

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 22, 2015

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 No. 2015AP462

Cir. Ct. No. 2014TR4200

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN THE MATTER OF THE REFUSAL OF KORY V. AMBROZIAK:

COUNTY OF SHAWANO,

PLAINTIFF-RESPONDENT,

v.

KORY V. AMBROZIAK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Shawano County:
JAMES R. HABECK, Judge. *Affirmed.*

¶1 STARK, P.J.¹ Kory Ambroziak appeals a judgment convicting him of refusal to take a chemical breath test after an arrest for operating a motor

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

vehicle while intoxicated (OWI). Ambroziak argues the deputy did not have reasonable suspicion to extend the traffic stop to request field sobriety testing. We disagree and affirm.

BACKGROUND

¶2 Ambroziak was arrested for first-offense OWI, a violation of WIS. STAT. § 346.63(1)(a). He subsequently was charged with refusing to submit to a chemical test in violation of WIS. STAT. § 343.305(9). Ambroziak timely filed a request for a refusal hearing.

¶3 At the refusal hearing, deputy David Rogers testified that at 12:32 a.m. on August 30, 2014, he observed Ambroziak perform a “brake-stand.”² Rogers therefore stopped Ambroziak to cite him for disorderly conduct with a motor vehicle. Ambroziak exited his vehicle before Rogers could approach, and Rogers had to instruct Ambroziak multiple times to return to the vehicle before Ambroziak complied. Rogers observed that Ambroziak was “staggering a little bit” and “had trouble walking.” Rogers also smelled “a strong odor of intoxicants.”

¶4 Rogers testified that, based on these observations, he believed Ambroziak was intoxicated. Rogers asked Ambroziak to perform standard field

² The County, in its brief, cites to facts taken from deputy Rogers’ police report, which is included in the appendix to its brief but is not part of the record. We do not consider these facts and limit our review to those facts in the record. See *Reznichuk v. Grall*, 150 Wis. 2d 752, 754 n.1, 442 N.W.2d 545 (Ct. App. 1989) (indicating that an appendix may not be used by parties to supplement the record).

Rogers testified that during a brake-stand, or “brake-torque,” the driver applies the vehicle’s brakes with the tires spinning, which causes the tires to squeal and smoke and debris to fly.

sobriety tests. Ambroziak refused, stating something to the effect of “he was going to jail anyway, so he didn’t want to do them.” Rogers asked Ambroziak why he thought he was going to jail, to which Ambroziak explained, “he was on probation and he was not supposed to be drinking.” Rogers then questioned Ambroziak about why he would be drinking if it violated his probation. Ambroziak responded “it was his [twenty-first] birthday, or he was celebrating his [twenty-first] birthday.” When asked how much he had to drink, Ambroziak responded, “[A] lot.” Rogers further observed that Ambroziak had slurred speech and bloodshot eyes.

¶5 Rogers arrested Ambroziak for OWI and transported him to the Shawano County jail. At the jail, Rogers read Ambroziak the Informing the Accused form and asked whether he would submit to an evidentiary chemical test of his breath. Ambroziak refused. The circuit court concluded a refusal finding was justified and entered a judgment of conviction. Ambroziak appeals.

DISCUSSION

¶6 “There is no question that a police officer may stop a vehicle when he or she reasonably believes the driver is violating a traffic law” *State v. Betow*, 226 Wis. 2d 90, 93, 593 N.W.2d 499 (Ct. App. 1999). A valid stop can be based on either a criminal or noncriminal traffic violation. *County of Jefferson v. Renz*, 231 Wis. 2d 293, 310, 603 N.W.2d 541 (1999). Here, the circuit court found that Rogers observed Ambroziak perform a brake-stand. The court correctly concluded the initial stop of Ambroziak was proper as the brake-stand, if proven at trial, was “essentially a classic disorderly conduct with a vehicle citation.” On appeal, Ambroziak does not dispute the initial stop was valid.

¶7 Instead, Ambroziak argues that Rogers did not have reasonable suspicion to ask him to perform field sobriety tests and, therefore, his continued detention violated his constitutional rights to be free from unreasonable search and seizure. An officer may lawfully extend a traffic stop if the officer discovers information, which, “when combined with information already acquired, provide[s] reasonable suspicion that [the person] was driving while under the influence of an intoxicant.” See *State v. Colstad*, 2003 WI App 25, ¶19, 260 Wis.2d 406, 659 N.W.2d 394; see also *Betow*, 226 Wis.2d at 94-95. “Reasonable suspicion requires that a police officer possess specific and articulable facts that warrant a reasonable belief that criminal activity is afoot.” *State v. Young*, 2006 WI 98, ¶21, 294 Wis.2d 1, 717 N.W.2d 729. The reasonableness determination involves an objective and common sense test. *State v. Waldner*, 206 Wis.2d 51, 56, 556 N.W.2d 681 (1996). “Whether reasonable suspicion exists is a question of constitutional fact.” *State v. Walli*, 2011 WI App 86, ¶10, 334 Wis.2d 402, 799 N.W.2d 898. Therefore, we apply a two-step standard of review. *Id.* First, we uphold the circuit court’s findings of fact unless they are clearly erroneous. *Id.* We then review de novo whether those facts give rise to reasonable suspicion. *Id.*

¶8 Ambroziak argues, “The odor of intoxicant by itself simply suggests that ... Ambroziak had consumed alcohol” and that “[t]his observation was an insufficient additional factor to extend the stop for the field sobriety testing.” However, in making this argument, Ambroziak ignores additional facts that the circuit court found Rogers observed after the stop and prior to his request that Ambroziak perform field sobriety tests. In addition to Rogers smelling a “strong odor of intoxicants,” the court noted Rogers observed Ambroziak was walking with “a slight stagger” and had bloodshot eyes. Furthermore, the traffic stop

occurred at 12:32 a.m. on a Saturday. See *Waldner*, 206 Wis. 2d at 58 (explaining that the time of day “standing alone, might well be insufficient,” but as the “[facts] accumulate, reasonable inferences about the cumulative effect can be drawn”). Based on the record, the circuit court’s findings are not clearly erroneous.

¶9 Given these factual findings—disorderly driving, a strong odor of intoxicants, Ambroziak walking with a “slight stagger,” his bloodshot eyes, and the time of day—we conclude it was entirely reasonable for Rogers to suspect that Ambroziak was intoxicated. As a result, Rogers was permitted under the Fourth Amendment to the United States Constitution to extend the stop to ask Ambroziak to perform field sobriety tests. See *Betow*, 226 Wis. 2d at 94-95.

¶10 Ambroziak makes no argument that the extension of the stop after his refusal to perform standard field sobriety tests violated his constitutional rights. We therefore do not reach the issue. See *M.C.I., Inc. v. Elbin*, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

By the Court.—Judgment affirmed.

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

