COURT OF APPEALS
DECISION
DATED AND FILED

January 30, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP799-CR **Cir. Ct. No. 2011CT995**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAVIER TENIENTE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: STEPHEN E. EHLKE, Judge. *Affirmed.*

¶1 KLOPPENBURG, J.[1] Javier Teniente appeals a judgment of conviction for operating a motorboat while intoxicated (OWI), as a second offense, in violation of WIS. STAT. § 30.681(1)(a), and for unreasonable refusal to

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

provide a sample of his breath, blood, or urine, as a second offense, in violation of WIS. STAT. § 30.684(5). Teniente argues that the circuit court erred in concluding that: (1) there was reasonable suspicion to justify the stop of his boat; (2) there was probable cause to arrest Teniente for OWI; and (3) the officer did not engage in improper and unlawful conduct by creating a sobriety checkpoint. For the reasons set forth below, we reject Teniente's arguments and affirm the judgment of conviction.

BACKGROUND

¶2 After being charged with the offenses stated above, Teniente filed a suppression motion. The circuit court held a jury trial on the charges and, with the parties' agreement, heard the suppression motion during the first part of the trial. In the suppression motion portion of the trial, the State presented the testimony of Thomas Roloff, the officer who stopped and arrested Teniente. The following facts are taken from Roloff's testimony.

¶3 On July 2, 2011, the night of the stop and arrest in question, Roloff was on duty with the Marine and Trail Enforcement Team. Roloff was assigned to monitor the Tenney Lock, which allows boats to travel between Lake Mendota and Lake Monona. That evening, there was a "high volume of traffic" at the Tenney Lock because of the Rhythm & Booms fireworks event. Roloff explained that there was about a two-hour wait to pass through the lock.

¶4 At approximately 8:00 p.m., Roloff's attention was drawn to a particular boat in the lock when the boat's occupant, who was later identified as Teniente, "stood up … and said something to the effect of 'That's the sound of freedom.'" Roloff noticed that Teniente's words appeared to be slurred. At the time, Teniente's boat was rising in the lock, and Roloff was standing on the lock's

concrete wall and was directly above Teniente's boat at a distance of six to eight feet.

¶5 Roloff made contact with Teniente and engaged him in conversation. As Roloff and Teniente conversed, Roloff "continued to notice that [Teniente's] words were slurred." Roloff observed that Teniente's eyes were bloodshot, and he detected an order of intoxicants on Teniente's breath. Roloff also observed a bottle of rum that "appeared to have about half of its contents missing" and a couple of open beer cans in plain view in Teniente's boat.

¶6 Roloff asked Teniente to pull his boat to the dock. He then asked Teniente to perform field sobriety tests. The field sobriety tests were performed inside the Tenney Lock facility, which Roloff described as a "garage" with a concrete floor. The first of the three tests that Roloff administered was the horizontal gaze nystagmus (HGN). During this test, Roloff observed, in both of Teniente's eyes, a lack of smooth pursuit, "distinct and sustained nystagmus," and "nystagmus onset prior to 45 degrees," for a total of six out of six potential "clues" of intoxication. The second of the three tests that Roloff administered was the walk and turn test. During this test, Roloff observed six clues out of a potential eight: Teniente failed to touch heel-to-toe several times, raised his hands from his waist "a couple of times," "had difficulty completing the turn as instructed," and failed to count the proper number of steps. The third of the three tests that Roloff administered was the one-leg stand test. During this test, Roloff observed three clues out of a potential four: Teniente lifted "his arms up from his side in an attempt to maintain his balance," "set his foot down several times," and "quit the test before … he reached [the] 30-second mark." Roloff formed the opinion that Teniente was under the influence of alcohol and arrested Teniente. Roloff asked

Teniente "if he would submit to an evidentiary chemical test of his breath." Teniente refused the breath test.

¶7 The circuit court denied Teniente's suppression motion, concluding that Roloff had reasonable suspicion to stop Teniente, and that Roloff had probable cause to arrest Teniente. The circuit court also concluded that Roloff did not create "an unlawful roadblock." Teniente appeals.

DISCUSSION

¶8 Teniente argues that the circuit court erred in three respects: (1) by determining that Roloff had reasonable suspicion to detain him; (2) by determining that Roloff had probable cause to arrest him; and (3) by determining that Roloff "did not engage in improper and unlawful conduct in creating a de facto sobriety checkpoint." We reject Teniente's arguments for the reasons that follow.

¶9 The Fourth Amendment of the United States Constitution and article I, section 11 of the Wisconsin Constitution both protect against unreasonable searches and seizures. Our supreme court has recognized two types of seizures—investigatory stops and arrests. ***State v. Young***, 2006 WI 98, ¶¶20, 22, 294 Wis. 2d 1, 717 N.W.2d 729. Investigatory stops must be supported by reasonable suspicion. ***Id.***, ¶20. Arrests must be supported by probable cause. ***Id.***, ¶22.

¶10 When we review a motion to suppress, we employ a two-step analysis. ***Id.***, ¶17. We uphold the circuit court's factual findings unless they are clearly erroneous. ***Id.*** However, we determine independently whether a seizure has occurred based on those facts. ***Id.*** And whether an investigatory stop or an

arrest is constitutional based on those facts is a question of law that we review *de novo*. *See* ***State v. Patton***, 2006 WI App 235, ¶7, 297 Wis. 2d 415, 724 N.W.2d 347 (whether an investigatory stop meets constitutional standards is a question of law that we review *de novo*); ***State v. Phillips***, 2009 WI App 179, ¶6, 322 Wis. 2d 576, 778 N.W.2d 157, *review denied*, 2010 WI 53, 326 Wis. 2d 35, 783 N.W.2d 872 (whether probable cause exists is a question of law subject to independent review). We first address when the seizure of Teniente occurred, and we then proceed to address whether the seizure was supported by reasonable suspicion and whether the arrest that followed was supported by probable cause.

Occurrence of Seizure

¶11 While investigatory stops are seizures that must be supported by reasonable suspicion, not all police-citizen encounters are seizures subject to the protections of the United States and Wisconsin Constitutions. ***Young***, 294 Wis. 2d 1, ¶18. A police-citizen encounter becomes a seizure when the law enforcement officer "'by means of physical force or show of authority'" in some way restrains the liberty of the citizen. ***United States v. Mendenhall***, 446 U.S. 544, 552 (1980) (quoted source omitted).

¶12 The parties appear to assume that a seizure occurred the moment that Roloff made contact with Teniente. However, by assuming that a seizure occurred when Roloff first made contact with Teniente, the parties disregard a critical aspect of the seizure analysis—*when* the seizure actually occurred. "The moment of 'seizure' is critical for two reasons: (1) it determines when Fourth Amendment … protections become applicable; and (2) it limits the facts we may consider in evaluating whether" Roloff had reasonable suspicion to stop Teniente, which in

turn affects whether Roloff had probable cause to arrest Teniente. ***Young***, 294 Wis. 2d 1, ¶23. For these reasons, we first address when the seizure occurred.

¶13 The United States Supreme Court has set forth the following test for determining whether a particular police-citizen encounter constitutes a seizure for purposes of the Fourth Amendment:

> [A] person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he [or she] was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.

Mendenhall, 446 U.S. at 554-55 (citations and footnote omitted). Additionally, questioning by law enforcement officers alone is unlikely to effectuate a seizure. ***Immigration and Naturalization Serv. v. Delgado***, 466 U.S. 210, 216 (1984).

¶14 We apply an objective test to determine whether a seizure has occurred. ***State v. Williams***, 2002 WI 94, ¶4, 255 Wis. 2d 1, 646 N.W.2d 834. In cases where the individual's freedom of movement is restricted by a factor independent of police conduct "the appropriate inquiry is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." ***Florida v. Bostick***, 501 U.S. 429, 436 (1991). "[T]he crucial test is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he [or

she] was not at liberty to ignore the police presence and go about his [or her] business.'" ***Id.*** at 437 (quoted source omitted).

¶15 When Roloff first made contact with Teniente, he was on "routine patrol" and approached Teniente to "engage[] him in conversation." Roloff testified that he "asked [Teniente] how he was doing." At this time, Teniente was in his boat, which was in the Tenney Lock. Roloff was standing on a concrete wall, "six or eight feet" directly above Teniente's boat. The gates were closed and the water level was rising. The lock was being operated by the lock tender, a civilian employee who controlled the opening and closing of the gates.

¶16 When Roloff engaged Teniente in conversation, none of the circumstances indicating a seizure were present. Roloff was the only officer speaking to Teniente. There is no evidence that Roloff displayed his weapon or physically contacted Teniente. There is no evidence that Roloff used a harsh or authoritative tone of voice. And although Teniente could not leave the lock—a factor that was beyond Roloff's control[2]—Teniente could have ignored Roloff's attempt to converse with him. For these reasons, we conclude that the initial contact between Roloff and Teniente did not constitute a seizure. *See* ***Bostick***, 501 U.S. at 434 (explaining that "a seizure does not occur simply because a police officer approaches an individual and asks a few questions" as long as "a reasonable person would feel free 'to disregard the police and go about his business'" (quoted source omitted)).

[2] *See* ***United States v. Drayton***, 536 U.S. 194, 201-03 (2002) (explaining that the movements of the defendants, who were passengers on a bus, were confined not as a result of coercive police conduct but as a "natural result of choosing to take the bus," and holding that the defendants were not seized when law enforcement officers boarded the bus and began questioning passengers).

¶17 However, Roloff's encounter with Teniente did not end after the initial contact, and Roloff eventually instructed Teniente to pull his boat over. We conclude that at this point, a reasonable person in Teniente's position would not have believed that he or she was free to leave. Teniente was therefore seized when Roloff instructed him to pull over. *See* ***State v. Griffin***, 183 Wis. 2d 327, 330, 515 N.W.2d 535 (Ct. App. 1994) ("The stopping of a motor vehicle is a seizure, which triggers Fourth Amendment protections from unreasonable searches and seizures.").

Reasonable Suspicion for Stop

¶18 Teniente argues that the circuit court erred in concluding that Roloff had reasonable suspicion to stop Teniente when Roloff instructed him to pull over. To execute a valid investigatory stop consistent with the United States and Wisconsin Constitutions, a law enforcement officer must have reasonable suspicion to believe that a crime or traffic violation has been or will be committed. ***State v. Popke***, 2009 WI 37, ¶23, 317 Wis. 2d 118, 765 N.W.2d 569. In assessing whether a stop is supported by reasonable suspicion, we consider whether "'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant'" the intrusion of the stop. ***State v. Post***, 2007 WI 60, ¶10, 301 Wis. 2d 1, 733 N.W.2d 634 (quoting ***Terry v. Ohio***, 392 U.S. 1, 21 (1968)). We determine the reasonableness of a stop based on the totality of facts and circumstances. ***Post***, 301 Wis. 2d 1, ¶13.

¶19 The State argues that Roloff had reasonable suspicion to stop Teniente based on the following facts. As Roloff and Teniente conversed, Roloff noticed that Teniente's speech "continued to be slurred." Roloff observed that Teniente's eyes were bloodshot, and he detected an odor of intoxicants coming

from Teniente. In Teniente's boat, Roloff observed "a Captain Morgan bottle and some beers." We agree that Roloff had reasonable suspicion to stop Teniente based on these facts.

Probable Cause to Arrest

¶20 Teniente argues that the circuit court erred by concluding that Roloff had probable cause to arrest him. To execute a valid arrest consistent with the United States and Wisconsin Constitutions, a law enforcement officer must have probable cause to suspect that a crime has been committed. ***Young***, 294 Wis. 2d 1, ¶22. We apply a common-sense test based on the totality of the circumstances to determine whether an arrest was supported by probable cause. ***County of Dane v. Sharpee***, 154 Wis. 2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990). "Probable cause to arrest exists where the officer, at the time of the arrest, has knowledge of facts and circumstances sufficient to warrant a person of reasonable prudence to believe that the arrestee is committing, or has committed, an offense." ***Id.***

¶21 Teniente contends that the only factors justifying his arrest were his statement, "that's the sound of freedom," and the officer's observation of "'slightly' slurred" speech. The State responds that the following factors justified Roloff's probable cause determination: Teniente's boisterous behavior and his slurred speech; the officer's observation of open intoxicants in plain view; Teniente's bloodshot eyes; the odor of intoxicants coming from Teniente; and the officer's observation of six out of six possible clues on the HGN test, six out of eight possible clues on the walk and turn test, and three out of four possible clues on the one-leg stand test. Based on the totality of the circumstances, including Teniente's performance on the field sobriety tests, we conclude that Roloff had probable cause to arrest Teniente for operating while intoxicated.

Sobriety Checkpoint

¶22 Teniente argues that the circuit court erred when it determined that Roloff did not engage in improper and unlawful conduct by creating a sobriety checkpoint. On appeal, Teniente develops no legal argument in support of his assertion that Roloff created a sobriety checkpoint. Although Teniente cites to WIS. STAT. § 349.02(2)(a),[3] he offers no argument or explanation as to how Roloff's conduct violated that statute. We therefore will not consider this argument. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (undeveloped arguments need not be considered).

CONCLUSION

¶23 We conclude that Teniente was not seized until Officer Roloff instructed him to pull his boat over; that Roloff had reasonable suspicion to seize Teniente; that Roloff had probable cause to arrest Teniente; and that Teniente offers no developed argument that the circuit court erred in determining that Roloff did not unlawfully create a sobriety checkpoint. We therefore affirm the judgment of conviction.

By the Court.—Judgment affirmed.

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

[3] WISCONSIN STAT. § 349.02(2)(a) provides in relevant part: "[A law enforcement] officer … may not stop … a vehicle solely to determine compliance with a statute or ordinance … unless the [law enforcement] officer … has reasonable cause to believe that a violation of a statute or ordinance … has been committed."