COURT OF APPEALS
DECISION
DATED AND FILED

JANUARY 6, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1472

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

CITY OF NEW BERLIN,

PLAINTIFF-RESPONDENT,

v.

JEFFERY D. EGGUM,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: DONALD J. HASSIN, Judge. *Affirmed.*

ANDERSON, J. Jeffrey D. Eggum appeals from a judgment convicting him of operating a vehicle with a prohibited alcohol concentration. Eggum contends that the trial court erred when it denied his motion to suppress evidence based on a lack of reasonable suspicion to stop his vehicle, a lack of probable cause to make an arrest and a failure to comply with the implied consent law pursuant to § 343.305(5)(b), STATS. This court concludes that the police officer had sufficient reasonable suspicion to execute a traffic stop,

probable cause to arrest Eggum existed and the procedures of § 343.305(5)(b) were followed. The judgment is therefore affirmed.

The facts are not disputed. Around 2:40 a.m. on April 12, 1997, Officer Godec of the New Berlin police department noticed a vehicle swerving while southbound on Moorland Road. The officer first observed the vehicle drift to the right, coming within inches of the fog (shoulder) line. The car then drifted left, within inches of the dotted line separating the two southbound lanes of traffic. The vehicle then stopped at a red light. After the light turned green and the vehicle proceeded, the officer again saw the vehicle drift to the right and then back to the left. Again the vehicle drifted right, this time touching the fog line, and then back left within the lane. It was at this time, after watching the vehicle swerve right and left three times within a mile, that the officer turned on his emergency lights and pulled the vehicle over.

When the officer went to the window of the car to ask for the driver's—Eggum's—and his passenger's identification, he smelled the odor of intoxicants coming from the vehicle. Both occupants denied drinking any alcohol that evening. The officer also noticed that Eggum's eyes were bloodshot and his speech was slurred. He asked him to step out of the car to perform some field sobriety tests. Eggum got out of the car but refused the sobriety tests stating that it was his constitutional right to refuse. The officer again smelled the odor of intoxicants coming from Eggum.

Godec then arrested Eggum for driving while intoxicated. He was transported to the police station for a breath test. The machine malfunctioned, and the officer decided to obtain a blood test instead. Eggum was transported to Waukesha Memorial Hospital where a phlebotomist drew blood for the officer.

Eggum requested that he be able to procure an independent blood test, so a second sample of blood was drawn for that purpose. Godec only took custody of the first blood sample for the police test. It was sent to the state lab where it was tested. The test came back with a 0.112% blood alcohol level.

At trial, Eggum moved to suppress the results of the blood alcohol tests. The motion was denied. A jury convicted Eggum of operating a vehicle with a prohibited alcohol concentration. It is from this judgment that Eggum now appeals.

When reviewing a trial court's denial of a suppression motion, an appellate court "will uphold a trial court's findings of fact unless they are against the great weight and clear preponderance of the evidence." ***State v. Richardson***, 156 Wis.2d 128, 137, 456 N.W.2d 830, 833 (1990). Whether a search or seizure passes statutory and constitutional standards, however, is a question of law which this court reviews de novo. *See* ***id***. at 137-38, 456 N.W.2d at 833.

The Fourth Amendment of the United States Constitution and art. I, § 11 of the Wisconsin Constitution guarantee citizens the right to be free from unreasonable searches and seizures. *See* U.S. Const. amend. IV; Wis. Const. art. I, § 11. Although it has been held that an investigative stop is a "seizure" under the Fourth Amendment, a police officer may, under appropriate circumstances, conduct an investigative stop when a lesser degree of suspicion exists. *See* ***Terry v. Ohio***, 392 U.S. 1, 22 (1968). The standard required for this exception is reasonable suspicion based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." ***Id***. at 21. Section 968.24, STATS., the codification of ***Terry*** in Wisconsin, allows investigative stops based upon a standard of reasonableness.

A "determination of reasonableness depends on the totality of the circumstances." ***Richardson***, 156 Wis.2d at 139, 456 N.W.2d at 834. The officer in this case acted with reasonable suspicion in executing a traffic stop because the uncontradicted evidence in this case shows that Eggum's vehicle was swerving and that it touched the fog line at least once.

In our search of the record, we found nothing to contradict Godec's account of Eggum's erratic driving on the night in question. Godec testified that he observed Eggum's vehicle swerve right and then left three times in the distance of a mile. On the last swerve to the right before Godec pulled Eggum over, the vehicle touched the fog line. The officer also added to these observations the fact that it was 2:40 in the morning, right after "bar time."

Although there may be innocent explanations for this erratic driving, we allow officers to execute a ***Terry*** stop when they draw the reasonable inference from the totality of facts that the behavior could be due to unlawfulness. *See* ***State v. Waldner***, 206 Wis.2d 51, 59-61, 556 N.W.2d 681, 685-86 (1996). We agree with the trial court's conclusion that the officer had reasonable suspicion to execute a traffic stop based on Eggum's erratic driving.

Eggum also argues that his motion to suppress the blood test results should have been granted because the officer did not have probable cause to arrest him. We disagree.

Godec observed Eggum driving erratically right after bar closing time. He also smelled the odor of intoxicants coming from Eggum, saw that his eyes were bloodshot and heard his slurred speech.

Based on these facts, the trial court concluded that Godec had probable cause to arrest Eggum. This court agrees. A police officer is not required to first perform a field sobriety test before arresting a suspect for driving while under the influence of an intoxicant. *See* ***State v. Wille***, 185 Wis.2d 673, 684, 518 N.W.2d 325, 329 (Ct. App. 1994). We determine whether probable cause exists by looking at the totality of the circumstances. *See* ***State v. Babbitt,*** 188 Wis.2d 349, 356, 525 N.W.2d 102, 104 (Ct. App. 1994). As we noted, Eggum displayed other indicia of being under the influence of alcohol. We conclude that all of the facts present in this case were sufficient to establish probable cause without requiring field sobriety tests. Therefore, the trial court did not err in denying Eggum's motion to suppress.

We conclude that Godec had probable cause to arrest Eggum without considering the fact that he refused to perform the field sobriety tests. Eggum argues that because he was asserting a constitutional right, that assertion cannot be used as evidence of probable cause. On the contrary, a defendant's refusal to submit to a field sobriety test may be used as evidence of intoxication for establishing probable cause. *See* ***id***. at 358, 525 N.W.2d at 105. While a driver does have a constitutional right not to answer an officer's questions during a traffic stop, there is no constitutionally protected right not to perform field sobriety tests. The United States Supreme Court has held that there is no constitutional right to refuse to submit to blood alcohol testing. *See* ***South Dakota v. Neville***, 459 U.S. 553, 564 (1983). The Court stated that the Fifth Amendment is designed to prohibit the use of physical or moral compulsion and that the values behind the Fifth Amendment are not hindered when the state offers a suspect the choice of submitting to a blood alcohol test or having a refusal used against him or her. *See* ***id***. at 562-63. The Court held that "a refusal to take a blood-alcohol test, after a

police officer has lawfully requested it, is not an act coerced by the officer, and thus is not protected by the privilege against self-incrimination." ***Id***. at 564.

We have reached the same conclusion with respect to a refusal to submit to field sobriety testing: "Like the Intoxilyzer test, suspects also have no [F]ifth [A]mendment right to refuse to perform a field sobriety test." ***Babbitt***, 188 Wis.2d at 361, 525 N.W.2d at 106. We held that because a suspect is not compelled to perform a field sobriety test, a refusal to do so is not protected by the Fifth Amendment. *See* ***id***. at 361-62, 525 N.W.2d at 106. And just as a refusal to take an intoxilyzer test is relevant evidence of consciousness of guilt, so too is the refusal to perform a field sobriety test. *See* ***id***. at 359, 525 N.W.2d at 105.

There are no Fourth or Fifth Amendment protections which bar the admission at trial of evidence of refusal to submit to field sobriety testing. As the supreme court noted in ***State v. Crandall***, 133 Wis.2d 251, 259, 394 N.W.2d 905, 908 (1986), "The person who cooperates by taking the breathalyzer test will have the result presented at trial. In fairness to those defendants, we do not believe the defendant who refuses to take the test should have no mention of that made at trial." The same policy of not wanting to give suspects an incentive to refuse to submit to breathalyzer tests also applies to field sobriety testing. Therefore, the trial court did not err in considering evidence of Eggum's refusal to submit to field sobriety testing as evidence of consciousness of guilt.

Eggum also argues that the trial court erred in refusing to suppress the results of the blood test because he was denied his right to an independent blood test under Wisconsin's implied consent law. *See* § 343.305(5)(a), STATS.

Eggum did not contradict the officer's testimony that a second sample of blood was taken after Eggum requested an independent test. The only

duty the police had with regard to Eggum's request for an independent test was to not frustrate that effort. *See* ***State v. Stary***, 187 Wis.2d 266, 272, 522 N.W.2d 32, 35 (Ct. App. 1994). There is no evidence in the record that Godec interfered with Eggum's request for an independent test.

It is not our understanding that the implied consent law was intended to give greater rights to an alleged drunken driver than he or she has been previously constitutionally afforded. *See* ***Scales v. State***, 64 Wis.2d 485, 493-94, 219 N.W.2d 286, 291 (1974). Rather, the law's "purpose was to impose a condition on the right to obtain a license to drive on a Wisconsin highway." ***Id.*** at 494, 219 N.W.2d at 292. "It was intended to facilitate the taking of tests for intoxication and not to inhibit the ability of the state to remove drunken drivers from the highway." ***Id.*** Considering that purpose, we must liberally construe the law to effectuate its policies. *See* ***id.***

Given that policy, this court is persuaded that Eggum was informed of his right to an independent test and has made no showing that he was prevented from setting up such a test. Therefore, his rights under the implied consent law were not infringed upon. Accordingly, this court affirms the judgment of the trial court.

Eggum next contends that the trial court erred when it failed to exclude blood analysis evidence. He argues that there was confusion over which blood vial was submitted to the state lab for analysis; thus, the chain of custody was not properly established. The degree of proof necessary to establish a chain of custody is within the discretion of the trial court. *See* ***B.A.C. v. T.L.G.***, 135 Wis.2d 280, 290, 400 N.W.2d 48, 53 (Ct. App. 1986). To establish a chain of custody of certain evidence, sufficient testimony must be given that it is

improbable that the original item has been tampered with, exchanged or contaminated. *See* ***id.*** In reviewing a trial court's discretionary decision, we will sustain if we determine the court examined the relevant facts, applied a proper standard of law and used a rational process to reach a reasonable conclusion. *See* ***Loy v. Bunderson***, 107 Wis.2d 400, 414-15, 320 N.W.2d 175, 184 (1982).

After reviewing the record, we conclude that the trial court carefully examined all of the facts, evaluated the testimony and concluded that the chain of custody was established through an exercise of reasonable and lawful discretion.

Finally, Eggum argues that the statutory requirements of § 343.305(5)(b), STATS., were not followed when his blood was drawn. Specifically, he asserts that his blood draw was performed by a phlebotomist, and this professional is not expressly enumerated in the statute as an individual permitted to draw the blood. Section 343.305(5)(b) states: "Blood may be withdrawn from the person arrested … where the offense involved the use of a vehicle … to determine the presence or quantity of alcohol … in the blood only by a physician, registered nurse, medical technologist, physician assistant *or person acting under the direction of a physician*." (Emphasis added.)

After reviewing the record, we conclude that the trial court took judicial notice that the phlebotomist was operating under the supervision of a physician. Section 343.305(5)(b), STATS., authorizes persons acting under the direction of a physician to withdraw blood under such circumstances. Furthermore, we have previously held that physicians do not have to give express authorization before a blood draw may be taken. *See* ***State v. Penzkofer***, 184 Wis.2d 262, 266, 516 N.W.2d 774, 776 (Ct. App. 1994). For these reasons, we hold that there was no error by the trial court.

In conclusion, we determine that the trial court acted without error when denying Eggum's motions. We are convinced that a reasonable suspicion was present to stop Eggum's vehicle; probable cause existed to make the arrest; and § 343.305(5)(b), STATS., was followed. As a result, we affirm.

By the Court.—Judgment affirmed.

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