COURT OF APPEALS
DECISION
DATED AND FILED

May 4, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-3076-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RANDALL M. MILLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Iowa County: WILLIAM D. DYKE, Judge. *Affirmed.*

¶1 ROGGENSACK, J.[1] Randall M. Miller appeals his conviction for operating a motor vehicle while under the influence of an intoxicant (OMVWI). He claims that the circuit court erred in denying his motion to suppress evidence

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1997-98). Additionally, all further references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

because the arresting officer did not have reasonable suspicion to stop him or probable cause to arrest him. Because we conclude the investigative stop was based on reasonable suspicion and the subsequent arrest was based on probable cause, we affirm the judgment of the circuit court.

BACKGROUND

¶2 At approximately 12:45 a.m., Officer Keri Spaeth of the Arena Police Department observed a vehicle driven by Miller traveling at a high rate of speed. She then observed Miller roll through a stop sign. Spaeth decided to stop Miller and activated the emergency lights on her squad car. Miller did not pull over immediately, but instead traveled one-half mile and entered the parking lot of a local tavern.

¶3 When Spaeth pulled into the parking lot and made contact with Miller, she detected an odor of intoxicants on his breath. After asking for his license and talking with him, Spaeth decided not to issue a citation, but instead, give him a verbal warning. She did so and left the parking lot.

¶4 Approximately twenty to twenty-five minutes later, Spaeth observed Miller's vehicle again. She saw him drive onto the shoulder of the road. She also noticed that Miller was weaving within his lane of travel. Spaeth activated her lights and stopped Miller. He got out and began walking toward the back of his vehicle while attempting to find his license. Spaeth observed that he "stumbled" through his wallet and that it took him about thirty seconds to find the license. Spaeth also saw that Miller was so unsteady on his feet that he put his hand on his vehicle to steady himself. Miller smelled of intoxicants and his speech was slurred. When Spaeth asked Miller if he had been drinking, Miller responded that he had consumed two beers.

¶5 Spaeth asked Miller to perform field sobriety tests. On the heel-to-toe test, Miller miscounted his steps, skipping seven numbers. On the finger-to-nose test, Miller touched the middle of his nose instead of its tip. Finally, on the alphabet test, Miller recited only twenty-one of the twenty-six letters. Based on her observations, Spaeth concluded that Miller was intoxicated and arrested him for OMVWI.

¶6 Miller brought a motion to suppress, claiming that Spaeth did not have reasonable suspicion for the stop. He claimed that Spaeth could not use any information from the first stop to support her second stop because she did not give him a citation after the first stop. Miller also argued that there was no probable cause for the arrest because he did not materially fail the field sobriety tests. The circuit court denied the motion. Miller appeals.

DISCUSSION

Standard of Review.

¶7 When we review a motion to suppress evidence, we will uphold the circuit court's findings of fact unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2); ***State v. Eckert***, 203 Wis. 2d 497, 518, 553 N.W.2d 539, 547 (Ct. App. 1996). However, whether those facts establish reasonable suspicion to stop or probable cause to arrest are questions of law which we review *de novo*. *See* ***State v. Richardson***, 156 Wis. 2d 128, 137-38, 456 N.W.2d 830, 833 (1990); ***State v. Babbitt***, 188 Wis. 2d 349, 356, 525 N.W.2d 102, 104 (Ct. App. 1994).

Reasonable Suspicion.

¶8 The Fourth Amendment prohibits unreasonable searches and seizures. *See* U.S. CONST. amend. IV. The detention of a motorist by a law

enforcement officer constitutes a "seizure" of the person within the meaning of the Fourth Amendment. *See* ***Berkemer v. McCarty***, 468 U.S. 420, 436-37 (1984). Statements given and items seized during a period of illegal detention are inadmissible. *See* ***Florida v. Royer***, 460 U.S. 491, 501 (1983). However, an investigative detention is not "unreasonable" if it is brief in nature, and justified by a reasonable suspicion that the motorist has committed, or is about to commit, a crime. *See* ***Berkemer***, 468 U.S. at 439; WIS. STAT. § 968.24. The same standards which have been established for rights arising under the Fourth Amendment of the United States Constitution apply to rights derived from article I, § 11 of the Wisconsin Constitution. *See* WIS. CONST. art. I, § 11; ***State v. Harris***, 206 Wis. 2d 243, 259, 557 N.W.2d 245, 252 (1996).

¶9 According to ***Terry v. Ohio***, 392 U.S. 1 (1968), the reasonable suspicion necessary to detain a suspect for investigative questioning must be bottomed on specific and articulable facts, together with rational inferences drawn from those facts, sufficient to lead a reasonable law enforcement officer to believe that criminal activity may be afoot, and that action would be appropriate. *See* ***id.*** at 21-22. "The question of what constitutes reasonable suspicion 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. Jackson***, 147 Wis. 2d 824, 834, 434 N.W.2d 386, 390 (1989). The test is designed to balance the personal intrusion into the suspect's privacy occasioned by the stop against the societal interests in solving crime and bringing offenders to justice. *See* ***State v. Guzy***, 139 Wis. 2d 663, 680, 407 N.W.2d 548, 556 (1987).

¶10 Miller argues that Spaeth did not have reasonable suspicion to support an investigative stop. He contends that Spaeth cannot rely on any information gathered from her first stop because she did not give him a citation

then. Miller also argues that the close proximity of Spaeth's vehicle to his vehicle was a precipitating factor in his weaving and driving onto the shoulder of the road. Therefore, he contends that the erratic driving cannot be used as evidence of impairment. Without the information from the first stop, and Miller's weaving and driving on the shoulder, Miller claims there are insufficient facts to justify Spaeth's stop. We disagree with Miller in all respects.

¶11 First, Miller does not cite to any authority for the proposition that an officer may not rely on a defendant's actions earlier in the evening to support a later belief of reasonable suspicion, nor do we find merit in that contention. When Spaeth stopped Miller in the parking lot, she had seen him driving at a high rate of speed, proceed through a stop sign without coming to a complete stop and she had detected the odor of intoxicants on his breath. When Spaeth later observed Miller drive erratically, she was not required to ignore her earlier observations which could have suggested intoxication.

¶12 Miller also claims that his erratic driving was caused by Spaeth because she was following too closely. Furthermore, he contends that the circuit court found Spaeth's observations to be "questionable" and that the court found that Spaeth's close proximity to Miller's vehicle was a precipitating cause of Miller's weaving and driving off the road into the shoulder. Without these observations, he argues, Spaeth did not have reasonable suspicion to stop him.

¶13 At the hearing, when she was asked how far her car was behind Miller's, Spaeth testified that she was approximately four to five feet behind him, or approximately half of a car length. The court stated that if Spaeth was correct, it would have some concern about whether the closeness of the squad car might have been a factor in the lane weaving. However, the court then stated that it

found Spaeth's estimate of the distance incredible and reiterated its belief that Spaeth's estimation was faulty. The circuit court's finding that Spaeth incorrectly estimated the distance between her vehicle and Miller's is a finding of fact which we will sustain unless it is clearly erroneous. *See* WIS. STAT. § 805.17(2). After stating that she was approximately four feet behind Miller, Spaeth later admitted during her testimony that she may have been further behind him than four feet. Therefore, the circuit court's finding that her estimation of the distance was faulty was not clearly erroneous. Accordingly, the court did not err in including Miller's erratic driving as a factor that supported reasonable suspicion.

¶14 The circuit court concluded that given Miller's weaving and driving on the shoulder, Spaeth's previous encounter with Miller in which she had detected a strong odor of intoxicants and had observed his failure to stop for a stop sign and his excessive speed, Spaeth had reasonable suspicion for the stop. We agree with the circuit court and also conclude there was reasonable suspicion for the stop.

Probable Cause to Arrest.

¶15 Every warrantless arrest must be supported by probable cause. *See* ***Molina v. State***, 53 Wis. 2d 662, 670, 193 N.W.2d 874, 878 (1972); U.S. CONST. amend. IV; WIS. CONST. art. I, § 11. A police officer has probable cause to arrest when the totality of the circumstances within that officer's knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant probably committed a crime. *See* ***State v. Koch***, 175 Wis. 2d 684, 701, 499 N.W.2d 152, 161 (1993). This is a practical test, based on considerations of everyday life on which reasonable and prudent persons, "not legal technicians," act. *See* ***State v. Drogsvold***, 104 Wis. 2d 247, 254, 311 N.W.2d 243, 247 (Ct.

App. 1981). The objective facts before the police officer need only lead to the conclusion that guilt is more than a possibility. *See* ***Richardson***, 156 Wis. 2d at 148, 456 N.W.2d at 838.

¶16 Miller argues that Spaeth did not have probable cause to arrest him because he did not materially fail the field sobriety tests. Miller does not cite to any legal authority that identifies criteria for determining when a person "materially" fails a field sobriety test, nor were we able to locate any. Spaeth testified that based upon her observations of Miller's performance on the field sobriety tests, she believed that he was "very intoxicated." And, in addition to Miller's poor performance on the field sobriety tests, Spaeth had previously observed Miller: (1) drive on the shoulder of the road and weave within his lane of traffic; (2) have difficulty retrieving his license; (3) have difficulty maintaining his balance, which included holding onto his vehicle to steady himself; (4) have a strong odor of intoxicants on his breath; (5) slur his speech; and (6) admit to drinking earlier in the evening. The totality of these factors were sufficient to establish probable cause to arrest Miller for OMVWI.

¶17 Much of Miller's argument focuses upon those signs of intoxication which he did not exhibit: he did not have a gap between his heel and toe during the heel-to-toe test; he touched his finger to his nose, even though he did not touch the tip as requested; and he recited the alphabet, missing only five letters. Even assuming that Miller's performance on the tests were, at the very best, mixed, we are satisfied that on this record, the totality of the circumstances was sufficient for Spaeth to have probable cause to believe that Miller was operating a motor vehicle while under the influence of an intoxicant.

CONCLUSION

¶18 Because we conclude the investigative stop was supported by reasonable suspicion and the subsequent arrest was based on probable cause, we affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

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