COURT OF APPEALS
DECISION
DATED AND FILED

August 27, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP332
Cir. Ct. No. 2014TR1077
2014TR1254

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

COLUMBIA COUNTY,

PLAINTIFF-RESPONDENT,

V.

JESSICA N. JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Columbia County: DANIEL GEORGE, Judge. *Affirmed.*

¶1 KLOPPENBURG, P.J.[1] Jessica Johnson appeals a judgment of conviction and the order denying her motion to suppress evidence arising out of a traffic stop. After a jury trial, Johnson was found guilty of operating a motor

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

vehicle while intoxicated first offense and operating a motor vehicle with a prohibited alcohol concentration. Johnson argues that the arresting officer did not have the requisite reasonable suspicion to extend her detention for field sobriety testing and, therefore, the circuit court erred in denying her motion to suppress the test results and subsequent evidence of intoxication. For the reasons set forth below, I reject Johnson's argument and affirm.

BACKGROUND

¶2 The County charged Johnson with operating a motor vehicle while intoxicated first offense and operating a motor vehicle with a prohibited alcohol concentration. Johnson filed a suppression motion and challenged the lawfulness of the continued detention to administer field sobriety tests. Deputy Gregory Kaschinske provided the only testimony at the motion hearing. The following is a summary of the undisputed facts leading up to Johnson's arrest.

¶3 At approximately 2:00 a.m. on Sunday, February 23, 2014, Deputy Kaschinske received a dispatch regarding a driving complaint from an anonymous reporting party that a blue Dodge van with license plate "WILDFR" was traveling southbound at approximately ninety miles per hour near Highway 22 and Attoe Road, and that the driver of the van had stopped, opened the vehicle door, and vomited.

¶4 As the deputy proceeded southbound on Highway 22 to try to "catch up" with the speeding van, he saw a blue Dodge van parked in the parking lot of a closed car dealership with its headlights on and engine running. The deputy activated his lights, pulled into the parking lot behind the van, and saw that the license plate read "WILDFR," which matched the information from the dispatch.

¶5 The deputy approached the van, and the driver, later identified as Jessica Johnson, opened the driver's door. Johnson was the only occupant in the van. The deputy smelled a strong odor of intoxicants coming from inside the vehicle and from Johnson. The deputy asked Johnson if she had been drinking and Johnson responded that she was out with her husband at a fire department event earlier and that she had been drinking then.

¶6 The deputy asked Johnson to step out of the vehicle to perform a field sobriety test, which the deputy was trained to administer. According to the deputy, Johnson exhibited six out of six possible clues from the field sobriety test.

¶7 The circuit court held that "even without the anonymous phone call, the officer had reasonable suspicion to approach [Johnson's] vehicle, given the circumstances of the timing, the time of day, the location, [and] the vehicle being in a parking lot of a closed business." The circuit court further found that those factors, "coupled with the information concerning the speeding, the vomiting, the aroma of alcohol, [and] the admission of drinking … justified the officer expanding his investigation into the request for the Field Sobriety Tests." Accordingly, the circuit court denied Johnson's motion to suppress evidence.

DISCUSSION

¶8 The dispositive issue here is whether the totality of circumstances gave rise to reasonable suspicion that Johnson was operating a motor vehicle while

intoxicated so as to justify continued detention to administer field sobriety tests.[2] As I explain below, I answer this question in the affirmative and conclude that the continued traffic stop and administration of field sobriety tests was lawful such that the circuit court properly denied Johnson's motion to suppress evidence obtained from the traffic stop.

Standard of Review

¶9 This court analyzes the denial of a suppression motion under a two-part standard of review: we uphold the circuit court's findings of fact unless they are clearly erroneous, and we independently review whether those facts warrant suppression. ***State v. Conner***, 2012 WI App 105, ¶15, 344 Wis. 2d 233, 821 N.W.2d 267. "Whether there is probable cause or reasonable suspicion to stop a vehicle is a question of constitutional fact." ***State v. Popke***, 2009 WI 37, ¶10, 317 Wis. 2d 118, 765 N.W.2d 569. The ultimate question of "whether the facts as found by the [circuit] court meet the constitutional standard" is reviewed de novo. ***State v. Hindsley***, 2000 WI App 130, ¶22, 237 Wis. 2d 358, 614 N.W.2d 48.

Reasonable Suspicion for Continued Detention

¶10 The Fourth Amendment of the United States Constitution and Article I, Section 11 of the Wisconsin Constitution offer protection against

[2] On appeal, Johnson also contends that the anonymous tip alone did not provide reasonable suspicion to support the "initial detention," which I understand her to mean the moment the deputy pulled into the parking lot behind Johnson and turned on his lights. However, Johnson conceded this argument in the circuit court, and, therefore, has forfeited this argument on appeal. *See* ***State v. Crute***, 2015 WI App 15, ¶19, 360 Wis. 2d 429, 860 N.W.2d 284 (argument not raised in the circuit court is forfeited on appeal).

unreasonable searches and seizures.[3] "'The temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a seizure of persons within the meaning of the Fourth Amendment.'" ***Popke***, 317 Wis. 2d 118, ¶11 (quoted source omitted). Therefore, the "stop must not be unreasonable under the circumstances." ***Id.*** A traffic stop is reasonable if supported by reasonable suspicion that a traffic violation has been or will be committed. ***State v. Houghton***, 2015 WI 79, ¶30, ___ Wis. 2d ___, ___ N.W.2d ___.

¶11 "[O]nce stopped, the driver may be asked questions reasonably related to the nature of the stop ...." ***State v. Betow***, 226 Wis. 2d 90, 93, 593 N.W.2d 499 (Ct. App. 1999). "If, during a valid traffic stop, the officer becomes aware of additional suspicious factors which are sufficient to give rise to an articulable suspicion that the person has committed or is committing an offense or offenses separate and distinct from the acts that prompted the officer's intervention in the first place, the stop may be extended and a new investigation begun. The validity of the extension is tested in the same manner, and under the same criteria as the initial stop." ***Id.*** at 94-95.

¶12 "The question of what constitutes reasonableness is a common sense test. What would a reasonable police officer reasonably suspect in light of his or her training and experience." ***State v. Waldner***, 206 Wis. 2d 51, 56, 556 N.W.2d

[3] The Fourth Amendment of the United States Constitution states, "The right of the people to be secure in their persons … against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause …." Article I, Section 11 of the Wisconsin Constitution provides, "The right of the people to be secure in their persons ... against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause …."

681 (1996) (citations omitted). "The reasonableness of a stop is determined based on the totality of the facts and circumstances." ***State v. Post***, 2007 WI 60, ¶13, 301 Wis. 2d 1, 733 N.W.2d 634.

¶13 Here, we must determine whether the deputy discovered information subsequent to the initial stop which, when combined with information already acquired, provided reasonable suspicion that Johnson was driving under the influence of an intoxicant in order to expand his investigation and ask Johnson to perform field sobriety tests.

¶14 In support of her argument that the deputy did not have the requisite reasonable suspicion, Johnson points to the lack of certain evidence, including that the deputy made no observations as to her speech, eyes, or motor coordination, and that the deputy did not observe any erratic driving. She also points out that "[a]side from the vehicle description, [the deputy] corroborated no details of the tip."

¶15 However, the problem with Johnson's argument is that she ignores the evidence that *was* present and the totality of the circumstances at the time of her detention. The deputy made the initial stop based on the fact that there was an anonymous tip indicating that a vehicle matching Johnson's van was speeding and that the driver had pulled over and vomited, and on the fact that Johnson's vehicle was parked in the parking lot of a closed business along a highway at around 2:00 a.m. with its lights on and engine running.

¶16 During the stop, the deputy became aware of additional suspicious factors. Specifically, the deputy smelled a strong odor of intoxicants coming from inside the vehicle and from Johnson. Johnson was the only occupant in the

vehicle. Johnson also admitted to the deputy that she had been drinking earlier that evening.

¶17 While any one of these facts, viewed separately, may not necessarily rise to the level of reasonable suspicion, a reasonable officer faced with the totality of circumstances here would reasonably suspect that Johnson had driven to the parking lot while intoxicated. Thus, the circuit court did not err in its finding that there was reasonable suspicion supporting Johnson's continued detention for the administration of field sobriety tests.

CONCLUSION

¶18 For the reasons set forth above, I reject Johnson's argument that the circuit court erred in denying her motion to suppress evidence, and therefore, I affirm the judgment.

By the Court.—Judgment affirmed.

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