COURT OF APPEALS
DECISION
DATED AND FILED

April 13, 2000

Cornelia G. Clark, Clerk
Court of Appeals of Wisconsin

No. 99-2600

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

COUNTY OF JEFFERSON,

PLAINTIFF-RESPONDENT,

V.

GLENN C. KIMPEL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Jefferson County: JOHN ULLSVIK, Judge. *Affirmed.*

¶1 EICH, J.[1] Glenn Kimpel appeals from a judgment convicting him of driving with a prohibited level of alcohol in his blood, carrying open intoxicants in a vehicle, and operating without a valid driver's license. He argues (a) that the arresting officers lacked reasonable grounds to stop his vehicle and, alternatively,

[1] This case is decided by a single judge pursuant to WIS. STAT. § 752.31(2)(f) (1997-98).

(b) that the lack of a "fresh pursuit" renders the officers' "extrajurisdictional" traffic stop unlawful. We disagree and affirm the judgment.

¶2 The facts are not in dispute. Jefferson County Sheriff's Deputies R.W. Meyer and M.A. Gray, responding to an emergency dispatch, were driving on Interstate 94 in Jefferson County with their car's lights and siren activated. According to the officers, a gold Mercury sedan traveling ahead of them in the passing lane did not promptly yield to their signals. They testified that they followed the vehicle in the passing lane, sometimes approaching to within 50-70 feet, for approximately two- to three-tenths of a mile before it finally pulled to the right to allow them to pass. They said that other traffic to the front and rear of the Mercury promptly yielded to their signals. Deputy Meyer saw a "very noticeable" and "excessive" weaving by the Mercury within the lane while they were behind it, and observed the driver of the car appearing to be drinking from a can. He says that when the Mercury eventually yielded to the deputies' car, it did so abruptly, "cut[ting] in front of another car." He believed it to be an unsafe lane deviation.

¶3 A few minutes later, the emergency call to which the deputies were responding was canceled by the dispatcher, and they pulled into a "crossover" area on the highway to wait for the Mercury to come by. While they were doing so, the Mercury passed them and Meyer noted his surprise that it had gotten there so quickly, concluding that the driver must have been driving at a speed in excess of the posted limit. The deputies activated the lights and siren and followed the Mercury, noting that it was again weaving within the traffic lane. At this point, they were about three miles from the Jefferson/Waukesha County line. By the time they stopped the car, they had crossed the line into Waukesha County. They identified Kimpel as the driver of the car and eventually arrested him for operating while intoxicated. A subsequent blood test revealed a blood-alcohol concentration

of .228%, and the companion charge of operating with a prohibited blood alcohol level was filed against Kimpel.

¶4 Kimpel moved to suppress all evidence, and the arrest itself, on the same grounds he advances on this appeal. The circuit court denied the motion, concluding that the deputies had a reasonable suspicion that Kimpel was driving while intoxicated, and that they were engaged in a continuous pursuit of Kimpel into Waukesha County. The case was tried on stipulated facts and Kimpel was found guilty of the charges noted above.

¶5 Kimpel argues first that the deputies lacked "reasonable grounds" to believe that he had committed, or was committing, a traffic-law violation before they stopped him. And he says that "[o]nly if this … requirement is met … should the court proceed to determine whether the [officers were] in fresh pursuit" within the meaning of WIS. STAT. § 175.40(2) (1997-98),[2] which permits a police officer, when in "fresh pursuit" of a suspect, to arrest that suspect in an adjacent jurisdiction. He attributes the "reasonable grounds" requirement to WIS. STAT. § 345.22, which states that a person may be arrested for a traffic offense if the officer "has reasonable grounds to believe that the person is violating or has violated a traffic regulation." And he equates that standard to the "reasonable suspicion" requirement for investigatory stops. The "reasonable suspicion" standard is a common sense test whose "fundamental focus" is reasonableness under all of the facts and circumstances present. ***State v. Richardson***, 156 Wis. 2d 128, 139-40, 456 N.W.2d 830 (1990). It asks the questions: "What is reasonable under the circumstances? What would a reasonable police officer reasonably suspect in

[2] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

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 (1990). 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.[3] And the "reasonable suspicion" determination is a question of law, which we review de novo on appeal. ***State v. Babbitt***, 188 Wis. 2d 349, 525 N.W.2d 102 (Ct. App. 1994).

¶6 Assuming, without deciding, that this is the test for the officers' conduct in this case, it was met. They observed Kimpel's car persistently weaving

---

[3] That the 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 (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….
>
> ….
>
> 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.
>
> … [P]olice officers are not required to rule out the possibility of innocent behavior before initiating a brief stop.
>
> … [I]f a reasonable inference of unlawful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, officers have the right to temporarily detain the individual for the purpose of inquiry.

Id. at 59-60 (citations omitted).

within its lane and it did not respond to the squad-car lights and siren, even though the officers were close behind it, and even though other cars both behind and in front of Kimpel's did respond. They observed him drinking from a can while driving, and, when they saw his car the second time, it was apparent from the elapsed time and distance from their first encounter with him that he probably had been speeding. We think those facts more than meet the argued standard—whether with respect to speeding, failure to yield to an emergency vehicle, unsafe lane deviation, or perhaps some other traffic violation.[4]

¶7 Kimpel next argues that, even if the officers had grounds to believe he was violating the traffic laws, they could neither stop nor arrest him outside of Jefferson County because they were not following him in "fresh pursuit." Citing ***City of Brookfield v. Collar,*** 148 Wis. 2d 839, 436 N.W.2d 911 (Ct. App. 1989), he states that there are three factors which must exist before an officer will be found to be in fresh pursuit: (1) the officer must be acting without unnecessary delay; (2) the pursuit must be continuous and uninterrupted (although uninterrupted surveillance is not required); and (3) consideration must be given to the relationship between the commission of the offense, the commencement of the pursuit, and the apprehension of the suspect. ***Id.*** at 842-43. He claims that the officers' pursuit of him was "neither continuous nor uninterrupted." Also, basing his contention on the fact that the circuit court apparently considered the "pursuit" to have begun only after the officers had been called off of their response to the

[4] Apparently abandoning the argument he makes in his initial brief that the officers "lacked reasonable grounds to believe that a traffic violation had occurred," he argues in his reply brief that the officers had to have "a reasonable suspicion to believe that [he] was too impaired by his consumption of alcohol to safely operate his vehicle" in order for their conduct to be justified. We have said many times that we do not consider arguments raised for the first time in a reply brief. ***Northwest Wholesale Lumber, Inc. v. Anderson***, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502 (Ct. App. 1995).

dispatcher's initial directions, he claims that the only observation they could have made of his conduct at that time was that he had covered enough ground since they last saw him to support an inference that he had been speeding; and he says that's insufficient. Again, we disagree.

¶8 It is true, as Kimpel states, that the officers did not attempt to stop him when they first saw him and made their initial observations. But they were, as indicated, responding to an alarm call, at that time. Had they not been, we assume they would have attempted to make contact with Kimpel then and there, given his weaving, his drinking from a can, his failure to respond to the officers' lights and sirens, and his abrupt, seemingly dangerous swerve into the outside lane once he noticed the officers' presence. As indicated, the fresh pursuit rule doesn't require continuous surveillance, and it permits delays in the officers' actions as long as those delays are not "unnecessary."

¶9 It appears, then, that the officers were in the following position: they had made observations constituting reasonable grounds to believe Kimpel was violating one or more traffic laws, but were unable to apprehend him immediately because they were responding to an emergency dispatch; they observed him again several minutes later, after the dispatch had been canceled, and began to follow him, losing sight of him for a time and finally pulling him over in Waukesha County. It is not unlike a situation where an officer observes a suspect engaging in conduct giving rise to a reasonable suspicion that a crime is or has been committed, but contact is lost through no fault of the officer's—perhaps the suspect turns a corner, or temporarily eludes the officer. If, a short time later, the officer sees the suspect from a distance, and begins to pursue him, losing sight of him for a time, and finally catches up to him after crossing the line into another jurisdiction, we don't think the officers' pursuit has lost its "freshness" any more than the pursuit in this case.

By the Court.—Judgment affirmed.

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