COURT OF APPEALS
DECISION
DATED AND FILED

November 8, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2649 **Cir. Ct. No. 2015TR1173**

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

CITY OF APPLETON,

PLAINTIFF-RESPONDENT,

V.

JACOB ANTHONY VANDENBERG,

DEFENDANT-APPELLANT.

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

¶1 SEIDL, J.[1] Jacob Vandenberg appeals a judgment entered on his plea of no contest to first-offense operating a motor vehicle while intoxicated (OWI). He argues that the arresting officer did not have reasonable suspicion to

[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.

conduct a traffic stop of his vehicle. Therefore, Vandenberg argues the circuit court should have granted his motion to suppress evidence obtained as a result of the traffic stop. We conclude that Vandenberg forfeited this argument, and therefore affirm.

BACKGROUND

¶2 Vandenberg was charged with first-offense OWI under WIS. STAT. § 346.63(1)(a) and was later charged with operating a motor vehicle with a prohibited blood alcohol concentration (PAC) contrary to § 346.63(1)(b). Vandenberg pled not guilty to the charges and filed a motion to suppress all evidence resulting from the traffic stop, arguing the officer had no reasonable suspicion for the stop.

¶3 At the suppression hearing, Jay Steinke, a twenty-eight-year member of the Appleton Police Department, testified that at about 2:30 a.m. on Sunday February 8, 2015, he was on patrol, parked in a downtown Appleton parking lot. Steinke testified that he was familiar with this particular lot as a frequent parking spot for patrons of local bars in addition to being frequented by those involved in drug activity. While in the lot, Steinke observed a truck, later found to be driven by Vandenberg, approach the exit of the lot. As Vandenberg's truck left the lot, Steinke observed the truck strike an approximately six-inch high concrete median and a metal sign near the exit, and, as a result, deviate from its current course. Steinke testified that he had previously seen other vehicles exit the lot safely without contacting any objects. Steinke then followed Vandenberg's truck out of the lot and pulled Vandenberg over a short time later under suspicion that Vandenberg was intoxicated or, in the alternative, had damaged property and caused a hit and run.

¶4 After initiating the traffic stop, Steinke radioed for a second officer to take over the investigation into whether Vandenberg was intoxicated. At the conclusion of the investigation, Vandenberg was issued a citation and Steinke returned to the exit of the parking lot to examine the sign. Steinke observed the sign sustained significant damage, some of which did not appear to have been caused by Vandenberg. However, he also observed Vandenberg's truck appeared to have grazed the sign and caused damage to both the rear quarter panel of the truck and the sign. Vandenberg testified at the hearing that he hit neither the median nor the sign as he left the lot and his vehicle sustained no damage. Thus, Vandenberg argued the officer had no basis for any suspicion to stop his vehicle.

¶5 The circuit court denied the motion to suppress, finding that Vandenberg's vehicle had made "contact with something" near the parking lot exit that would cause Vandenberg's vehicle to "deviate from what a normal vehicle would do." While the circuit court found that Vandenberg did not exhibit any "erratic driving once … out on the street," it concluded that Steinke had reasonable suspicion to conduct a traffic stop to investigate either a possible traffic offense or possible driving while intoxicated based upon contact with the median and the sign. While the court cited ***State v. Houghton***, 2015 WI 79, ¶30, 364 Wis. 2d 234, 868 N.W.2d 143, for the holding that reasonable suspicion of a traffic law violation may justify a traffic stop, it did not specify which statute had been violated, only that a possible "hit-and-run" had occurred.

¶6 After the denial of the motion, Vandenberg pled no contest to the OWI first offense and the PAC offense was dismissed. Vandenberg now appeals.

DISCUSSION

¶7 Vandenberg argues on appeal that Steinke did not have reasonable suspicion to stop his vehicle. Traffic stops by law enforcement are considered seizures under the Fourth Amendment. ***State v. Post***, 2007 WI 60, ¶10, 301 Wis. 2d 1, 733 N.W.2d 634 (citing ***Terry v. Ohio***, 392 U.S. 1, 22 (1968)). A law enforcement officer may conduct a traffic stop when he or she possesses reasonable suspicion that, "in light of his or her training and experience," criminal activity is afoot. ***Id.***, ¶13. Reasonable suspicion is an objective standard that accounts for the totality of the circumstances. ***State v. Williams***, 2001 WI 21, ¶22, 241 Wis. 2d 631, 623 N.W.2d 106. Reasonable suspicion is a common sense inquiry in which we must balance the interests of both society and the individual. ***State v. Richardson***, 156 Wis. 2d 128, 139, 456 N.W.2d 830 (1990).

¶8 We review a motion to suppress evidence from a traffic stop as a question of constitutional fact. ***Post***, 301 Wis. 2d 1, ¶8. Under that standard, the circuit court's findings of historical fact are upheld unless "clearly erroneous," while "application of those facts to constitutional principles" are reviewed independent of the circuit court's conclusions. ***Id.***

¶9 Before we address the merits of Vandenberg's argument, we must first determine whether Vandenberg forfeited his right to appeal.[2] Under the "guilty-plea-waiver rule," a defendant "waives all nonjurisdictional defects, including constitutional claims" by knowingly pleading guilty or no contest. ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886. WISCONSIN STAT.

[2] After this appeal was initially filed, we directed the parties to brief whether Vandenberg forfeited his right to appeal by entering a no-contest plea.

§ 971.31(10) contains an explicit exception that preserves the right to appeal denied motions to suppress when a defendant pleads guilty or no contest, but that exception applies only to criminal cases. ***County of Racine v. Smith***, 122 Wis. 2d 431, 436-37, 362 N.W.2d 439 (Ct. App. 1984).

¶10 Vandenberg pled no contest to first-offense OWI, a civil offense. His appeal does not fall within the statutory exception. Vandenberg thus "cannot be heard to complain of an act to which he deliberately consents." *See* ***id.*** at 437. We initially conclude the guilty-plea-waiver-rule applies.

¶11 However, Vandenberg asks us to disregard the guilty-plea-waiver-rule and review the merits of his appeal. The guilty-plea-waiver rule is a principle of judicial administration and not a jurisdictional bar. *See* ***Kelty***, 294 Wis. 2d 62, ¶18. There are four factors that are most relevant when the court decides whether to disregard a forfeiture of a right to appeal: (1) the administrative efficiencies resulting from the plea; (2) whether an adequate record has been developed; (3) whether the appeal appears motivated by the severity of the sentence; and (4) the nature of the potential issue. ***County of Ozaukee v. Quelle***, 198 Wis. 2d 269, 275-76, 542 N.W.2d 196 (Ct. App. 1995), *abrogated on other grounds by* ***Washburn Cty. v. Smith***, 2008 WI 23, 308 Wis. 2d 65, 746 N.W.2d 243.

¶12 In this case, however, we are unable to disregard Vandenberg's forfeiture of his right to appeal. The parties concede that the first three factors are satisfied in this case, and they only dispute whether the fourth has been met. But given Vandenberg's argument on appeal, we cannot agree with them on the second factor, that the record has been adequately developed. Vandenberg argues the nature of his appeal presents an opportunity to interpret WIS. STAT. § 346.69, governing the duty of a vehicle operator who strikes property on or adjacent to a

highway.[3] Vandenberg argues Steinke could only have reasonable suspicion to stop him if § 346.69 is interpreted to require drivers to *immediately* halt when they damage property along a highway and take "reasonable steps" to locate and notify the owner or person in charge of the property, in addition to the other steps listed in the statute.

¶13 The circuit court, however, never had an opportunity to interpret WIS. STAT. § 346.69 or apply it to the present facts. Vandenberg disputed whether he struck and caused damage to the sign as a factual matter in his suppression motion, but he never contended that his compliance or noncompliance with his duty to inform under § 346.69 was relevant to reasonable suspicion or rose to a level worthy of charging an actual hit-and-run violation.[4] Because this issue of statutory interpretation was never presented to the circuit court, we need not address it. ***State v. Gaulke***, 177 Wis. 2d 789, 793-94, 503 N.W.2d 330 (Ct. App. 1993).

[3] WISCONSIN STAT. § 346.69 provides as follows:

> The operator of any vehicle involved in an accident resulting only in damage to fixtures or other property legally upon or adjacent to a highway shall take reasonable steps to locate and notify the owner or person in charge of such property of such fact and of the operator's name and address and of the registration number of the vehicle the operator is driving and shall upon request and if available exhibit his or her operator's license and shall make report of such accident when and as required in s. 346.70.

[4] In this scenario, the circuit court would also be required to determine, if it interpreted the statute along the lines of Vandenberg's argument, whether Steinke's mistake of law regarding the duty of drivers to inform was reasonable and on that basis could justify the traffic stop. *See* ***State v. Houghton***, 2015 WI 79, ¶¶5, 52, 364 Wis. 2d 234, 868 N.W.2d 143 (adopting the holding of ***Heien v. North Carolina***, 574 U.S. ___, 135 S. Ct. 530, 536 (2014)).

¶14 Vandenberg argues for the purposes of the fourth factor above, that Steinke could not have reasonably suspected he was driving while intoxicated. Vandenberg concedes the law on traffic stops for suspected intoxication is well-settled, and his argument on WIS. STAT. § 346.69 is irrelevant to that analysis. Observed driving behavior need not be illegal to give rise to reasonable suspicion of intoxication. *See* ***Post***, 301 Wis. 2d 1, ¶25. We thus decline to address Vandenberg's arguments, having determined he has forfeited his right to appeal and has not presented an issue upon which we should review his case. Accordingly, we affirm the judgment.

By the Court.—Judgment affirmed.

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