COURT OF APPEALS
DECISION
DATED AND FILED

February 25, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2536 **Cir. Ct. No. 2013CV429**

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

VILLAGE OF LITTLE CHUTE,

PLAINTIFF-RESPONDENT,

V.

RONALD A. ROSIN,

DEFENDANT-APPELLANT.

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

¶1 STARK, J.[1] Ronald Rosin, pro se, appeals a judgment of conviction for operating while intoxicated, first offense.[2] Rosin asserts field sobriety tests

[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.

constitute a "search" within the meaning of the Fourth Amendment, and, therefore, 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 Michael Grumman testified that, on November 16, 2012, at approximately 12:37 a.m., he was on patrol and monitoring traffic near the intersection of Madison Street and West Lincoln Avenue in the Village of Little Chute. Grumman observed a vehicle approach the intersection and turn left onto Madison Street. Madison Street is a four-lane road with two traffic lanes in each direction. As the vehicle turned left onto Madison Street, the vehicle made a wide turn, crossing into the right lane of traffic. The vehicle then continued to travel right, crossed into the bicycle lane, and almost struck the curb.

¶3 Grumman began following the vehicle. After the vehicle crossed a bridge, Grumman observed the vehicle drift right a second time and cross the fog line into the bicycle lane. Grumman then stopped the vehicle.

¶4 Grumman made contact with Rosin, who was driving. Grumman noticed Rosin's eyes were watery and bloodshot. Grumman also smelled a slight odor of intoxicants emanating from Rosin's vehicle, which "was masked by a

[2] Attorney John Miller Carroll filed briefs on behalf of Rosin. Following briefing, Attorney Carroll's license to practice law was suspended. Attorney Carroll notified us of the suspension, and we removed him from the case.

strong odor of cigarette smoke." Grumman explained, "People will sometimes try to disguise the odor of alcohol with cigarette smoke." Rosin told Grumman he had just left a bar where he consumed one beer. Rosin also told Grumman he made a wide turn because he has a commercial driver's license and is used to driving semi-tractor-trailers.

¶5 Grumman asked Rosin to exit his vehicle. After Rosin was "in the fresh air," Grumman stated "the cigarette smoke started to dissipate and I could smell a strong odor of alcoholic beverages coming from his person." Grumman then asked Rosin to perform field sobriety tests. Ultimately, Rosin was arrested for operating while intoxicated.

¶6 At the suppression hearing, Rosin argued field sobriety tests constitute a search within the meaning of the Fourth Amendment. He argued Grumman needed, but did not have, probable cause to request the field sobriety tests.

¶7 The circuit court concluded Grumman needed only reasonable suspicion of intoxication to request field sobriety tests. The court found that, based on the totality of the circumstances, Grumman had reasonable suspicion of intoxication and therefore lawfully requested Rosin to perform field sobriety tests. The court denied Rosin's suppression motion.

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

DISCUSSION[3]

I. Fourth Amendment and Field Sobriety Tests

¶9 Rosin 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, Rosin 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

[3] The brief-in-chief advanced by Attorney Carroll on behalf of Rosin is virtually identical to the brief-in-chief Attorney Carroll filed on behalf of Matthew Fellinger. We therefore take the majority of our legal analysis directly from our decision in ***Town of Freedom v. Fellinger***, No. 2013AP614, unpublished slip op. (WI App Aug. 6, 2013).

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 Rosin 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, Rosin cites several cases from other jurisdictions that have discussed this issue. Every case Rosin cited has held field sobriety tests are searches and Rosin argues that, based on this persuasive authority, we too must conclude field sobriety tests constitute searches.

¶13 The Village of Little Chute does not respond to Rosin'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 Village as to whether field sobriety tests constitute a search, we therefore conclude that, for purposes of this appeal, Rosin'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 Rosin 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 Rosin cites as authority required only reasonable suspicion.

¶15 Rosin, 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,[4] 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, Rosin 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.

[4] *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."); *see also* ***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.").

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

¶17 Second, we agree with Rosin 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 lead 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,'" suggest impairment. *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 Rosin cited. 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, therefore, 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 Rosin next argues, if the correct standard is reasonable suspicion, Grumman did not reasonably suspect Rosin 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 identify "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, ¶10, 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.***, ¶20. However, whether those facts amount to reasonable suspicion is a question of law we review independently. ***Id.***, ¶¶10, 25.

¶22 Rosin argues the only factors suggesting that he might be impaired were a slight odor of intoxicants, 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 also contends Grumman did not observe any slurred speech or "lethargic or clumsy mobility."

¶23 The Village responds that Grumman had the requisite reasonable suspicion to request Rosin perform field sobriety tests. The Village asserts drifting back and forth into the bicycle lane, the odor of intoxicants, the cigarette smoke used to mask the odor, Rosin's watery and bloodshot eyes, and his drinking admission gave Grumman reasonable suspicion to request Rosin to exit the vehicle to perform field sobriety tests.

¶24 Grumman did not state he observed slurred speech or lethargic or clumsy mobility before requesting Rosin perform field sobriety tests. However, there is no requirement that officers make those specific observations before requesting such tests. Grumman articulated specific facts, and reasonable inferences drawn from them, suggesting Rosin's impairment. They include Rosin's drift across the traffic lanes on his turn and almost striking the curb,

crossing the fog line on two occasions, the odor of intoxicants, the admission of drinking, Rosin's watery and bloodshot eyes, and the time of night. Considered together, they provide reasonable suspicion that Rosin was operating his vehicle while intoxicated. *See* ***State v. Lange***, 2009 WI 49, ¶¶28-29, 32, 317 Wis. 2d 383, 766 N.W.2d 551 (time of night of traffic stop and defendant's driving are relevant factors in OWI investigation); *see also* ***Renz***, 231 Wis. 2d at 316 (indicators of intoxication include odor of intoxicants and admission of drinking). Accordingly, Grumman lawfully requested Rosin to perform field sobriety tests, and the circuit court properly denied Rosin's suppression motion.

By the Court.—Judgment affirmed.

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