COURT OF APPEALS
DECISION
DATED AND FILED

January 14, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1010 **Cir. Ct. No. 2012TR6200**

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

COLUMBIA COUNTY,

PLAINTIFF-RESPONDENT,

V.

BRITTANY N. KRUMBECK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Columbia County: ALAN J. WHITE, Judge. *Affirmed*.

¶1 LUNDSTEN, J.[1] Brittany Krumbeck appeals the circuit court's judgment convicting her of operating a motor vehicle while under the influence of

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

an intoxicant. She challenges the circuit court's denial of her suppression motion, arguing that the court erred in concluding that there was reasonable suspicion to stop her vehicle. I agree with the circuit court's conclusion that reasonable suspicion was present. Krumbeck also argues that the court erred in concluding that there was probable cause supporting her arrest. This argument is insufficiently developed, and I reject it on that basis. I affirm.

Reasonable Suspicion

¶2 In reviewing a suppression ruling, I uphold the circuit court's findings of fact unless those findings are clearly erroneous. ***State v. Dubose***, 2005 WI 126, ¶16, 285 Wis. 2d 143, 699 N.W.2d 582. However, the application of constitutional standards to those facts is a question of law for de novo review. *See* ***id.*** What constitutes the reasonable suspicion necessary to justify an investigative stop of a vehicle 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. Colstad***, 2003 WI App 25, ¶8, 260 Wis. 2d 406, 659 N.W.2d 394 (quoted source omitted).

¶3 Here, the pertinent facts come from the officer's suppression hearing testimony, which the circuit court credited. I reference that testimony as needed for discussion below.

¶4 Krumbeck's reasonable suspicion challenge is based on ***State v. Post***, 2007 WI 60, 301 Wis. 2d 1, 733 N.W.2d 634. The court in ***Post*** concluded that there was reasonable suspicion for an investigative stop of a vehicle based on the following circumstances: a time of approximately 9:30 p.m.; the suspect vehicle was weaving, approximately ten feet from right to left in a discernible S-pattern, over the course of two blocks, on a wide street with no line marking the

parking lane; and the vehicle was initially "canted," meaning that the driver was driving at least partially in the unmarked parking lane. *See* ***id.***, ¶¶3-5, 30, 37. As most pertinent here, the court in ***Post*** stated that "weaving within a single traffic lane does not alone give rise to the reasonable suspicion necessary to conduct an investigative stop of a vehicle." ***Id.***, ¶2.

¶5 Krumbeck argues that the only suspicious factor present here is the type of weaving within a traffic lane that, under ***Post***, cannot give rise to reasonable suspicion. I disagree, and conclude that the totality of the circumstances here is at least as suspicious as in ***Post***. In particular, the officer's testimony here showed that, in addition to the in-lane weaving that ***Post*** declared was by itself insufficient, we have the following factors:

> 1. The weaving occurred around 3:00 a.m., a time when a higher percentage of intoxicated drivers are on the road. *See* ***id.***, ¶36 (poor driving around "bar time" is suspicious).
>
> 2. Krumbeck repeatedly made sharp or jerky corrections as she approached the center line and the fog line. That is, Krumbeck was not merely weaving.
>
> 3. Krumbeck continuously weaved over a prolonged period of time, a type of circumstance that the ***Post*** court acknowledged may count as a suspicious factor in addition to the fact of weaving itself. *See* ***id.***, ¶25 (courts point to factors such as pronounced or prolonged weaving as supporting reasonable suspicion).

¶6 As to Krumbeck's continuous and prolonged weaving, the officer testified that, as he was driving behind Krumbeck, he observed her continually weaving between the fog line and the center line over the course of six or seven miles on a highway. He testified that Krumbeck never maintained a straight path of travel. The officer acknowledged that, for the first five or six miles, the highway was in poor condition, making it difficult to travel in a straight line.

Significantly, however, the officer also testified that Krumbeck continued with the same weaving behaviors for an additional mile after the road surface became flat and level in a newly constructed area. A reasonable inference from this testimony is that Krumbeck's weaving over the course of six or seven miles was due to something other than the poor road conditions.

¶7 It is true, as Krumbeck argues, that there are notable differences between the weaving in ***Post*** and her weaving, including that the weaving in ***Post*** involved a greater side-to-side distance change and crossing into an unmarked parking lane. *See* ***id.***, ¶¶3-5, 37. However, these differences do not change my conclusion that the totality of the circumstances here supplies reasonable suspicion that Krumbeck was driving while impaired.

Probable Cause

¶8 I turn to Krumbeck's argument that the officer lacked probable cause to arrest her for an intoxicated driving offense. As noted above, I conclude that Krumbeck's probable cause argument is insufficiently developed, and I reject it on that basis. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals need not consider inadequately developed arguments). I explain below the main reasons for this conclusion. And, as we shall see, my explanation also shows that it is far from apparent that a better developed argument would have succeeded on the merits.

¶9 First, Krumbeck downplays or ignores a number of additional suspicious circumstances that came to light during the course of her stop and before her arrest, as if to say that those circumstances do not matter. This is not a persuasive approach given that probable cause, like reasonable suspicion, is a totality of the circumstances test. *See* ***State v. Sykes***, 2005 WI 48, ¶18, 279 Wis.

2d 742, 695 N.W.2d 277. The additional circumstances included that the officer noticed that there was an odor of intoxicants coming from Krumbeck's vehicle; that Krumbeck's eyes were bloodshot and glassy; and that Krumbeck would delay in responding to the officer's questions. In addition, Krumbeck admitted to having consumed alcohol. Krumbeck does not compare the totality of the circumstances here to those in any other case addressing probable cause.

¶10 Second, Krumbeck fails to meaningfully address, or even mention, the circuit court's reliance on a preliminary breath test (PBT) result that the court found was "twice the legal limit." It is true that, at the suppression hearing, the circuit court sustained Krumbeck's objection to admitting the PBT results, seemingly based on an argument by Krumbeck that such results are generally inadmissible. However, the court apparently, and correctly in my view, changed its mind by the time it later issued its written suppression ruling. *See* WIS. STAT. § 343.303 (PBT result is admissible "to show probable cause for an arrest, if the arrest is challenged"); *see also* ***State v. Fischer***, 2010 WI 6, ¶7, 322 Wis. 2d 265, 778 N.W.2d 629 (noting that PBT results "are routinely relied on to establish probable cause for arrest and have been held to be admissible for purposes other than those prohibited by statute").

¶11 Krumbeck does not develop an argument explaining why the circuit court's reliance on the PBT result was error, let alone reversible error. The closest Krumbeck comes is a belated and unsupported assertion in her reply brief that the record "does not reflect a numerical result for the PBT." In fact, the record contains a copy of a police report stating that the PBT result was 0.161. Regardless, I fail to see a developed argument as to why the circuit court's reliance on the PBT result provides a basis for reversal.

¶12 For the reasons stated above, I affirm the judgment of conviction.

By the Court.—Judgment affirmed.

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