COURT OF APPEALS
DECISION
DATED AND FILED

September 17, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal Nos. 2014AP109-CR
2014AP227

Cir. Ct. Nos. 2013CT167
2013TR1715

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

NO. 2014AP109-CR

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANDREW J. KUSTER,

DEFENDANT-APPELLANT.

NO. 2014AP227

IN THE MATTER OF THE REFUSAL OF ANDREW J. KUSTER:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANDREW J. KUSTER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Affirmed*.

APPEAL from an order of the circuit court for Walworth County: DAVID M. REDDY, Judge. *Affirmed*.

¶1 REILLY, J.[1] In these consolidated appeals from his conviction for drunk driving and the revocation of his driving privileges, Andrew Kuster challenges every step of the State's handling of his case from the initial stop of his vehicle through the testing of his blood. We affirm.

BACKGROUND

¶2 Whitewater police officer James Elder was on patrol when he heard a "loud engine rev" coming from a vehicle in a parking lot at 12:17 a.m. He observed the vehicle traveling at a speed that was "alarming to me as unsafe" and pulling from the driveway of the parking lot onto a street, where it again revved its engine loudly and accelerated so rapidly that its "tires broke tracks with the pavement and spun excessively." Elder visually estimated that the vehicle

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

accelerated to the point where it was exceeding the posted speed limit by ten miles an hour.

¶3 Elder made a Y-turn and caught up with the vehicle at a T-shaped intersection where it was sitting at a red flashing light. Elder observed the vehicle wait for thirty to forty-five seconds even though it "had more than ample opportunity to proceed through the intersection safely." Elder activated his emergency lights, shined his spotlight on the driver's side of the vehicle, got out of his squad car, and motioned for another vehicle to go around. As Elder approached the stopped vehicle, it pulled away. Elder got back into his squad car and activated his siren, and the vehicle pulled over to the side of the road.

¶4 Elder identified Kuster as the driver of the vehicle and advised him that he had been stopped "for the erratic driving and the revving of the engine." During the stop, Elder noticed a "moderate odor of intoxicants coming from the vehicle" and asked Kuster how many drinks he had consumed. Kuster answered "a few," then "[n]one" and then "one" when Elder pressed him to be more specific. Elder had Kuster perform field sobriety tests and observed four clues of intoxication on the horizontal gaze nystagmus (HGN) test, one clue of intoxication on the walk-and-turn test, and one clue of intoxication on the one-leg stand test.

¶5 Elder placed Kuster under arrest for drunk driving and read the Informing the Accused form asking Kuster to submit to a chemical test of his blood, which Kuster refused. Kuster was thereafter transported to a hospital where his blood was drawn, revealing a .176 blood alcohol concentration. Kuster was charged with operating a motor vehicle while under the influence of an intoxicant (OWI) and operating with a prohibited alcohol concentration (PAC), both as

second offenses, cited for excessive acceleration, and notified that his operating privileges could be revoked for refusing consent to the blood test.

¶6 Kuster requested a refusal hearing and filed suppression motions challenging the legality of the traffic stop, arrest, and blood test. At a joint refusal/suppression hearing, the court denied Kuster's suppression motions and found that his refusal of the blood test was unlawful.[2] Kuster subsequently pled guilty to the PAC charge. Kuster appeals his judgment of conviction and the order finding that he unlawfully refused a chemical test of his blood. We granted his motion to consolidate the appeals. *See* WIS. STAT. RULE 809.10(3).

STANDARD OF REVIEW

¶7 As Kuster's appeal from the refusal order pertains only to the court's probable cause determination, we review his appeal from that order under the same standard as we employ in reviewing the denial of his motions to suppress. That is, we uphold the circuit court's findings of fact unless they are clearly erroneous. ***State v. Waldner***, 206 Wis. 2d 51, 54, 556 N.W.2d 681 (1996). Whether those facts satisfy the constitutional requirements is a question of law that we decide independently. ***Id.***

[2] The Honorable David M. Reddy presided over the refusal/suppression hearing and entered the refusal order in No. 2014AP227. After a judicial transfer following the hearing, the Honorable James L. Carlson presided over the proceedings below in No. 2014AP109-CR.

DISCUSSION

¶8 Kuster raises a multiplicity of issues on appeal dealing with whether police had reasonable suspicion necessary to initiate and extend the traffic stop of his vehicle, whether police had probable cause to place him under arrest or to believe he was operating a motor vehicle while intoxicated pursuant to WIS. STAT. § 343.305(9)(a)5.a., and whether police could rely on the good faith exception to the warrant requirement in conducting the test of his blood after ***Missouri v. McNeely***, 569 U.S. ___, 133 S. Ct. 1552 (2013).

Traffic Stop

¶9 A police officer may perform an investigatory stop of a vehicle based on reasonable suspicion of a noncriminal traffic violation. ***State v. Colstad***, 2003 WI App 25, ¶11, 260 Wis. 2d 406, 659 N.W.2d 394. Reasonable suspicion requires the officer possess specific and articulable facts, in light of the officer's training and experience, that an offense has been committed, is being committed, or is about to be committed. ***Waldner***, 206 Wis. 2d at 56. This is a common sense, objective test. ***Id.***

¶10 Kuster bases his argument that reasonable suspicion did not exist to justify the traffic stop of his vehicle on a discrepancy between Elder's identification of Kuster's vehicle as tan in color on Kuster's citation and the fact that Kuster's vehicle is registered as silver in color. From this, Kuster extrapolates that all of the driving behavior that Elder observed prior to his Y-turn can be attributed to a separate "tan" vehicle and only the "unexplained lingering" at the flashing red light can be attributed to Kuster's "silver" vehicle.

¶11 We disagree with Kuster's premise. The testimony at the refusal/suppression hearing established nothing more than that Elder may have been mistaken about the vehicle's color. Kuster points to no facts other than the citation to show that the vehicle that Elder stopped and cited was not the one he observed in the parking lot. Pointedly, Kuster did not raise the issue of misidentification before the circuit court; had he done so, additional testimony from Elder may have addressed the discrepancy. The court implicitly found that the vehicle in the parking lot and the vehicle that Elder stopped were the same and were driven by Kuster. This finding of fact is not clearly erroneous. Elder had reasonable suspicion that Kuster had engaged in excessive acceleration, speeding, and other erratic driving behavior, and therefore, Kuster was lawfully stopped.

¶12 Kuster next contends that even if there was reasonable suspicion for the initial stop, the duration of the stop was unreasonably extended as the odor of intoxicants and Kuster's varying statements about his level of drinking were the only evidence that he may have been operating while intoxicated. This argument also fails as a traffic stop may be extended and a new investigation begun if the police officer becomes aware of additional factors sufficient to give rise to an articulable suspicion that the individual has committed an offense separate from the offense that prompted the initial stop. *See* ***Colstad***, 260 Wis. 2d 406, ¶19. The decision to extend a stop is based on the same criteria as the initial stop, i.e., reasonable suspicion that an offense has been, is being, or will be committed. ***State v. Betow***, 226 Wis. 2d 90, 94-95, 593 N.W.2d 499 (Ct. App. 1999). Reasonable suspicion considers the information gathered after the stop as well as the information possessed by the officer in initiating the stop. ***Colstad***, 260 Wis. 2d 406, ¶19.

¶13 At the time that Elder extended the stop to have Kuster perform field sobriety tests, he had observed Kuster excessively accelerate his vehicle in a parking lot and speed on a city street in an unsafe manner, inexplicably wait at a flashing red light as traffic gathered behind him, emit a moderate odor of intoxicants, and give inconsistent answers about how many alcoholic beverages he had consumed. These articulable factors provided reasonable suspicion such that Elder could lawfully extend the stop to begin a new investigation into whether Kuster had been operating his vehicle while intoxicated.

Probable Cause

¶14 Kuster challenges the circuit court's finding that Elder had probable cause to arrest him for OWI following his performance on the field sobriety tests. "Probable cause to arrest refers to that quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed a crime." ***State v. Paszek***, 50 Wis. 2d 619, 624, 184 N.W.2d 836 (1971). This fact-specific inquiry requires that there is sufficient information to "lead a reasonable officer to believe that guilt is more than a possibility." ***Id.*** at 625. We conclude that the information possessed by Elder at the time of the arrest provided a quantum of evidence that would lead a reasonable police officer to believe that Kuster was operating while intoxicated.

¶15 Elder observed Kuster operating his vehicle in an unsafe manner. Kuster emitted an odor of intoxicants and was inconsistent and equivocal when asked how much alcohol he had consumed. Kuster exhibited four signs of

intoxication on the HGN test[3] and two signs on two other field sobriety tests. Given that these factors could reasonably add up to more than a possibility that Kuster was driving drunk, the court properly denied Kuster's motion to suppress and found Kuster's refusal to take a chemical test of his blood unlawful. *See* ***State v. Wille***, 185 Wis. 2d 673, 681-82, 518 N.W.2d 325 (Ct. App. 1994).

Blood Draw

¶16 Kuster's last challenge concerns his warrantless blood draw. Kuster acknowledges that at the time his blood was taken, binding appellate precedent in Wisconsin permitted the warrantless seizure of blood from a person lawfully under arrest for drunk driving. Kuster contends that as ***McNeely*** was issued before the blood was *tested*, that the State needed a warrant before proceeding to test (search) his blood for alcohol. We disagree.

[3] At the outset of the refusal/suppression hearing, the court denied Kuster's motion in limine to exclude Elder's observations of Kuster on the HGN test, and this testimony was admitted at the hearing. Kuster contends that the court erred when it relied on an unpublished decision of this court for its persuasive value that an officer's testimony about field sobriety tests, including the HGN, are not expert opinion testimony. *See* ***State v. Warren***, No. 2012AP1727-CR, unpublished slip op. ¶¶3, 7 (WI App Jan. 26, 2013).

Kuster ignores, however, that the circuit court did not rely solely upon ***Warren*** in concluding that the HGN testimony was admissible. The court also found that the officer's HGN testimony was admissible as the HGN test's methods were reliably based upon analytical data, subject to peer review and publication, and accepted in the "relevant" community—that is, the testimony was admissible as expert opinion testimony under WIS. STAT. § 907.02(1). *See* ***State v. Giese***, No. 2013AP2009-CR, slip op. ¶18 (WI App Aug. 27, 2014) (recommended for publication). The State made an offer of proof that Elder would testify as to his training and experience in the use of field sobriety tests, including the HGN, such that he was qualified to render an opinion. Kuster does not develop an argument on appeal for why the court's determination that Elder could testify as an expert was erroneous. We will not develop this argument for him. *See* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992).

¶17 This court held in ***State v. VanLaarhoven***, 2001 WI App 275, ¶¶16-17, 248 Wis. 2d 881, 637 N.W.2d 411, that the seizure and subsequent analysis of a person's blood was a single event for warrant requirement purposes. ***McNeely*** simply holds that police may no longer rely solely on the rapid dissipation of alcohol in the blood to establish the exigent circumstances necessary for a warrantless blood draw. *See* ***McNeely***, 133 S. Ct. at 1556. As acknowledged by the circuit court in this case, that change rendered the warrantless draw of Kuster's blood unconstitutional. That constitutional violation does not merit suppression, however, if the State "relied in good faith on clear and settled law that was only subsequently changed." ***State v. Dearborn***, 2010 WI 84, ¶34, 327 Wis. 2d 252, 786 N.W.2d 97. At the time that Kuster's blood was seized, ***State v. Bohling***, 173 Wis. 2d 529, 547-48, 494 N.W.2d 399 (1993), provided that police did not need a warrant to draw his blood to obtain possible evidence of intoxication. At the time that his blood was searched (i.e., tested), ***VanLaarhoven*** provided—and still provides—that the State does not need a separate warrant to conduct a test. Thus, suppression was not required as both the seizure and search of Kuster's blood was done in good faith reliance on clear and settled law at the time. ***Dearborn***, 327 Wis. 2d 252, ¶34.

By the Court.—Judgment and order affirmed.

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