COURT OF APPEALS
DECISION
DATED AND FILED

August 6, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP614 **Cir. Ct. No. 2012TR7691**

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

TOWN OF FREEDOM,

PLAINTIFF-RESPONDENT,

V.

MATTHEW W. FELLINGER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: NANCY J. KRUEGER, Judge. *Affirmed*.

¶1 STARK, J.[1] Matthew Fellinger appeals a judgment of conviction for operating while intoxicated, first offense. Fellinger asserts field sobriety tests constitute a "search" within the meaning of the Fourth Amendment, and, therefore,

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

he argues the quantum of evidence necessary to request a field sobriety test should be probable cause. He also argues the circuit court erred by denying his suppression motion because the officer unlawfully requested he perform field sobriety tests. We affirm.

BACKGROUND

¶2 At the suppression hearing, officer Christopher Nechodom testified that, on June 23, 2012, at approximately 1:50 a.m., he was running radar near the Town of Freedom high school. Nechodom observed a vehicle traveling thirty-five miles-per-hour in a twenty-five-mile-per-hour zone. Nechodom began following the vehicle. The vehicle then entered a forty-five-mile-per-hour zone, and increased its speed to sixty miles-per-hour.

¶3 Nechodom stopped the vehicle for speeding. When Nechodom made contact with Fellinger, Nechodom "could smell an odor of intoxicant[s] coming from either [Fellinger's] person or from inside the vehicle." Nechodom asked Fellinger whether he had been drinking, and Fellinger responded that he had. Nechodom could not specifically recall how much Fellinger told him he had to drink, but believed it was "two beers."

¶4 Nechodom asked Fellinger, while he was still seated inside his vehicle, to say the alphabet backward and to count backward from sixty-four to forty-nine. Fellinger was unable to complete either task satisfactorily. Nechodom then asked Fellinger to exit his vehicle so he could administer standardized field sobriety tests.

¶5 At the suppression hearing, Fellinger argued field sobriety tests constitute a search within the meaning of the Fourth Amendment. He contended

that, because the tests are a search, the officer needed probable cause before he could request that an individual participate in the tests. Fellinger also asserted that, even if the correct standard was reasonable suspicion, the officer did not have enough objective evidence of intoxication before asking Fellinger to say the alphabet backward and count backward.

¶6 The Town argued the standard necessary to request field sobriety tests is reasonable suspicion, and Nechodom reasonably suspected Fellinger was operating while impaired because of Fellinger's driving, the odor of intoxicants, the admission of drinking, and the time of night.

¶7 The circuit court denied Fellinger's suppression motion. It first determined field sobriety tests were not a "search" within the meaning of the Fourth Amendment, and the quantum of evidence an officer needed to request a field sobriety test was reasonable suspicion. The court then concluded the officer's requests that Fellinger say the alphabet backward and count backward while in his vehicle were simply questions to determine Fellinger's ability to respond—not field sobriety tests. Finally, the circuit court found that, based on the totality of the circumstances, Fellinger's driving, the odor of alcohol, the admission of drinking, the time of night, and Fellinger's unsatisfactory ability to say the alphabet backward or count backward gave Nechodom reasonable suspicion to request standardized field sobriety tests.

¶8 Following a court trial, the circuit court found Fellinger guilty of operating while intoxicated, first offense. He appeals.

DISCUSSION

I. Fourth Amendment and Field Sobriety Tests

¶9 Fellinger challenges the quantum of evidence needed to request a field sobriety test. He asserts officers should have probable cause before they may lawfully administer a field sobriety test. To support his argument, Fellinger first argues field sobriety tests constitute a "search" within the meaning of the Fourth Amendment. He contends that, because field sobriety tests are searches, the quantum of evidence needed to request a field sobriety test should be "*more* than reasonable suspicion, but *less* than probable cause to arrest."

¶10 The Fourth Amendment to the United States Constitution provides that "[t]he 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 …." U.S. CONST. AMEND. IV. Whether a search has occurred is a question of law subject to independent review. ***State v. Richardson***, 156 Wis. 2d 128, 137-38, 456 N.W.2d 830 (1990). A "search" under the Fourth Amendment occurs when the police infringe on an expectation of privacy that society considers reasonable. ***United States v. Jacobsen***, 466 U.S. 109, 113 (1984).

¶11 "The [F]ourth [A]mendment does not proscribe all searches, only unreasonable searches." ***State v. Guy***, 172 Wis. 2d 86, 93, 492 N.W.2d 311 (1992) (citing ***Terry v. Ohio***, 392 U.S. 1, 9 (1968)). "In order to determine whether a search is reasonable, we balance the need for the search against the invasion the search entails." ***Id.*** (citing ***Terry***, 392 U.S. at 21).

¶12 Fellinger argues field sobriety tests are searches because "[a]n inherent right as a human being is to control and coordinate the actions of [his or

her] own body[,]" and, therefore "a fundamental expectation of privacy is implicated when a person is subject to the performance of [field sobriety tests]." After asserting that no Wisconsin case has addressed whether a field sobriety test is a search within the meaning of the Fourth Amendment, Fellinger cites several cases from other jurisdictions that have discussed this issue. Every case cited by Fellinger has held field sobriety tests are searches and Fellinger argues that, based on this persuasive authority, we too must conclude field sobriety tests constitute searches.

¶13 The Town does not respond to Fellinger's assertion that field sobriety tests are searches under the Fourth Amendment. It simply argues our jurisprudence establishes that an officer may request a field sobriety test if the officer has reasonable suspicion to believe the driver is operating while impaired. Because we decline to abandon our neutrality to develop arguments for the Town as to whether field sobriety tests constitute a search, we therefore conclude that, for purposes of this appeal, Fellinger's argument is conceded. *See* ***State v. Gulrud***, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987) (court need not develop argument for parties); ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 108-09, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded).

¶14 However, a concession that a field sobriety test is a search has little impact on the quantum of evidence needed before an officer may request field sobriety tests. Though Fellinger advances a probable cause standard on appeal, he acknowledges that, of the cases he cited in support of his assertion that field sobriety tests are searches, only two—a Colorado case and a federal case applying Colorado law—required probable cause before requesting field sobriety tests. The

remainder of the cases Fellinger cites as authority required only reasonable suspicion.

¶15 Fellinger, however, maintains that some level of probable cause is necessary before an officer may lawfully request a field sobriety test. He argues Wisconsin courts have never explicitly addressed the quantum of evidence needed for a field sobriety test, but he contends "prior decisions by Wisconsin courts clearly indicate that the quantum of evidence … should be higher than mere reasonable suspicion." Specifically, he notes that our jurisprudence has determined an officer needs reasonable suspicion of impairment before lawfully detaining an individual for field sobriety tests,[2] and he asserts that, "[i]f the field sobriety test's invasion of liberty is greater than that of the initial stop[,] then reasonably the requisite quantum of evidence [for field sobriety tests] would be at least equal to that of the initial stop." Finally, Fellinger urges us to rely on Colorado case law and conclude some level of probable cause is needed before an officer can request that an individual perform field sobriety tests.

¶16 We conclude Fellinger's proposed probable cause standard is nothing more than a "reasonable suspicion of impairment" standard. First, we agree with Fellinger that an officer may not conduct field sobriety tests merely

[2] *See, e.g.*, ***State v. Colstad***, 2003 WI App 25, ¶19, 260 Wis. 2d 406, 659 N.W.2d 394 (An extension of a stop to request field sobriety tests is reasonable if "the officer discovered information subsequent to the initial stop which, when combined with information already acquired, provided reasonable suspicion that [the defendant] was driving while under the influence of an intoxicant."); ***State v. Betow***, 226 Wis. 2d 90, 94-95, 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.").

because the officer's traffic stop was supported by reasonable suspicion. To lawfully request a driver perform field sobriety tests, an officer must have some evidence of *impairment*. As our supreme court stated in ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 310, 603 N.W.2d 541 (1999):

> First, an officer may make an investigative stop if the officer "reasonably suspects" that a person has committed or is about to commit a crime … or reasonably suspects that a person is violating the non-criminal traffic laws …. After stopping the car and contacting the driver, the officer's observations of the driver may cause the officer to suspect the driver of operating the vehicle while intoxicated. If his observations of the driver are not sufficient to establish probable cause for arrest for an OWI violation, the officer may request the driver to perform various field sobriety tests. The driver's performance on these tests may not produce enough evidence to establish probable cause for arrest. The legislature has authorized the use of the PBT to assist an officer in such circumstances.

Id. (emphasis added). ***Renz*** establishes that it is not simply the officer's stop that allows the officer to request field sobriety tests—rather, it is specific observations of impairment that allows the officer to request the tests. *See* ***id.*** at 310.

¶17 Second, we agree with Fellinger that the requisite quantum of evidence for field sobriety testing should be at least equal to that of the initial stop's reasonable suspicion requirement. Because ***Renz*** states that an officer must make specific observations that cause the officer to "suspect" the individual is operating while intoxicated, we conclude that, to justify the intrusion of a field sobriety test, an officer must have reasonable suspicion that the driver is impaired before requesting field sobriety tests.

¶18 An officer has reasonable suspicion that an individual is impaired if he or she is "'able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant' the intrusion." *See*

State v. Post, 2007 WI 60, ¶10, 301 Wis. 2d 1, 733 N.W.2d 634 (quoted source omitted). "[W]hat 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. Young***, 212 Wis. 2d 417, 424, 569 N.W.2d 84 (Ct. App. 1997). An "officer's inchoate and unparticularized suspicion or hunch," however, will not give rise to reasonable suspicion. *See* ***Post***, 301 Wis. 2d 1, ¶10.

¶19 Finally, we decline to give any persuasive value to the Colorado case cited by Fellinger. In ***People v. Carlson***, 677 P.2d 310, 317-18 (Colo. 1984), the Colorado Supreme Court determined, "To satisfy constitutional guarantees against unlawful searches and seizures a roadside sobriety test can be administered only when there is *probable cause to arrest* the driver for driving under the influence … or when the driver voluntarily consents to perform the test." (Emphasis added.) However, as established in ***Renz***, 231 Wis. 2d at 310, our supreme court has determined field sobriety tests may be administered before the officer has probable cause to arrest. ***Carlson*** is inconsistent with our jurisprudence.

II. Reasonable Suspicion for Field Sobriety Tests

¶20 Fellinger next argues, if the correct standard is reasonable suspicion, Nechodom did not reasonably suspect he was operating while intoxicated so as to lawfully administer the field sobriety tests. As previously stated, to possess the requisite reasonable suspicion, an officer must be able to point to "specific and articulable facts" and "rational inferences from those facts" to reasonably suspect the driver was impaired. *See* ***Post***, 301 Wis. 2d 1, ¶10.

¶21 Whether reasonable suspicion exists is a question of constitutional fact. ***State v. Popke***, 2009 WI 37, ¶25, 317 Wis. 2d 118, 765 N.W.2d 569. We

will uphold the circuit court's findings of fact unless they are against the great weight and clear preponderance of the evidence. ***Id.*** However, whether those facts amount to reasonable suspicion is a question of law we review independently. ***Id.***

¶22 Fellinger argues the only factors suggesting that he might be impaired were an odor of intoxicants emanating from the vehicle, an admission of drinking, and the "time of night." He asserts these facts are not enough to establish reasonable suspicion that he was operating while intoxicated. He emphasizes Nechodom did not observe any erratic driving or other typical indications of intoxication, such as glassy eyes or slurred speech. Fellinger also contends the alphabet test and counting test, which were administered before Nechodom requested he exit his vehicle to perform standardized field sobriety tests, may not be included in the reasonable suspicion determination because, contrary to the circuit court's characterization, they are field sobriety tests, not questions.

¶23 The Town responds that Nechodom had the requisite reasonable suspicion to request Fellinger perform field sobriety tests. The Town asserts the odor of intoxicants coming from the vehicle, Fellinger's admission to drinking, the speeding, the 1:50 a.m. time of night, and Fellinger's inability to satisfactorily recite the alphabet backward and count backward gave Nechodom reasonable suspicion to request Fellinger exit the vehicle to perform standardized field sobriety tests.

¶24 We conclude that, even before Nechodom requested Fellinger to recite the alphabet and count backward, Nechodom had reasonable suspicion to believe that Fellinger was operating while intoxicated.[3] Although Nechodom did not observe glassy eyes or slurred speech before requesting Fellinger perform field sobriety tests, there is no requirement that officers make these observations before requesting field sobriety tests. Instead, the speeding, which showed Fellinger's nonconformance with the law, combined with the odor of intoxicants, the admission of drinking, and the time of night, 1:50 a.m., around "bar time," amounts to reasonable suspicion that Fellinger was operating his vehicle while intoxicated. *See* ***State v. Lange***, 2009 WI 49, ¶32, 317 Wis. 2d 383, 766 N.W.2d 551 (time of night of traffic stop is relevant factor in OWI investigation); *see also* ***Renz***, 231 Wis. 2d at 316 (indicators of intoxication include odor of intoxicants and admission of drinking); ***State v. Colstad***, 2003 WI App 25, ¶19, 260 Wis. 2d 406, 659 N.W.2d 394 (the facts that driver struck child on street combined with mild odor of alcohol amounted to reasonable suspicion to conduct field sobriety tests). Accordingly, Nechodom lawfully requested Fellinger to perform field sobriety tests, and the circuit court properly denied Fellinger's suppression motion.

By the Court.—Judgment affirmed.

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

[3] Because we conclude the officer had the requisite reasonable suspicion before administering the alphabet and counting tests, we need not determine whether those tests are field sobriety tests. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (cases should be decided on the "narrowest possible ground").