COURT OF APPEALS
DECISION
DATED AND FILED

April 22, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-3043-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

SCOTT D. STEFFES,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Rock County: JAMES WELKER, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

EICH, J.[1] Scott Steffes appeals from a judgment, entered after a jury trial, finding him guilty of operating a motor vehicle while intoxicated. He argues: (a) that the circuit court erred when it allowed into evidence the fact that

[1] This appeal is decided by a single judge pursuant to § 752.31(2)(f), STATS.

he had refused to submit to standard field sobriety tests at the scene of his arrest, and to submit to a blood-alcohol test after he had been arrested and taken to the police station; and (b) that he was illegally stopped and detained by the arresting officer. We reject both arguments and affirm the judgment.

Town of Beloit Police Officer Dennis Hamil stopped Steffes on the night in question after observing him leaving a tavern and driving down the street.[2] Noticing an odor of intoxicants about his person and on his breath, that his eyes were red and watery and his speech slurred, and that he was "stumbling" and having difficulty withdrawing his wallet and driver's license, Hamil asked Steffes to recite the alphabet, generally the first of several field sobriety tests administered by police officers at the scene of an OWI arrest. According to Hamil, Steffes replied "that he wasn't gonna do anything for me and that I got him." At that point, Hamil arrested Steffes for driving under the influence, took him to the police station, advised him of his rights under the implied consent law and asked that he take a breath-alcohol test. Steffes refused to take the test and was issued a citation. Shortly thereafter, Steffes received a notice of the State's intent to revoke his license pursuant to provisions of the law which impose a period of temporary revocation for refusing to take a test. Under the law, a driver wishing to contest the revocation proceedings must file a demand for a hearing in circuit court within a specified time period. At the hearing, the court considers only three issues: (a) whether, at the time the test was requested, the officer had detected the presence of alcohol or other controlled substances on the driver's person or had reason to believe that he or she was driving while intoxicated; (b) whether the officer gave

[2] The facts of the stop are discussed at greater length in the concluding section of this opinion.

the driver the information and "warnings" required by law; and (c) whether the driver can show, by a preponderance of evidence, that the refusal was "due to a physical inability to submit to the test due to a physical disability or disease unrelated to the use of alcohol [or] controlled substances." If the court resolves any of these issues in the driver's favor, the administrative revocation otherwise prescribed by law would not take effect. Sections 343.305(9)(a)4, 5 and 6, STATS.

When a driver is properly "warned" under the law and refuses the test, the fact of that refusal is admissible in evidence at a subsequent OWI trial "as relevant to the defendant's consciousness of guilt." ***State v. Schirmang***, 210 Wis.2d 324, 332, 565 N.W.2d 225, 228 (Ct. App. 1997).

Steffes filed the required hearing demand but, for reasons the parties do not explain, no hearing was ever held—nor was Steffes's license ever administratively suspended under the implied-consent law. Prior to his trial on the OWI charge, Steffes filed a motion in limine seeking to preclude the State from using the fact of his refusal at trial. The motion was based on the fact that, despite filing a timely demand for a refusal hearing, none had been held; and Steffes claimed that, as a result, no adverse inference should be drawn from his "purported refusal" to consent to a test. The prosecutor initially stated to the court that Steffes's hearing request was untimely—that it was filed more than ten days after he received the notice of intended revocation. The court agreed and denied Steffes's motion, noting that, in its opinion, the request for a refusal hearing, and the hearing itself, relates only to "administrative [license] suspension" and that "the failure to hold a refusal hearing does not render the evidence inadmissible." At trial, in a hearing outside the jury's presence, the court overruled Steffes's objection to the State's question to the officer concerning his refusal to take the test, noting that, "if he wants to introduce evidence as to the reasons why he

refused [the test] and explain that to the jury, he can do that." The evidence of Steffes's refusal came in, and was eventually commented upon by the prosecutor in his closing argument to the jury. Officer Hamil also testified—very briefly and without objection by Steffes—that he had also refused to submit to the field sobriety tests.

The State concedes that Steffes was improperly denied a hearing. It argues, however, that this should not lead to reversal because the evidence at trial established (1) that his initial "stop" by the officer was proper; and (2) that he received all of the statutory "warnings." Citing ***State v. Donner,*** 192 Wis.2d 305, 531 N.W.2d 369 (Ct. App. 1995), the State says that, as a result, Steffes received "the equivalent of an implied consent hearing" at trial, and that that should be enough. As we have set forth above, however, three, not just two, issues are to be considered at the refusal hearing. In addition to probable cause and the giving of the warnings, the defendant also has the opportunity to establish (by a preponderance of the evidence) that his or her refusal to take the test was due to a physical inability or disability. There is no question in this case that the appropriate warnings were given, and Steffes does not claim on this appeal that Hamil lacked probable cause to arrest him.[3] There is also no question, however, that Steffes was denied the opportunity to attempt to justify his refusal under the physical-disability provisions of the law. He does not dispute that he was given the warnings in this case, and evidence to that effect was put on at trial (as the "foundation" for admissibility of the evidence of his refusal); he argues that,

[3] As may be seen below, Steffes does argue that the officer lacked a reasonable suspicion to stop him in the first place, an argument we reject.

despite that foundation, the evidence should not have been received "because the … court did not conduct a refusal hearing, when it should have."

We think the situation should be remedied, and that the appropriate remedy is, as the State suggests, a remand to the trial court with directions to grant Steffes's request for a refusal hearing on the only question remaining—whether his refusal was the result of a physical inability or disability to take the test under § 343.305(9)(a)(5)c, STATS. Then, if the court determines that his refusal was justified on that ground, a new trial should be ordered. If the court rules that Steffes has failed to justify his refusal under the statute, judgment on the jury's verdict should be re-entered.[4] As the State points out, the supreme court has approved the use of postconviction hearings to remedy similar oversights in criminal proceedings. *See*, *e.g.*, ***State v. Johnson***, 133 Wis.2d 207, 224-25, 395 N.W.2d 176, 184-85 (1986) (determination of defendant's competency to stand trial); and ***State v. Nelson***, 138 Wis.2d 418, 440, 406 N.W.2d 385, 394 (1987) (availability of victim-witness). We think such a remedy is appropriate here, as well.

Steffes also moved in limine to bar evidence of his refusal to submit to field sobriety tests at the scene of his arrest, and the circuit court denied the motion. He claims error here, as well. We agree with Steffes that there is no direct Wisconsin authority on point, and that, in ***State v. Babbitt***, 188 Wis.2d 349, 363, 525 N.W.2d 102, 107 (Ct. App. 1994), where we held that refusal to submit to field sobriety tests may be used as evidence of probable cause to arrest, we

[4] In so ordering, we do not hold that the failure to hold a hearing—especially where, as here, no administrative revocation was ever imposed—bars use of evidence of the fact of refusal at trial.

expressly noted that our conclusion in that regard "should not be construed to mean that a defendant's refusal to submit to a field sobriety test may be used as evidence at trial."

He refers us to (but does not discuss) a Florida Court of Appeals case, ***Taylor v. State***, 625 So.2d 911 (Fla. App. 2d Dist. 1993), as one "support[ing] his position." That case was overruled by the Florida Supreme Court in 1995, however. *See* ***State v. Taylor***, 648 So.2d 701 (Fla. 1995). Beyond that, he argues that because, unlike a blood-alcohol test, field sobriety tests are not required, and no law attaches adverse results to the failure to submit to them, his refusal should not be considered as evidence of consciousness of guilt. Like the driver in ***Taylor***, ***id.*** at 704, Steffes has had experience in these matters, inasmuch as, according to the criminal complaint, this was his third such charge in the past ten years. As the ***Taylor*** court noted:

> In short, [defendant] knew that refusal was not a "safe harbor" free of adverse consequences and acted in spite of that knowledge. His refusal thus is relevant to show consciousness of guilt. If he has an innocent explanation for not taking the tests, he is free to offer that explanation in court.

Id.

Finally, Steffes argues that we should reverse his conviction because the arresting officer lacked a reasonable suspicion to stop and detain him. Again, we disagree. Police officers may, "in appropriate circumstances and in an appropriate manner," stop a person for the purpose of investigating possible criminal behavior even where there is no probable cause to arrest. ***Terry v. Ohio***, 392 U.S. 1, 22 (1968). To execute a valid investigatory stop, the officer must reasonably suspect, in light of his or her experience, that criminal activity has, is, or is about to take place. ***State v. Richardson***, 156 Wis.2d 128, 139, 456 N.W.2d 830, 834 (1990).

To be reasonable, that suspicion must be based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant th[e] intrusion." ***Id.*** It is a common sense test whose "fundamental focus" is reasonableness under all of the facts and circumstances present. ***Id.*** at 139-40, 456 N.W.2d at 834. It asks the questions: "What is reasonable under the circumstances? What would a reasonable police officer reasonably suspect in light of his or her training and experience? What should a reasonable police officer do?" ***State v. Anderson***, 155 Wis.2d 77, 83-84, 454 N.W.2d 763, 766 (1990) (citation omitted). At bottom, "if any reasonable inference of wrongful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, the officers have the right to temporarily detain the individual for the purpose of inquiry." ***Id.*** at 84, 454 N.W.2d at 766.

In this case, Hamil saw Steffes leave a bar late at night, "staggering" across the street to a parking lot. Believing him to be intoxicated, Hamil yelled at Steffes, telling him not to drive his car. According to Hamil, Steffes responded, in a voice that was "a little slurred," that he wasn't driving. Hamil then lost sight of Steffes for a few moments. He then saw the lights come on in one of the vehicles in the lot and that the vehicle was having difficulty backing out of the parking stall, requiring "two or three attempts" to do so. Hamil testified that between the time he briefly lost sight of Steffes and his observation of the vehicle attempting to back out of the stall, no other persons left the bar and no one else was in the parking lot. Based on his observations, and being satisfied that Steffes was inside, Hamil followed the vehicle and stopped it two blocks away, finding Steffes in the driver's seat. While following the vehicle, Hamil did not notice any violations of traffic or other laws.

Steffes, stressing the fact that Hamil briefly lost sight of him in the parking lot, and conceded that he did not notice any traffic-law violations before he stopped Steffes's vehicle, says that there was nothing illegal or unusual about his conduct sufficient to justify any reasonable suspicion on Hamil's part that he was committing any offense.

First, we do not consider that the brief interruption of Hamil's view of Steffes in the bar parking lot is significant. He was able to testify that, during that brief period of time no one else entered or left the lot. Second, he testified that Steffes was staggering as he left the bar and walked across the street and that his speech was slurred when he responded to Hamil's admonition not to drive. And, with respect to Steffes's assertions that much, if not all of his conduct, could be considered "innocent," it is well established that the fact that a defendant's acts by themselves were lawful and could well have innocent explanations is not determinative. ***State v. Waldner***, 206 Wis.2d 51, 59, 556 N.W.2d 681, 685 (1996).

> The Fourth Amendment does not require a police officer who lacks … probable cause to arrest to simply shrug his or her shoulders and thus possibly allow a crime to occur or a criminal to escape. The law of investigative stops allow[s] police officers to stop a person when they have less than probable cause. Moreover, police officers are not required to rule out the possibility of innocent behavior before initiating a brief stop….
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> ….
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> Suspicious conduct by its very nature is ambiguous, and the principal function of the investigative stop is to quickly resolve that ambiguity. Thus when a police officer observes lawful but suspicious conduct, if a reasonable inference of unlawful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, police officers have the right to temporarily detain the individual for the purpose of inquiry. Police officers are not required to rule out the possibility of innocent behavior before initiating a brief stop.

Id. at 59-60, 556 N.W.2d at 685-86 (internal citations and quoted sources omitted).

We hold that, under these standards and on this record, Officer Hamil could reasonably suspect that Steffes was operating a vehicle while intoxicated, and we reject his arguments to the contrary. The stop was proper.

We therefore reverse the judgment and remand for the limited purpose of holding the refusal hearing pursuant to Steffes's request. Should the circuit court determine after that hearing that Steffes's refusal was justified under the "disability" provisions of § 343.305(9)(a)(5)c, STATS., a new trial should be ordered. If the court decides that issue against Steffes, the judgment of conviction should stand. In all other respects, we affirm the judgment.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

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