COURT OF APPEALS
DECISION
DATED AND FILED

September 23, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP426-CR **Cir. Ct. No. 2013CT822**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JULIE A. BILQUIST,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County: KENDALL M. KELLEY, Judge. *Affirmed*.

¶1 HOOVER, P.J.[1] Julie Bilquist appeals a judgment of conviction for operating a motor vehicle while intoxicated (OWI) second offense, and for

[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.

operating after revocation (OAR).[2] Bilquist contends the circuit court erred by denying her motion to suppress evidence because the officer who stopped her lacked reasonable suspicion to extend her detention for administering field sobriety tests. We disagree and affirm.

BACKGROUND

¶2 After being stopped by Green Bay Police officer Timothy Kenney, Bilquist was charged with OWI, second; PAC, second; and OAR. Bilquist moved to suppress evidence, arguing Kenney unlawfully extended the traffic stop. At the suppression hearing, Kenney was the sole witness.

¶3 Kenney testified that at 12:46 a.m. on Sunday, March 17, 2013, he pulled up behind Bilquist at a red light. When the light turned green, Bilquist accelerated away from Kenney's fully marked squad car. Kenney caught up with

[2] While Bilquist was found guilty of OWI as well as operating with a prohibited alcohol concentration (PAC), both as second offenses, the judgment of conviction reflects that she was convicted only on the OWI charge and on the OAR charge to which she pleaded no contest. We assume, despite no mention from the parties, that this was in accordance with WIS. STAT. § 346.63(1)(c) which provides:

> A person may be charged with and a prosecutor may proceed upon a complaint based upon a violation of any combination of par. (a), (am), or (b) for acts arising out of the same incident or occurrence. If the person is charged with violating any combination of par. (a), (am), or (b), the offenses shall be joined. If the person is found guilty of any combination of par. (a), (am), or (b) for acts arising out of the same incident or occurrence, there shall be a single conviction for purposes of sentencing and for purposes of counting convictions under ss. 343.30 (1q) and 343.305. Paragraphs(a), (am), and (b) each require proof of a fact for conviction which the others do not require.

Paragraph (a), (am), and (b) refer, in relevant part, to the condition of driving while under the influence of an intoxicant; with a detectable amount of a restricted controlled substance in his or her blood; and with a prohibited alcohol concentration.

Bilquist's vehicle, which, based on his own speed, was traveling over forty-five miles per hour in a thirty-mile-per-hour zone. He activated his lights, but Bilquist failed to react by slowing down or pulling over, which Kenney considered unusual. Kenney then activated his siren. At this point, Bilquist tapped the brakes, and moved into the left turn lane. However, she then returned to her previous lane and continued driving to the next intersection. She made a left-hand turn onto an access road leading into a parking lot for Planet Fitness, but stopped her vehicle on this access road before reaching the parking lot.

¶4 Kenney approached Bilquist and explained why he stopped her. Bilquist responded that she did not realize she was driving that fast. Kenney asked whether Bilquist had been drinking; she said she had not. Kenney testified that he did not feel Bilquist was being truthful. He also testified that he and the backup officer checked Bilquist's mouth because she spoke as though she had something in it, but they did not find anything. Kenney returned to his vehicle and learned from the teletype that Bilquist's driving privileges were revoked for an OWI-related offense. Kenney then asked Bilquist to perform field sobriety tests. Ultimately, Bilquist was arrested for OWI.

¶5 At the conclusion of the suppression hearing, the circuit court denied Bilquist's motion, noting there was ample basis for Kenney's reasonable suspicion for conducting field sobriety tests. In reaching its decision, the circuit court detailed the circumstances leading up to the initial stop, describing it as "odd behavior from the very first observation, behavior that would certainly be consistent with impaired decision making, with impaired driving." The court determined Bilquist's behavior was "sufficiently unusual, disturbing and sufficiently consistent with impaired decision making and impaired driving that it served as a basis for reasonable suspicion[.]"

¶6 Bilquist subsequently pleaded no contest to the OAR charge, and proceeded to a jury trial on the remaining two counts. She was found guilty of OWI and PAC, both second offenses. However, as noted above, Bilquist was only convicted of OWI and OAR. Bilquist now appeals.

DISCUSSION

¶7 There is no dispute that Bilquist's initial detention was justified by reasonable suspicion of a civil traffic violation. Bilquist argues Kenney's decision to extend Bilquist's detention to conduct field sobriety tests was not justified by the reasonable suspicion that she was operating while intoxicated.

¶8 It is constitutionally permissible for a police officer to stop and detain a vehicle if the officer has a reasonable and articulable suspicion that the driver is violating a traffic law, or is about to commit an offense. ***State v. Betow,*** 226 Wis. 2d 90, 93-94, 593 N.W.2d 499 (Ct. App. 1999). Whether a valid traffic stop may be lawfully extended to administer field sobriety tests turns on "whether the officer discover[s] information subsequent to the initial stop which, when combined with information already acquired, provide[s] reasonable suspicion [of] … 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.

¶9 Whether reasonable suspicion exists is a question of constitutional fact. ***State v. Popke***, 2009 WI 37, ¶10, 317 Wis. 2d 118, 765 N.W.2d 569. We will uphold the circuit court's findings of fact unless they are clearly erroneous. ***Id.*** However, whether those facts amount to reasonable suspicion is a question of law we review independently. ***Id.***, ¶¶10, 25.

¶10 "[W]hat constitutes reasonable suspicion is a common sense test: under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience." ***State v. Young***, 212 Wis. 2d 417, 424, 569 N.W.2d 84 (Ct. App. 1997). A police officer must be able to identify "specific and articulable facts" and draw "rational inferences from those facts" sufficient to constitute reasonable suspicion to justify an extension of a driver's detention. ***State v. Post***, 2007 WI 60, ¶10, 301 Wis. 2d 1, 733 N.W.2d 634. An officer's "inchoate and unparticularized suspicion or 'hunch'" is not enough to establish reasonable suspicion. ***Id.*** (quoted source omitted).

¶11 Bilquist argues there was no evidence to suggest she had consumed intoxicants or that she was impaired. She insists her driving decisions after hearing Kenney's siren reflected her attempt to get out of the officer's way before realizing he was pulling her car over. She lists a slew of common intoxication indicators that were absent in her case: there was no weaving, swerving, or lane deviation; no fumbling when producing identification; no slurred speech; no glassy, glossy, or bloodshot eyes; no odor of intoxicants or marijuana. Bilquist contends that without the presence of any of these intoxication indicators, Kenney improperly acted on an "inchoate and unparticularized suspicion or 'hunch.'" *See* ***id***. Bilquist asserts that case law points to the requirement of some indication of intoxication to provide for reasonable suspicion; yet in her case, she maintains, there was no indication of consumption, intoxication, or impairment to justify her extended detention after the initial traffic stop.

¶12 Notably, none of the officers observed any reckless or inattentive driving by the defendants in the cases on which Bilquist relies, and in which this court found insufficient reasonable suspicion of intoxicated driving. *See* ***State v.***

Gonzalez, No. 2013AP2585-CR, unpublished slip op. (WI App May 8, 2014); ***State v. Meye***, No. 2010AP336-CR, unpublished slip op. (WI App July 14, 2010); ***County of Sauk v. Leon***, No. 2010AP1593, unpublished slip op. (WI App Nov. 24, 2010). Bilquist fails to appreciate that none of these cases contain circumstances that rise to the level of her own; while the officers in her cited cases may have detected odors of intoxication, none of them observed potentially impaired driving to bolster their suspicions of intoxicated driving. In Bilquist's case, the observation of an indicative odor may have been absent, but the troubling driving was not.

¶13 Furthermore, the absence of other commonly recognized indicators of intoxicated driving is not persuasive; suspicious activity is naturally ambiguous. The totality of the circumstances test, by its very nature, does not require specific indicia to establish reasonable suspicion. Rather, reasonable suspicion is determined by each case's specific and articulable facts and inferences from those facts. As our supreme court noted in ***State v. Lange***, 2009 WI 49, ¶37, 317 Wis. 2d 383, 766 N.W.2d 551, "[a]lthough evidence of intoxicant usage—such as odors, an admission, or containers—ordinarily exists in drunk driving cases and strengthens the existence of probable cause, such evidence is not required. The totality of the circumstances is the test." While ***Lange*** involved a challenge to probable cause to arrest for OWI, the supreme court's proclamation concerning evidence of intoxicant usage is nevertheless useful to our own inquiry into the existence of reasonable suspicion to extend a lawful traffic stop to investigate OWI.

¶14 In response to Bilquist's arguments, the State maintains that the totality of the circumstances provided Kenney with more than enough information to reasonably suspect that Bilquist was driving while intoxicated. Relying on

State v. Waldner, 206 Wis. 2d 51, 556 N.W.2d 681 (1996), the State stresses the cumulative effect of Kenney's observations and rational inferences: the suspiciously inattentive driving, the impression Kenney and his backup officer formed that Bilquist spoke as though she had something in her mouth, the timing of the incident, and the knowledge that Bilquist's operating privileges were revoked as a result of a previous OWI-related offense.

¶15 Bilquist replies that the State's reliance on ***Waldner*** is misplaced, because the issue in ***Waldner*** was whether the officer had reasonable suspicion to stop the defendant, whereas here, the issue is whether the officer had reasonable suspicion to extend Bilquist's stop. This argument fails, as the law is clear: "[t]he validity of the extension is tested in the same manner, and under the same criteria, as the initial stop." ***Betow***, 226 Wis. 2d at 94-95. Examining ***Waldner*** to survey reasonable suspicion standards was appropriate.

¶16 Based on the totality of the circumstances, we conclude that Kenney had reasonable suspicion to extend Bilquist's detention to conduct field sobriety tests. As the circuit court pointed out, "[T]he introduction to the defendant was that she is speeding away from a marked police car. That, by itself, is irregular behavior." Kenney articulated specific facts, and rational inferences from those facts, indicating impaired driving. There was the timing of the traffic stop in the early morning hours on a weekend, Bilquist's excessive speed in front of the marked police car, and Bilquist's reaction (as well as lack thereof) to Kenney's attempts to pull her over. These driving behaviors, combined with Kenney's impressions that Bilquist was speaking oddly, seemed untruthful, and was driving on a license revoked due to a previous OWI-related offense, were sufficient to create reasonable suspicion that Bilquist was operating her vehicle while intoxicated. *See* ***Lange***, 317 Wis. 2d 383, ¶¶28-29, 32-33 (time of night of traffic

stop, defendant's driving, and defendant's prior conviction for OWI are relevant factors in OWI investigation). Accordingly, the circuit court properly denied Bilquist's suppression motion.

¶17 Lastly, in light of the above, we need not address the State's alternative argument that it was not possible to unreasonably extend the traffic stop because Bilquist's operating privileges were revoked and she would not have been allowed to drive away. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (cases should be decided on the narrowest possible ground).

By the Court.—Judgment affirmed.

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