler's motions to suppress. His material, undisputed testimony is as follows.

¶3 Around 11 p.m. on Saturday,[3] December 15, 2012, the trooper came upon a van parked on the shoulder of Interstate Highway 94 with its engine running and hazard lights flashing. To determine whether the operator was in need of assistance, the trooper pulled his squad car behind the van and approached the passenger side. Making contact, the trooper identified a woman in the passenger seat and Kugler as the driver. The woman indicated that they were coming from a Milwaukee Bucks game and were "lost on their way to Janesville." Speaking with Kugler and the woman, the trooper observed a "strong odor" of intoxicants, but could not confirm if it was coming from the woman, Kugler, or open intoxicants within the van, though the trooper observed that the woman was "obviously impaired." The trooper asked Kugler if he had been drinking and Kugler "deflected" his question. The trooper testified that he could not recall exactly what Kugler said but that his response "wasn't a direct answer." The

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[2] As noted in paragraph 25, *infra*, there is a clerical error in the judgment of conviction which shall be corrected upon remittitur.

[3] Although there was no testimony that December 15, 2012, was a "Saturday," we take judicial notice of this fact.

trooper confirmed that when asked a second time, Kugler responded that he had consumed "a beer."

¶4 The trooper requested that Kugler step out of the van, provided him directions back to Janesville, and asked him about other means by which he could get home. Due to the strong odor of alcohol coming from the vehicle and Kugler's deflective response to the inquiry as to whether he had been drinking, the trooper had concerns that Kugler might be impaired and wanted to determine if the strong odor of alcohol was coming from Kugler or his passenger. During his interaction with Kugler outside the van, the trooper smelled a "strong odor of intoxicants" coming from Kugler. The trooper further described the smell as a "heavy odor of intoxicants in open air that shouldn't be there if he only had one beer."

¶5 The trooper asked Kugler to perform a preliminary breath test (PBT), but Kugler refused. The trooper determined that he had to "continue my investigation due to the fact [Kugler] wanted to drive home and I couldn't allow him to do that based on his impairment," so the trooper had Kugler perform field sobriety tests, which included the horizontal gaze nystagmus, walk-and-turn and "one-legged stand" tests.[4] Following the tests, the trooper concluded that Kugler

[4] In performing the horizontal gaze nystagmus test, the trooper saw that Kugler's eyes were "watery and blood shot," and observed a "lack of smooth pursuit in both eyes," "nystagmus at maximum deviation … in both eyes," and nystagmus prior to forty-five degrees in the right eye. On the walk-and-turn test, Kugler placed his feet into a standing position that was the reverse of how he was instructed to stand, began the test prior to being instructed to do so, and when the trooper "was asking him if he had any questions," placed his first step approximately three inches "off the line ... [a]nd then he took deliberate steps after that … definitely concentrating." Near the last of his first nine steps, Kugler "kind of stepped over his own feet almost losing his balance." On the "one-legged stand" test, Kugler "leaned over to his right side … approximately ten seconds into it," and put down the foot he was supposed to keep raised.

was impaired and placed him under arrest for OWI. Kugler refused to submit to a blood draw, but a sample of his blood was drawn nonetheless.

¶6 Kugler filed motions to suppress evidence derived from the related detention and arrest and to suppress his blood test result following the warrantless blood draw. The circuit court denied the motions and Kugler was found guilty following a jury trial. Kugler appeals.

Discussion

¶7 Kugler frames his appeal as addressing a situation where the trooper employed an unconstitutional "community caretaker preliminary breath test." We see the relevant question, however, as did the circuit court—without considering Kugler's refusal to perform a PBT, did the facts possessed by the trooper at the time he temporarily detained Kugler for field sobriety tests objectively amount to reasonable suspicion that Kugler had been operating while intoxicated?

¶8 In reviewing a circuit court decision that a law enforcement officer had reasonable suspicion to temporarily detain an individual for investigation, we will uphold the court's factual findings unless they are clearly erroneous, but we review de novo the application of those facts to constitutional principles. *See* ***State v. Post***, 2007 WI 60, ¶8, 301 Wis. 2d 1, 733 N.W.2d 634. When considering whether reasonable suspicion existed, "we apply an objective standard in reviewing the actions of law enforcement officers. Thus, it is the circumstances that govern, not the officer's subjective belief." ***State v. Buchanan***, 178 Wis. 2d 441, 447 n.2, 504 N.W.2d 400 (Ct. App. 1993); *see also* ***Devenpeck v. Alford***, 543 U.S. 146, 153 (2004) ("[T]he fact that the officer does not have the state of mind [that] is hypothecated by the reasons [that] provide the legal justification for the

officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." (citation omitted)).

¶9 Reasonable suspicion exists if, 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." ***Post***, 301 Wis. 2d 1, ¶13. It must be based on more than an officer's "inchoate and unparticularized suspicion or 'hunch.'" ***Id.***, ¶10. An 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).

¶10 Kugler argues that at the time the trooper requested that he perform the PBT, the trooper did not have the requisite probable cause to believe Kugler had been operating while intoxicated and that the trooper improperly requested, as a community caretaker, that Kugler perform the PBT. However, we need not address whether the PBT was properly requested because, as the circuit court properly concluded, even without considering Kugler's PBT refusal, at the time the trooper detained Kugler for field sobriety tests, he had the necessary reasonable suspicion to do so.

¶11 At the time the trooper requested Kugler perform the PBT and field sobriety tests, he was aware that (1) it was approximately 11 p.m. on a Saturday night and Kugler was coming from a Bucks game; (2) as the operator of the vehicle, Kugler was "lost"; (3) his passenger was "obviously impaired"; (4) Kugler "deflected" the trooper's question as to whether he too had been drinking; and (5) upon further questioning, Kugler stated that he had "a beer," yet in separating Kugler from his passenger and the vehicle, Kugler smelled of a

"heavy odor of intoxicants in open air that shouldn't be there if he only had one beer."

¶12 On the first point, the day of the week and time of night lends to the suspicion that Kugler may have been drinking intoxicants and in an amount greater than might be consumed at other times of day or on other days of the week. *See* ***id.***, ¶36 (time of night "does lend some further credence" to an officer's suspicion of intoxicated driving); *see also* ***State v. Lange***, 2009 WI 49, ¶32, 317 Wis. 2d 383, 766 N.W.2d 551 (The time of day is relevant for an OWI probable cause (or reasonable suspicion) determination and "[i]t is a matter of common knowledge that people tend to drink during the weekend when they do not have to go to work the following morning."). It is also common knowledge that professional sports events are venues at which adults often consume alcohol. A reasonable officer certainly would have more reason to suspect Kugler had been consuming an excessive amount of alcohol based on these facts than if, for example, he had been coming from work or a child's school event at 10 a.m. on a Tuesday.

¶13 As to the second point, while sober individuals certainly also get "lost" from time to time while driving, the fact that Kugler was lost suggests a mental incoherence that would provide a reasonable officer with an indication of possible impairment. For example, a person in an impaired condition is more likely to miss or miscomprehend road signs or directions indicating the proper route, or fail to respond in an appropriate manner upon observing signs or directions so as to safely get into the proper lane for a turn.

¶14 On the third point—that Kugler's female companion appeared "obviously intoxicated"—Kugler asserts that any consideration of her condition is

improper because "[t]he constitution requires an individualized and particularized determination of probable cause." We do not take issue with this statement; however, the trooper here was aware that Kugler and his female companion had been engaged in a joint venture together—attending the Bucks game. And while it is certainly possible his companion became heavily intoxicated while at the game yet he did not drink at all, it was also quite likely that if she had consumed as much alcohol as she obviously had, that Kugler had joined her in drinking intoxicants, and perhaps to excess. This natural conclusion is evidenced by the fact that upon observing the intoxicated state of Kugler's companion, the trooper asked Kugler if he too had been drinking. Moreover, when there are two people in a joint venture together, it is a logical conclusion that one did not consume alcoholic beverages alone. *See* ***State v. Seibel***, 163 Wis. 2d 164, 182, 471 N.W.2d 226 (1991) ("Ordinarily, the mere fact that the defendant's friends were drinking would not constitute evidence of … drinking. However, it is evidence of the defendant's drinking in [this case] because the defendant and his friends were engaged in a joint venture, to wit, traveling together between taverns on their motorcycles."); *cf.* ***Post***, 301 Wis. 2d 1, ¶36 n.13.

¶15 Regarding the fourth point, Kugler argues that the trooper's testimony that Kugler "deflected" the trooper's question as to whether he had been drinking should be given "no weight" because the trooper could not remember the precise words Kugler stated as part of this "deflect[ion]." We disagree. The trooper did not need to remember the precise words. His testimony was sufficient that the response from Kugler appeared to be an attempt to deflect the trooper's question because Kugler's response "wasn't a direct answer." What is unquestionably clear from the trooper's testimony is that when the trooper first

asked Kugler the direct question as to whether Kugler too had been drinking, Kugler did not respond with the straightforward truthful affirmation that he had.

¶16 As to the final point, upon further questioning, Kugler told the trooper that he had "a beer," yet when the trooper spoke with Kugler outside of the van, Kugler smelled of a "heavy odor of intoxicants in open air that shouldn't be there if he only had one beer." This suggests not only an effort by Kugler to hide the true amount of alcohol he had consumed, but that he actually had consumed a sufficient amount to create a "heavy odor" of alcohol "in open air."

¶17 The foregoing constitute "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant," the intrusion of the investigative detention for field sobriety tests. *See* ***Post***, 301 Wis. 2d 1, ¶10 (citation omitted); *see also* ***State v. Colstad***, 2003 WI App 25, ¶¶19-21, 260 Wis. 2d 406, 659 N.W.2d 394. Under the totality of the circumstances, a reasonable officer with the knowledge the trooper possessed prior to his requests that Kugler perform a PBT and field sobriety tests would have reasonably suspected Kugler had been operating while intoxicated. *See* ***Post***, 301 Wis. 2d 1, ¶13; ***Colstad***, 260 Wis. 2d 406, ¶¶19-21.

¶18 Kugler asserts that the trooper's request that he perform a PBT was improper, and thus the request "tainted all subsequent events." We disagree, and instead agree with the assessment of the circuit court that the PBT request by the trooper in a community caretaker-type role and the related refusal by Kugler are "immaterial to the consequences of the continued actions of the [trooper]" because the trooper had reasonable suspicion to perform the field sobriety tests without consideration of Kugler's refusal to perform a PBT. Further, the trooper's belief that he was acting in a community caretaker-type role is ultimately irrelevant here

because "we apply an objective standard in reviewing the actions of law enforcement officers.… [I]t is the circumstances that govern, not the officer's subjective belief." ***Buchanan***, 178 Wis. 2d at 447 n.2.

¶19 Because the trooper had the requisite reasonable suspicion to request that Kugler perform field sobriety tests, the trooper's observations as to Kugler's performance on those tests were in no way "tainted" by the request that he perform a PBT, whether or not that request was properly made. Other than Kugler's contention that consideration of his refusal to take a PBT "tainted" the investigation and arrest, Kugler makes no argument that the indicia of intoxication observed by the trooper—both prior to the request for a PBT and during the field sobriety tests conducted thereafter—did not objectively amount to probable cause to arrest.[5] As a result, Kugler has provided us with no grounds by which we could conclude that the circuit court erred in denying his first motion to dismiss.

¶20 Kugler also challenges the trooper's "warrantless, forced blood draw," arguing that it was unconstitutional under Fourth Amendment principles as clarified in ***Missouri v. McNeely***, 569 U.S. ___, 133 S. Ct. 1552 (2013). The State concedes that the blood draw was taken in violation of Kugler's Fourth Amendment rights based on ***McNeely***, but argues the evidence from the blood sample should not be excluded because, at the time of the blood draw, the trooper was acting in good faith reliance upon "well-established state precedent" that permitted such draws. The State points out that our supreme court clearly held in ***State v. Bohling***, 173 Wis. 2d 529, 494 N.W.2d 399 (1993), *cert. denied*, ***Bohling***

[5] Also, during the evidentiary hearing on his motions, Kugler did not question the trooper regarding Kugler's performance on the field sobriety tests.

v. Wisconsin, 510 U.S. 836 (1993), that the dissipation of alcohol in a person's system, by itself, constituted sufficient exigent circumstances to justify a warrantless blood draw.

¶21 In support of his position, Kugler points out that when the trooper ordered the blood draw on December 15, 2012, (1) the Missouri Supreme Court had issued its decision in ***State v. McNeely***, 358 S.W.3d 65 (Mo. 2012) (per curiam), disagreeing with the ***Bohling*** holding, and similar case law in other states, that dissipation alone justified a warrantless blood draw and (2) the United States Supreme Court had granted certiorari review in the case. The Supreme Court's April 2013 decision in ***McNeely*** ultimately did abrogate the law of Wisconsin as articulated in ***Bohling***. The ***McNeely*** Court held that "[i]n those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." ***McNeely***, 133 S. Ct. at 1561. Kugler emphasizes that even though the Supreme Court did not issue its decision in ***McNeely*** until April 2013, its grant of certiorari in the case was three months *before* the blood draw here and thus the blood draw authority granted to law enforcement by our state supreme court in ***Bohling*** was "no longer clear and settled."

¶22 The State conversely emphasizes that the Supreme Court did not issue its decision in ***McNeely*** until April 2013—five months *after* the trooper ordered the blood draw. The State argues that at the time of the blood draw, our state supreme court's ruling in ***Bohling*** was the controlling law in Wisconsin and clearly authorized warrantless blood draws such as the one in this case.

¶23 The circuit court assessed the situation as follows:

> The change in ***McNeely*** wasn't decided just because the Writ was pending. It didn't mean it goes to favor the State or the defendant in that case. We don't know the outcome. How is law enforcement supposed to respond to that.
>
> ….
>
> [T]o somehow affect the law enforcement and the long-standing law of Wisconsin simply upon the acceptance of a decision from the Supreme Court of the State of … Missouri by the United States Supreme Court I think is overburdening and overwhelming.

¶24 We agree with the circuit court; the law in Wisconsin did not change because the Supreme Court granted certiorari review of the ***McNeely*** decision by the Missouri Supreme Court. Rather, until the United States Supreme Court issued its ruling in ***McNeely*** in April 2013, ***Bohling*** remained the clear and well-settled law in Wisconsin and law enforcement officers relying upon it did so in good faith.[6] Thus, the trooper properly relied upon Wisconsin law as it existed at the time of the blood draw and, accordingly, the evidence should not be excluded. *See* ***State v. Reese***, 2014 WI App 27, ¶¶18-22, 353 Wis. 2d 266, 844 N.W.2d 396 (applying good faith exception to exclusionary rule in a pending OWI case where warrantless blood draw was obtained prior to Supreme Court's decision in ***McNeely***).

¶25 On a separate matter, we note that the judgment of conviction incorrectly indicates that Kugler's trial was to the court, not to a jury. Because this appears to be a clerical error, upon remittitur, the circuit court shall enter an

[6] We note that Kugler has failed to cite any law supporting his proposition that clear, well-settled law is no longer clear or well-settled simply because the Supreme Court has accepted review in a case that *could* alter that law.

amended judgment of conviction correctly identifying Kugler's conviction to be upon trial to a jury. With this modification, the judgment is affirmed.

By the Court.—Judgment modified and as modified, affirmed, and cause remanded with directions.

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