COURT OF APPEALS
DECISION
DATED AND FILED

July 8, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP239-CR **Cir. Ct. No. 2014CM52**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT C. BLANKENHEIM,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Ozaukee County: JOSEPH W. VOILAND, Judge. *Affirmed*.

¶1 GUNDRUM, J.[1] Robert Blankenheim appeals from a judgment of conviction for operating after revocation (OAR), contending the circuit court erred

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c), (f) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

in concluding he was lawfully stopped by a law enforcement officer and in denying Blankenheim's motion to suppress. He further argues there was no evidence to support a necessary element of the offense—operating the motor vehicle on a highway. Related to both issues, he claims the court erred in relying upon the officer as a credible witness. We disagree with Blankenheim on all points and affirm.

Background

¶2 A court trial on the OAR charge and a refusal hearing were jointly held. The relevant evidence to this appeal of the OAR conviction[2] was provided by two witnesses at that proceeding.

¶3 Ryan Hurda, a city of Port Washington police officer, testified that on January 29, 2014, he was dispatched at approximately 10:25 p.m. to investigate "a vehicle parked in a driveway that is not normally used, and it was occupied, the engine running." Hurda arrived at the location in a marked squad car five minutes after receiving the dispatch. He pulled his squad behind the vehicle, which had an Illinois license plate, and illuminated it with a spotlight but did not activate the squad car's emergency lights or siren. Hurda observed "fumes coming out of the exhaust pipe." He approached the vehicle and communicated with the person in the driver's seat, whom Hurda believed to be a male and identified at trial as Blankenheim. When Hurda asked Blankenheim if he lived at the residence, Blankenheim responded "no," and a man in the passenger's seat responded, "I

[2] This court dismissed Blankenheim's appeal of his refusal conviction as untimely, s*ee* ***State v. Blankenheim***, No. 2015AP240, unpublished op. and order (WI App Apr. 8, 2015), and he has not petitioned for review of that decision. Thus, we consider his appeal here as to the OAR conviction only.

do." Hurda was familiar with the passenger, Thomas Kassouf. Hurda asked Blankenheim if the vehicle was his, and Blankenheim indicated it was.

¶4 Hurda returned to his squad car, pulled out onto and parked on the street, again without his emergency lights on, and reviewed registration information he received from dispatch related to the vehicle. Hurda's recollection at trial was that when he first pulled into the driveway, he "called out over the radio" information related to the vehicle, and when he returned to his vehicle after making contact with Blankenheim, he "reviewed the registration that [he] had run on the vehicle" and "noticed that the vehicle did not match the plate" and "it was also registered to a female."

¶5 After learning of the registration and license discrepancies, Hurda again exited the squad car, and noticed Blankenheim and Kassouf had exited the subject vehicle. From "about 50 feet" or more away from Blankenheim and Kassouf, Hurda asked Blankenheim if Hurda could speak with him regarding his registration. Hurda did not order Blankenheim to stop, but said, "[E]xcuse me, sir, may I speak with you about your registration." In response to Hurda's inquiry and as Hurda was walking up the driveway, Blankenheim "stood next to his vehicle and began conversing with [Hurda] about the registration and the fact that the plates belonged to a girlfriend. And that he had just titled the car that day."

¶6 Hurda asked to see the title for the vehicle and Blankenheim's identification because he believed there was "a violation" related to registration of the vehicle and "based on the fact that it appeared he had driven there." Hurda had to request Blankenheim's driver's license several times before Blankenheim produced it, which Hurda believed was unusual. Hurda observed that Blankenheim "seemed nervous. And a little bit agitated. He paced back and forth

a little bit. And he—his speech was slow and very metered. And I also noted when I was speaking with him that even with my flashlight his eyes appeared dilated." Hurda asked Blankenheim "if there was anything [Hurda] needed to know, and [Blankenheim] indicated no. He did not have any warrants." Hurda also asked Blankenheim if he had a revoked license, and Blankenheim "became silent and his shoulders slumped, and he handed me the license." Hurda then "ran the license" and learned that Blankenheim "did, in fact, have a revoked status based on a prior OWI offense." Hurda then "asked [Blankenheim] how he had gotten there. And he indicated that he had—he did not want to talk about that."

¶7 Hurda testified that he also spoke with Kassouf, "outside of the vehicle and outside of the presence of Mr. Blankenheim," after which conversation Hurda placed Blankenheim under arrest for OAR. Although the State attempted to get into evidence the substance of Hurda's conversation with Kassouf, the circuit court sustained an objection by Blankenheim's counsel that such evidence was hearsay. While handcuffing Blankenheim, Hurda was "[l]ess than a foot" from Blankenheim and "could smell marijuana emanating from his person that [he] had not previously detected."

¶8 On cross-examination, Hurda testified that when he had returned from checking the vehicle's registration, Blankenheim and Kassouf were standing beside the vehicle. Questions and answers continued as follows:

> [Counsel]: And when you went up now the second time you stated in a loud fashion, hey, you, stop. I want to talk to you. Isn't that true?
>
> [Hurda]: No. Absolutely not. I did not say that.
>
> [Counsel]: You didn't command them in a—make a command in a loud voice for them to stop as they were heading into the house?

[Hurda]: No.

[Counsel]: Was your hand on your gun?

[Hurda]: No.

After related questioning, Hurda responded, "No. I don't remember ever having my hand on my gun. I had my flashlight under my arm, and I asked, excuse me, sir, may I speak with you about your vehicle's registration." Hurda testified that when he returned to his squad car after the first encounter with Blankenheim, his concerns about a possible trespass had been allayed because he recognized Kassouf, who he knew belonged at the residence, but Hurda still considered the vehicle to be "a suspicious vehicle."

¶9 The State called Kassouf as its next witness, and he testified to the following. He acknowledged his criminal record and that Blankenheim was a friend. Kassouf lived at the residence where the events at issue occurred, and Blankenheim came to visit him on the evening in question, as the two had previously planned. Kassouf knew when Blankenheim arrived because Blankenheim called Kassouf upon his arrival. Kassouf believed Blankenheim called him from Blankenheim's cell phone, and that it was a "[c]ouple minutes" from the time Blankenheim called Kassouf to the time Kassouf came out of his home and observed Blankenheim "in the driver's seat" "in his car in the driveway" and with no one else in the vehicle. Kassouf also saw no one else walking away from the vehicle. He believed Blankenheim lived in Milwaukee at the time.

¶10 Kassouf entered Blankenheim's vehicle and "smoked a couple cigarettes." The second time the officer approached him and Blankenheim, the officer asked Kassouf if he had driven the vehicle and he responded, "No." The officer also asked Kassouf whether Blankenheim had driven the vehicle there, and

Kassouf believed he told the officer "yes," although he also acknowledged he did not see Blankenheim drive the vehicle.

¶11 On cross-examination Kassouf stated he and Blankenheim were outside of the vehicle when the officer approached them the second time. He said the vehicle was turned off and he and Blankenheim were heading into Kassouf's house. Regarding the interaction with the officer, additional questioning and testimony went as follows:

> [Counsel]: And did you notice did the officer have his hand on his gun?
>
> [Kassouf]: I didn't notice.
>
> [Counsel]: Okay. Did the officer command you or order you to stop? How did that happen? I'm just—
>
> [Kassouf]: I really don't remember.
>
> [Counsel]: How did it come about that you both stopped? Why didn't you just keep going into the house?
>
> [Kassouf]: Well, he must have said something like, hey, or stop, or you guys. But I don't remember.
>
> [Counsel]: Do you recall him saying, stating anything, excuse me, sir, I'd like to speak to you about your registration or words to that effect?
>
> [Kassouf]: At some point.
>
> [Counsel]: I mean, as you're going into the house that caused you to stop do you recall that statement or words to that effect being stated then?
>
> [Kassouf]: I don't recall that statement.
>
> [Counsel]: So you don't recall what words he used to cause you to stop, but he said something?
>
> [Kassouf]: Yes.
>
> [Counsel]: All right. On a scale of one to ten … for loudness, okay, tone, you know, loud, one being a whisper.

> [Kassouf]: Uh-huh.
>
> [Counsel]: And ten being a shouting, okay? Do you know that?
>
> [Kassouf]: Yes.
>
> [Counsel]: All right. Using that scale, his commands, what he gave you that caused you to stop, do you know where it would be in that scale from one to ten, or don't you know?
>
> [Kassouf]: I don't know. I don't remember. Somewhere between a three and a seven which isn't very helpful. Sorry.

¶12 Kassouf reconfirmed that he never saw Blankenheim driving the vehicle on that date. When asked, "Do you know as you sit here today whether or not another person drove him there?" Kassouf responded, "I don't know."

¶13 The circuit court asked Kassouf if "[a]t any time that night … before Mr. Blankenheim arrived was there a tow truck in your driveway," to which Kassouf responded, "No." At the conclusion of the trial, the circuit court found Blankenheim guilty of operating a motor vehicle on a state highway after revocation.[3] Blankenheim appeals.

Discussion

¶14 Blankenheim first contends he was stopped and detained illegally on the property in question and all evidence flowing therefrom should have been suppressed by the circuit court. Relatedly, he insists the court clearly erred "by relying upon Officer Hurda as a credible witness." Lastly, Blankenheim argues the court erred in finding that Blankenheim operated his vehicle on a highway, a

[3] The State proved, and Blankenheim acknowledged, that Blankenheim's operating privileges were revoked at the time of the relevant events.

necessary element, because there was no evidence "other than Hurda's unreliable testimony." Blankenheim is incorrect in all respects.

¶15 To begin, we note that the State asserts Blankenheim forfeited the suppression issue because he did not adequately raise it before the circuit court. We agree. At the trial, Blankenheim made no attempt to have the circuit court rule that evidence should be suppressed. Indeed, at no time during the trial did Blankenheim mention suppression or complain that the circuit court failed to address the issue. That said, even if Blankenheim had not forfeited the issue, suppression nonetheless would have been inappropriate based on this record.

¶16 We will affirm a circuit court's findings of fact if they are not clearly erroneous. *See* WIS. STAT. § 805.17(2); ***Ozaukee Cnty. v. Flessas***, 140 Wis. 2d 122, 130-31, 409 N.W.2d 408 (Ct. App. 1987). We decide de novo the legal issue of whether evidence should be suppressed. *See* ***State v. Hambly***, 2008 WI 10, ¶49, 307 Wis. 2d 98, 745 N.W.2d 48. It is the circuit court, not this court, that determines the credibility of witnesses and resolves conflicts in the evidence. ***State v. Johannes***, 229 Wis. 2d 215, 222, 598 N.W.2d 299 (Ct. App. 1999). As to a challenge to the sufficiency of the evidence,

> an appellate court may not reverse a conviction unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.

State v. Poellinger, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990).

¶17 "[A] person is 'seized' only when, by means of physical force or a show of authority, his freedom of movement is restrained," and is "'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances

surrounding the incident, a reasonable person would have believed that he was not free to leave." ***United States v. Mendenhall***, 446 U.S. 544, 553-54 (1980). Here, the undisputed evidence supports the circuit court's conclusion that Blankenheim "voluntarily engage[d] in a conversation with the officer," and that he was not temporarily detained, or seized, at the time relevant to his challenge.

¶18 During Hurda's first interaction with Blankenheim, Blankenheim told Hurda the vehicle belonged to him. After Hurda returned to his squad car, he learned, based upon an earlier request to dispatch, the vehicle was registered to a female and did not match the license plate. Hurda exited his squad car and observed that Blankenheim and Kassouf had exited the subject vehicle. From about fifty feet away, Hurda asked Blankenheim if he could speak with him regarding his registration. Blankenheim "engaged [Hurda] in conversation" and they began discussing why the license plate did not match the vehicle. Hurda testified that he did not order Blankenheim and Kassouf to stop, but said something to the effect of "excuse me, sir, may I speak with you about your registration." The only other witness to testify, Kassouf, largely supported Hurda's testimony, and at a minimum did not conflict with it. Despite the efforts of Blankenheim's counsel to secure testimony from Kassouf countering Hurda's version, Kassouf repeatedly stated he had no recollection of Hurda exhibiting any type of force or authority to engage Blankenheim and Kassouf during the second encounter.

¶19 There is no evidence that would suggest Blankenheim would not have believed he was free to leave when Hurda approached him for conversation the second time. More importantly, based on the totality of the circumstances, a reasonable person in Blankenheim's position would not have felt compelled to stay. *See* ***id.*** The evidence provides us with no reason to conclude the circuit

court erred in determining that Hurda's engagement with Blankenheim the second time was on a voluntary basis.

¶20 However, even if Blankenheim had been temporarily "seized," in the constitutional sense, for investigative inquiry, we conclude that such a seizure was lawful because Hurda had reasonable suspicion to temporarily detain Blankenheim to determine if "criminal activity" was "afoot." *See* ***State v. Waldner***, 206 Wis. 2d 51, 58-60, 556 N.W.2d 681 (1996); ***State v. Pugh***, 2013 WI App 12, ¶9, 345 Wis. 2d 832, 826 N.W.2d 418 (2012) (citation omitted). On their first encounter, Blankenheim told Hurda the vehicle was his; yet, upon Hurda's return to his squad car he learned that the vehicle was registered to a female and did not match up with the license plate. Indeed, Hurda would have been guilty of poor police work if he did not re-engage with Blankenheim to quickly clear up or confirm Hurda's reasonable suspicions of illegal activity.

¶21 As to the credibility of Hurda, Blankenheim contends that if Hurda was fifty feet or more away from Blankenheim when he re-engaged with Blankenheim, "[t]he distance alone indicates" that the re-engagement "was both commanding and authoritative." Blankenheim adds, "It is clearly erroneous to presume that an officer could speak politely from fifty feet or more away and receive consent …." He also asserts that Hurda's credibility is called into question because Hurda had "no rational basis" to return to the property simply because of concerns regarding registration of the vehicle, asserting that doing so was "a pre-text in order to fish for criminal activity." Blankenheim further argues Hurda's credibility is "dramatically undermined" by Hurda "ha[ving] his reasonable suspicions [of illegal activity] dispelled when he was next to Mr. Blankenheim during the first stop only to have a laundry list of suspicious behavior develop during the second illegal stop mere minutes later." Blankenheim further questions

Hurda's credibility with regard to Hurda's testimony that he smelled marijuana around Blankenheim after making contact with Blankenheim the second time due to the fact Hurda testified he did not smell any marijuana odor during his first contact with Blankenheim.

¶22 We reject Blankenheim's challenge to the circuit court's credibility determination regarding Hurda.[4] We are to give significant deference to the circuit court's determination of witness credibility "because of '... the superior opportunity of the [circuit] court to observe the demeanor of witnesses and to gauge the persuasiveness of their testimony.'" *See* ***Johnson v. Merta***, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980). Blankenheim makes additional arguments suggesting particular evidence undermines Hurda's credibility. We will not detail them all since they are all in the same vein and really amount to little more than an attempt to retry the case before us, essentially making closing arguments to this court as if we were the circuit court. Our job is not to reweigh the evidence, however, but to determine whether the circuit court erred. That said, we will address Blankenheim's challenges identified above.

¶23 To begin, no evidence was introduced to suggest Hurda could not have utilized a reasonable and measured tone of voice that Blankenheim could have heard from fifty feet away. On Blankenheim's second point, Hurda clearly had legitimate reason to re-engage Blankenheim in that Hurda learned upon returning to his squad car after the first encounter that the license plates did not

[4] We are unimpressed with Blankenheim's use of dramatic accusations throughout his briefs, such as, "Hurda's assertion of a marijuana smell is dubious at best …. If anything, it shows his overzealous desire to pin Mr. Blankenheim for any crime he could fabricate under any circumstances he could create."

match the vehicle and the vehicle was registered to a female while Blankenheim had just told the officer it belonged to him. Regarding the "laundry list of suspicious behavior develop[ed]" during Hurda's second encounter with Blankenheim, it is clear from the testimony that Hurda's second interaction with Blankenheim was more in depth than the first encounter, including Blankenheim now standing outside of his vehicle, not merely sitting inside it. As to the marijuana smell, Kassouf testified to smoking "a couple cigarettes" in the vehicle and Hurda testified that while he was handcuffing Blankenheim, during the second encounter, he was "[l]ess than a foot" from Blankenheim, both of which reasons would reasonably explain why Hurda smelled a marijuana odor on Blankenheim during their second encounter but not during their first. It is clear Hurda had a better opportunity to observe Blankenheim during their second encounter.

¶24 The circuit court relied upon Hurda's testimony in its findings and therefore found him to be a credible witness. The court would have been hard pressed to find otherwise in that the testimony of the only other witness, Kassouf—Blankenheim's friend for some years—did not conflict with Hurda's testimony in any significant way. The court's reliance upon Hurda's testimony was entirely appropriate.

¶25 Lastly, the evidence also fully supports the circuit court's finding that Blankenheim had operated his vehicle on a highway on the evening in question. The undisputed evidence on this point is as follows. When Hurda arrived at the property, he observed Blankenheim in the driver's seat of the vehicle and "fumes coming out of the exhaust pipe." During Hurda's first interaction with Blankenheim and Kassouf, Blankenheim told Hurda he did not live at the residence and Kassouf told Hurda that he (Kassouf) did live there. During their second conversation, Hurda observed Blankenheim to appear "nervous" and "a

little bit agitated," and Blankenheim "paced back and forth a little bit." When Hurda asked Blankenheim if there was "anything [Hurda] needed to know," Blankenheim indicated "no. He did not have any warrants." But when Hurda asked Blankenheim if he had a revoked license, Blankenheim "became silent and his shoulders slumped, and he handed me the license." These actions, particularly the slumping of the shoulders in response to Hurda's question, indicated Blankenheim's consciousness of his guilt. Blankenheim's further response to Hurda that he "did not want to talk" about how Blankenheim "had gotten there," would have further suggested to the fact finder that Blankenheim had driven to the property. Significantly, Hurda testified that when he asked Kassouf if Kassouf had driven the vehicle to the property, Kassouf gave a response which Hurda understood to indicate that Kassouf had not driven the vehicle.

¶26 Kassouf also provided important testimony on the issue of whether Blankenheim had driven the vehicle on the highway. Kassouf testified that he and Blankenheim had made prior arrangements for Blankenheim to come visit Kassouf, and Kassouf believed Blankenheim lived in Milwaukee. Blankenheim called Kassouf when he arrived at Kassouf's home and Kassouf believes Blankenheim called him from Blankenheim's cell phone. Just a couple minutes after Blankenheim called Kassouf, Kassouf went outside of his home and Blankenheim was alone in the driver's seat of Blankenheim's vehicle in Kassouf's driveway. Kassouf observed no one else in the vehicle and observed no one walking away from the vehicle. While Kassouf acknowledged he did not actually see Blankenheim drive the vehicle on the highway, he believed he told Hurda "yes" when Hurda asked Kassouf if Blankenheim had driven the vehicle there. There is more than ample evidence to support the circuit court's finding that

Blankenheim had driven his vehicle on a state highway to get to Kassouf's house. The inference to this effect was reasonable and clear.

¶27 For the foregoing reasons, we affirm.

By the Court.—Judgment affirmed.

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