COURT OF APPEALS DECISION DATED AND FILED

December 15, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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. 2016AP127-CR **Cir. Ct. No. 2015CT421**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GREGORY J. MCMILLAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: NICHOLAS McNAMARA, Judge. *Affirmed*.

¶1 LUNDSTEN, J.[1] Gregory McMillan argues that the circuit court wrongly denied his suppression motion. More specifically, McMillan challenges a

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

seizure by a police officer that led to evidence that McMillan was driving while intoxicated. Because I agree with the circuit court that reasonable suspicion justified the seizure, I affirm the circuit court's judgment convicting McMillan of operating while under the influence of an intoxicant.

Discussion

¶2 In this case, an officer in a marked squad car engaged his flashing lights as he pulled up behind McMillan, who was standing next to his car. The parties agree this was a seizure and that there needed to be justification for the seizure at the time the officer engaged his flashing lights. The circuit court held, and the State argues, that the seizure was justified both by reasonable suspicion and as a community caretaker stop. I agree that the stop was supported by reasonable suspicion and, therefore, do not address whether it was also justified as a community caretaker stop.

¶3 "In reviewing a denial of a motion to suppress, we will uphold the circuit court's findings of fact unless they are clearly erroneous. Whether those facts satisfy the constitutional requirement of reasonableness is a question of law, which we review de novo." ***State v. Young***, 212 Wis. 2d 417, 424, 569 N.W.2d 84 (Ct. App. 1997).

¶4 The law governing the legality of temporary investigative seizures was aptly summarized in ***Young***:

> A brief investigatory stop is a seizure and is therefore subject to the requirement of the Fourth Amendment to the United States Constitution that all searches and seizures be reasonable. To execute a valid investigatory stop consistent with the Fourth Amendment, a law enforcement officer must reasonably suspect, in light of his or her experience, that some kind of criminal activity has taken or is taking place. The officer must be able to

> point to specific and articulable facts that, taken together with rational inferences from those facts, reasonably warrant the intrusion. The standard is the same under Article I, Section 11 of the Wisconsin Constitution. The question of what 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.

Id. at 423-24 (citations omitted). In other words, when viewed objectively, the facts and reasonable inferences from those facts must be sufficient for an officer to reasonably conclude, in light of his or her experience, that criminal activity may be afoot. ***Terry v. Ohio***, 392 U.S. 1, 21-22, 30 (1968).

¶5 McMillan does not challenge any fact finding by the circuit court or otherwise present developed argument as to why any of the officer's testimony may not be accepted as true for purposes of this appeal. As is all too common in appeals like this, McMillan, as the challenger, makes arguments as to why this appellate court should find some aspects of an officer's testimony not credible. But credibility is an issue for the circuit court and, plainly, the circuit court here, albeit implicitly, found the officer credible. Absent patent error in this regard, I lack the authority to override a circuit court's credibility findings. *See* ***State v. Daniels***, 117 Wis. 2d 9, 17, 343 N.W.2d 411 (Ct. App. 1983).

¶6 Accordingly, I now recite the facts in a manner that reflects the express fact finding of the circuit court and a reasonable view of the evidence consistent with the circuit court's conclusion that reasonable suspicion was present.

¶7 At about 12:30 a.m. on a Saturday in March 2015, a McFarland police officer was patrolling in a marked squad car. The officer was driving north

on Terminal Drive in a "predominantly [] business area" in McFarland. Ahead of the officer was McMillan's Dodge Charger, also proceeding north.

¶8 As the circuit court observed, it was "around the time that there are frequent[ly] intoxicated drivers." And, McMillan was driving away from an area in McFarland where "many ... local taverns" are located.

¶9 The officer's marked squad was approximately two car lengths behind McMillan, and the officer followed McMillan for about two or three blocks. With the officer following, McMillan made a "quick [right] turn" from Terminal Drive onto McFarland Court. The circuit court interpreted the officer's "quick turn" testimony as indicating a "relatively sudden turn." Apart from this sudden turn, the officer did not observe anything unusual or improper about McMillan's control of his car, such as weaving or speeding.

¶10 As noted, the general area was a business area. The specific street McMillan turned onto was approximately one block long, with no intersecting streets. It was a dead-end street, ending in a cul-de-sac. The street is solely populated with large industrial-type buildings. None of the businesses were open, and it is not typical to see citizens at this location at this time of night. In the officer's words, "[t]here's nothing open back there at that time of night. There would be no reason for a vehicle to go down that road."[2]

[2] There was also a white van with its engine running parked on McFarland Court. The officer also thought this situation was suspicious, and believes that another officer investigated that vehicle. I agree with the circuit court that the presence of this vehicle does not undercut the reasonable view that it was suspicious that McMillan turned onto this desolate dead-end street at this late hour.

¶11 The officer did not follow McMillan onto McFarland Court. Rather, the officer proceeded northbound on Terminal Drive for approximately one block and then turned right onto a private road that led to a back entrance to a paved parking and delivery lot surrounding one of the businesses at the end of McFarland Court. The officer entered the business's lot at this rear entrance and proceeded around the building until McMillan came into view. McMillan's car was parked in the lot near the public cul-de-sac. It would have been reasonable for the officer to surmise from the position and direction of McMillan's car that he entered the lot heading north and then swung around back toward the entrance, now heading south, but stopped short of the entrance. McMillan was standing at the back of his car and appeared to be talking on his cell phone.

¶12 Notably, the officer approached McMillan from an unexpected direction. McMillan was at the back of his car, away from the public street. From McMillan's point of view, if the officer driving the squad behind him had decided to follow him after all, and took the most obvious action of turning around and following him on McFarland Court, McMillan was positioned so that he could see the squad coming and, if he chose, attempt to disappear into the dark areas around him. However, the squad effectively approached McMillan from an unexpected direction, from the back of the lot.

¶13 As the officer pulled to within about 50 feet of McMillan, the officer activated his flashing lights.[3]

[3] My recitation of facts includes my review of video from the officer's squad and a comparison of that video with Exhibit 1, an overhead photograph showing a portion of Terminal Drive, all of McFarland Court, and the businesses adjacent to McFarland Court.

¶14 In my view, the facts recited above support a reasonable suspicion that McMillan was driving while intoxicated.

¶15 Given the time, location, and direction of travel, it was reasonable for the officer to wonder whether McMillan had been drinking at a local tavern. It was also reasonable, as the circuit court observed, to suppose that McMillan noticed the marked squad car following him. When McMillan made a relatively sudden turn onto a short dead-end street, that was unquestionably suspicious behavior indicating an ill-considered evasive maneuver. If, instead, McMillan had simply made a wrong turn onto the short dead-end street with nothing but closed businesses, you would expect that he would have turned around and immediately returned to Terminal Drive. He did not.

¶16 When the officer spotted McMillan standing at the back of his car, in the closed business's lot—out of his car with his car between him and the public cul-de-sac—it was reasonable to wonder whether McMillan was preparing to distance himself from his car if he saw the headlights of what might be a police car approach. The overhead photo of the area and the dash-cam video show that it would have appeared to McMillan that he could disappear from easy view quickly.[4]

[4] The circuit court did not rely on the idea that it was suspicious that McMillan positioned himself to the back of his car away from the public cul-de-sac. That does not prevent me from making the observation based on the testimony and physical evidence. Moreover, it is not necessary to my conclusion that reasonable suspicion exists. Rather, it adds to what is already reasonable suspicion.

¶17 In sum, the circumstances are more than merely curious. They would have indicated to any reasonable police officer that McMillan might be intoxicated.

¶18 This is not to say that there are not innocent explanations for McMillan's behavior. Indeed, those innocent explanations might be *more* likely than the inference of intoxicated driving. But the reasonable suspicion standard does not require that the inculpatory inference be more likely than not. Indeed, even probable cause is not a more-likely-than-not standard. *See* ***State v. Erickson***, 2003 WI App 43, ¶14, 260 Wis. 2d 279, 659 N.W.2d 407 ("Probable cause does not mean more likely than not.").

¶19 I also observe that the circuit court and the officer relied on the possibility that McMillan might have intended to rob one of the closed businesses. The officer articulated this suspicion and stated that there had been a couple of burglaries in the area a couple of years prior. This consideration may add to reasonable suspicion, but it is not necessary. I need not rely on it.

¶20 McMillan challenges the idea that it was reasonable for the officer to believe that McMillan was attempting to avoid the officer. McMillan argues that the officer's alleged suspicion is contradicted by the circuit court's observation of no "improper driving." However, the circuit court followed up this no-improper-driving comment with the specific finding that McMillan turned suddenly in circumstances in which it was reasonable to suspect that McMillan had observed the squad following him. That is, McMillan's argument, in this respect, takes the circuit court's no-improper-driving observation out of context.

¶21 McMillan argues that cases such as ***State v. Baker***, No. 2012AP2163-CR, unpublished slip op. (WI App May 30, 2013), and ***State v.***

Parker, No. 2012AP245-CR, unpublished slip op. (WI App July 12, 2012), indicate that the facts here do not amount to reasonable suspicion. McMillan asserts that ***Baker*** and ***Parker***, and other cases, involve facts that are more suspicious than those here. According to McMillan, the holdings in those cases affirming reasonable suspicion show that more is needed here. They do not. The question is not whether most, or even all, other binding or persuasive decisions involve facts more suspicious than those here. The question is whether the facts here support a reasonable belief that McMillan may have been intoxicated. And, McMillan does not point to a comparable case in which a court found no reasonable suspicion.

Conclusion

¶22 For the reasons above, I affirm the circuit court's decision denying McMillan's suppression motion. I therefore affirm the judgment of conviction.

By the Court.—Judgment affirmed.

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