COURT OF APPEALS
DECISION
DATED AND FILED

September 17, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1016-CR **Cir. Ct. No. 2012CT68**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KENNETH B. BURMEISTER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sawyer County: GERALD L. WRIGHT, Judge. *Affirmed*.

¶1 HOOVER, P.J.[1] Kenneth Burmeister appeals a judgment of conviction for operating while intoxicated, third offense. Burmeister argues the

[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.

circuit court erred by denying his suppression motion because the officer lacked reasonable suspicion to prolong the traffic stop to request field sobriety tests. We disagree, and affirm.

BACKGROUND

¶2 At the suppression hearing, officer Charles Logan testified that on May 28, 2012, he was on patrol with officer Simpson,[2] who was in training. As a vehicle passed their squad car, Logan observed the driver was not wearing a seatbelt. Logan conveyed his observations to Simpson, who pulled out behind the vehicle and made a traffic stop.

¶3 Both officers exited the squad car. Simpson approached the vehicle and spoke with the driver, subsequently identified as Burmeister. Simpson retrieved Burmeister's driver's license and returned to Logan. Simpson told Logan that he could smell what he believed to be the odor of intoxicants emanating from Burmeister's person. Because Simpson had not fully completed his operating while intoxicated training, Logan took over the traffic stop.

¶4 Logan contacted dispatch, and dispatch confirmed Burmeister's license was valid and he had no active warrants. Logan then approached Burmeister, and smelled alcohol. Logan asked Burmeister if he had been drinking. Burmeister told Logan he was coming from a friend's house and had

[2] The record does not reflect officer Simpson's first name.

just put a "dip"[3] in. However, when Logan insisted he could smell alcohol, Burmeister admitted he had been drinking earlier that night.

¶5 At that point, Logan asked Burmeister to exit the vehicle to perform field sobriety tests. After Burmeister showed indications of impairment on the tests, Logan asked Burmeister to submit to a preliminary breath test, the result of which was a .12. Logan arrested Burmeister for operating while intoxicated.

¶6 The circuit court concluded Logan had reasonable suspicion to extend the traffic stop to administer field sobriety tests. It reasoned:

> [T]he officer noted a mild odor of intoxicants. He questioned Mr. Burmeister about that. Mr. Burmeister initially denied having consumed any alcohol. He said, oh gosh, it must be the chew that I just put in my mouth. And upon being confronted … he said, oh yeah, I did drink. So that is an indicia that he, himself believed that he was intoxicated and did not want the officer to pursue that line of investigating.

The court denied Burmeister's suppression motion. Burmeister subsequently pleaded no contest, and the court found him guilty.

DISCUSSION

¶7 On appeal, Burmeister concedes the initial traffic stop was lawful. He argues the circuit court erred by denying his suppression motion because Logan lacked reasonable suspicion to believe he was impaired and, therefore, Logan unlawfully extended the traffic stop to administer field sobriety tests.

[3] A "dip" is a type of single use tobacco. *See* THE NEW OXFORD AMERICAN DICTIONARY 481 (2001) (defining "dip" as "take (snuff)").

¶8 When reviewing a denial of a motion to suppress, we uphold the circuit court's findings of fact unless they are clearly erroneous. ***State v. Popke***, 2009 WI 37, ¶10, 317 Wis. 2d 118, 765 N.W.2d 569. Whether those facts satisfy the constitutional requirement of reasonableness is a question of law we review de novo. ***State v. Guzy***, 139 Wis. 2d 663, 671, 407 N.W.2d 548 (1987).

¶9 An officer may lawfully extend a traffic stop, if, during the stop, "the officer discover[s] … information ... which, when combined with information already acquired, provide[s] reasonable suspicion that [the defendant] was driving while under the influence of an intoxicant." ***State v. Colstad***, 2003 WI App 25, ¶19, 260 Wis. 2d 406, 695 N.W.2d 394. Reasonable suspicion exists when, under the totality of the circumstances, "the facts of the case would warrant a reasonable police officer, in light of his or her training and experience, to suspect that the individual has committed, was committing, or is about to commit a crime." ***State v. Post***, 2007 WI 60, ¶13, 301 Wis. 2d 1, 733 N.W.2d 634. It "must be based on more than an officer's 'inchoate and unparticularized suspicion or hunch.'" ***Id.***, ¶10 (citation omitted). The officer "'must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant' the intrusion of the [extended] stop." ***Id.*** (citation omitted); *see also* ***State v. Betow***, 226 Wis. 2d 90, 94-95, 593 N.W.2d 499 (Ct. App. 1999).

¶10 Burmeister argues Logan lacked reasonable suspicion to extend the traffic stop because "the only indicia which suggested the presence of alcohol were … the odor, and … Burmeister's statement that he had … just put a dip in, followed by his statement that he had been drinking at Anglers." Burmeister objects to the circuit court's "characteri[zation of] Burmeister's statements … regarding chewing tobacco and his subsequent admission of drinking alcohol as evidence that Burmeister himself may have believed he was impaired." He

emphasizes he never made an admission that he was impaired and Logan never testified he believed the statements indicated Burmeister was impaired. Burmeister also explains he was stopped for a seatbelt violation and the officers did not notice any "bad driving" before the stop. He asserts the facts observed by Logan suggest only the presence of alcohol, which is not illegal, and they do not indicate Burmeister was impaired.

¶11 We reject Burmeister's assertion that the facts observed by Logan suggest only the presence of alcohol. First, we agree with the court's determination that Burmeister's deflective answer coupled with his subsequent admission to drinking reasonably leads to a rational inference that, when Logan initially asked about alcohol, Burmeister believed he may be impaired and did not want Logan to discover his impairment. *See* ***Post***, 301 Wis. 2d 1, ¶10 (rational inferences taken from specific and articulable facts are included in reasonable suspicion determination). Further, it is of no consequence that Logan did not specifically testify that he inferred Burmeister's deflective answer followed by his admission to drinking was an indication that Burmeister was impaired. The test for reasonable suspicion is an objective one. *See* ***State v. Waldner***, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996); *see also* ***State v. Buchanan***, 178 Wis. 2d 441, 447 n.2, 504 N.W.2d 400 (Ct. App. 1993) ("[I]t is the circumstances that govern, not the officer's subjective belief."). Finally, Logan did not need proof of "bad driving" for purposes of reasonable suspicion. *See* ***State v. Powers***, 2004 WI App 143, ¶12 n.2, 275 Wis. 2d 456, 685 N.W.2d 869 ("Because an OWI conviction does not require proof of erratic driving, proof of erratic driving is obviously not required for purposes of a reasonable suspicion.").

¶12 In this case, at the moment Logan requested that Burmeister participate in field sobriety tests, Logan knew there was an odor of intoxicants

emanating from Burmeister's person, Burmeister deflected a question of whether he had been drinking by blaming it on the dip in his mouth, and he later admitted to consuming alcohol. Given these facts and the rational inferences derived from these facts, we conclude that, under the totality of the circumstances, Logan had reasonable suspicion to believe Burmeister was impaired by alcohol. *See* ***Post***, 301 Wis. 2d 1, ¶¶10, 13. Burmeister properly extended the traffic stop to administer field sobriety tests.

By the Court.—Judgment affirmed.

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