COURT OF APPEALS DECISION DATED AND FILED

January 10, 2017

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. 2016AP108-CR

Cir. Ct. No. 2013CM391

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

JOSHUA D. WINBERG,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Eau Claire County: JON M. THEISEN, Judge. *Reversed and cause remanded for further proceedings*.

¶1 SEIDL, J.[1] The State appeals a circuit court order granting a motion to suppress evidence obtained as the result of a traffic stop of a vehicle driven by

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[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.

Joshua Winberg. As a result of evidence obtained after the stop, Winberg was arrested for operating while intoxicated, second offense; operating with a prohibited alcohol concentration, second offense; possession of tetrahydrocannabinols; and possession of drug paraphernalia. In a previous appeal, we concluded the circuit court erroneously suppressed evidence when it held the initial stop of Winberg's vehicle was made without reasonable suspicion. *See* ***State v. Winberg*** (***Winberg I***), No. 2013AP2661-CR, unpublished slip op. (WI App May 28, 2014). We remanded the matter for the circuit court to determine whether reasonable suspicion justified extending the stop once the officer made initial contact with Winberg. In this second appeal, we now conclude that it was reasonable to suspect Winberg was under the influence of an intoxicant, allowing for an extended seizure and further investigation into operating a vehicle while intoxicated. Accordingly, we again reverse the suppression order and remand for further proceedings.

BACKGROUND

¶2 On remand, the circuit court appeared to have questioned the law which formed part of the basis for our decision in ***Winberg I***. Thus, we first briefly restate the background and results of ***Winberg I***.

¶3 Officer Wayne Bjorkman stopped a vehicle upon learning its owner had a revoked driver's license. ***Winberg I***, ¶3. Bjorkman approached the vehicle and made contact with its operator, Winberg, who was not the vehicle's owner. The circuit court granted Winberg's motion to suppress evidence obtained as a result of the stop on the basis that an officer could not stop a vehicle by assuming the registered owner was the driver. ***Id.*** After the State moved for reconsideration, the circuit court concluded that Bjorkman could not approach the

vehicle once stopped upon realizing the male driver may not have been the registered female owner whose license was revoked. ***Id.***, ¶¶7, 10.

¶4 The State appealed, and we reversed. First, we concluded ***State v. Newer***, 2007 WI App 236, 306 Wis. 2d 193, 742 N.W.2d 923, allowed officer Bjorkman to stop the vehicle because he observed no other factors that would lead him to believe the owner of the vehicle was not its current driver. ***Winberg I***, ¶14. Second, we concluded ***State v. Williams***, 2002 WI App 306, 258 Wis. 2d 395, 655 N.W.2d 462, permitted Bjorkman to make contact with the operator of the vehicle once stopped, even though Bjorkman saw the driver was male, and to request identification from Winberg. ***Winberg I***, ¶19. We stated, "[B]ecause Winberg did not challenge the [extended] stop … at the original suppression hearing, there is no factual record as to what Bjorkman observed when he made contact with Winberg." ***Id.***, ¶22. For this reason, we remanded. *See* ***State v. Betow***, 226 Wis. 2d 90, 94-95, 593 N.W.2d 499 (Ct. App. 1999) ("[T]he scope of the officer's inquiry, or the line of questioning, may be broadened beyond the purpose for which the person was stopped only if additional suspicious factors come to the officer's attention[.]").

¶5 On remand, two circuit court hearings were held. At the first hearing, Bjorkman was the only witness. He testified that upon making contact with the vehicle, he noticed Winberg smelled of intoxicants, his speech was slurred, his eyes appeared bloodshot and glazed over, and Winberg admitted he had "a few beers" that night. Bjorkman also testified he told another officer dispatched to the scene that Winberg "appeared gassed, meaning intoxicated, and that he smelled very strongly of intoxicants." Once the backup officer arrived, Bjorkman asked Winberg to exit the vehicle and field sobriety tests were conducted.

¶6 At the first hearing, the circuit court stated it had no "reason to question the credibility" of Bjorkman regarding any of his observations. However, the court then adjourned the hearing to review a video from Bjorkman's squad car and a transcript of the video that had not yet been entered into evidence. The court also stated it wished to review the holdings of ***Winberg I*** regarding what legal issues had not yet been reached.

¶7 At the second hearing, after Bjorkman reviewed the video and its corresponding transcript, he once again testified that Winberg had slurred speech, bloodshot eyes, and the smell of intoxicants. The video played at the suppression hearing showed that Winberg and a female passenger in the vehicle, who identified herself as the vehicle's owner, were questioned by Bjorkman for about one minute before Bjorkman returned to his vehicle to radio for a backup officer. In addition to Bjorkman's post-traffic stop observations, the circuit court heard testimony from him regarding the video and any observations he made before initiating the traffic stop.

¶8 Bjorkman acknowledged several discrepancies between his observations regarding Winberg's appearance of intoxication and what the video evidence showed. He noted that the slurring of Winberg's speech on the video recording did not come across as strongly as when he heard it in person at the stop. Bjorkman testified he was face-to-face with Winberg but did not beam his flashlight into Winberg's eyes. He described Winberg's eyes as looking "similar to nearly every other intoxicated person [he has] dealt with while working" as a police officer. Bjorkman also stated that, while he detected the odor of intoxicants emanating from the vehicle, and that Winberg admitted to him that he had been drinking prior to the stop, Bjorkman did not separately detect whether Winberg or the passenger was the source of the odor.

¶9 In a written order, the circuit court stated the ***Newer*** decision "should be clarified" to create a requirement that law enforcement officers must identify a driver whenever an officer can "reasonably or safely act so as to identify the driver" before conducting a traffic stop on the basis of a licensing violation. It then concluded Bjorkman unlawfully seized the vehicle because he "failed to conduct reasonable, simple and safe follow up and, therefore, exceeded the authority allowed by the intent of ***Newer***."

¶10 The circuit court next concluded that even though ***Williams*** permitted Bjorkman to approach the vehicle and ask for identification, Bjorkman unreasonably extended the scope of the traffic stop by asking a "false question" of Winberg. According to the circuit court, the "false question" was Bjorkman asking Winberg if he was the owner of the vehicle even though he could see Winberg was a male while he was aware the owner was a female based on his registration check of the vehicle. According to the court, the "false question" led to further unreasonable questioning regarding where Winberg and the female passenger had been that night and if Winberg had anything to drink.

¶11 Finally, the circuit court concluded the totality of the circumstances did not support a reasonable suspicion that Winberg was intoxicated before Bjorkman requested that he exit the vehicle. The court found that Winberg did admit to drinking alcohol and that Bjorkman did detect a smell of intoxicants in the vehicle. However, the court found there was "[l]imited credible evidence" of either bloodshot, glassy eyes or slurred speech because Bjorkman was not credible on either observation. It also found Bjorkman did not make a "distinction between [the] smell of intoxicants emanating from [the] driver or from [the] passenger." The circuit court further stated that by saying Winberg was "gassed … smells just

like a brewery coming from the car … [Bjorkman] failed to presume innocence, and rather, concluded guilt … reveal[ing] his bias as an investigator."

¶12 The circuit court again granted Winberg's motion to suppress the evidence gathered from the extended stop. The State now appeals.

DISCUSSION

¶13 A motion to suppress evidence from a traffic stop presents a question of constitutional fact. ***State v. Post***, 2007 WI 60, ¶8, 301 Wis. 2d 1, 733 N.W.2d 634. The circuit court's findings of historical fact are upheld unless they are clearly erroneous. ***Id.*** We review application of constitutional principles to historical facts independent of the circuit court's conclusions. ***State v. Houghton***, 2015 WI 79, ¶18, 364 Wis. 2d 234, 868 N.W.2d 143.

¶14 We first address the circuit court's conclusions, on remand, regarding the reasonableness of the initial stop. In ***Winberg I***, we stated:

> We reject Winberg's argument. At the suppression hearing, *Bjorkman testified that he knew the registered owner had a revoked license, that he could not see who was driving before stopping the vehicle, and that he stopped the vehicle because of the revoked license*. By ultimately conceding in the circuit court that Bjorkman's testimony supported the stop, Winberg forfeited his right to argue on appeal that other facts show Bjorkman knew the registered owner was not driving at the time of the stop. … *We conclude Bjorkman lawfully stopped the vehicle based on* ***Newer***[.]

Winberg I, ¶¶13-14 (footnotes omitted; emphasis added).

¶15 "A trial judge may not simply reject instructions on remand because he [or she] disagrees with the appellate court's legal analysis." ***Burch v. American Family Mut. Ins. Co.***, 198 Wis. 2d 465, 477 n.1, 543 N.W.2d 277

(1996). As the State correctly argues, "a decision on a legal issue by an appellate court establishes the law of the case, which must be followed in all subsequent proceedings in the trial court or on later appeal." ***State v. Stuart***, 2003 WI 73, ¶23, 262 Wis. 2d 620, 664 N.W.2d 82 (citation omitted). Winberg offers no rebuttal of the State's invocation of this principle, and we accordingly deem the argument conceded. *See* ***Hoffman v. Economy Preferred Ins. Co.***, 2000 WI App 22, ¶9, 232 Wis. 2d 53, 606 N.W.2d 590 (1999). There are otherwise no "cogent, substantial, and proper reasons" that would compel us to disregard our previous conclusion. ***Stuart***, 262 Wis. 2d 620, ¶24.

¶16 We next turn to the reasonableness of Bjorkman's extended seizure of Winberg. *See* ***Williams***, 258 Wis. 2d 395, ¶¶21-22. "[Q]uestioning can transform a reasonable seizure into an unreasonable one if it extends the stop beyond the time necessary to fulfil the purpose of the stop." ***State v. Griffith***, 2000 WI 72, ¶54, 236 Wis. 2d 48, 613 N.W.2d 72. Once a vehicle is stopped by law enforcement, "the driver may be asked questions reasonably related to the nature of the stop—including his or her destination and purpose." ***Betow***, 226 Wis. 2d at 93-94.

¶17 The so-called "false question"[2] in the context of the conversation—lasting about ten seconds—between Bjorkman, Winberg, and the passenger upon initial contact, was transcribed from the video as follows:

> Q. (Officer Bjorkman) How ya doing?
>
> A. (Joshua Winberg) Good.

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[2] We are hesitant to call this question a "false" one since the subjective motivations of police officers are irrelevant to Fourth Amendment inquiry. *See* ***State v. Sykes***, 2005 WI 48, ¶33, 279 Wis. 2d 742, 695 N.W.2d 277.

> Q. I'm Officer Bjorkman Eau Claire Police Department. The reason I stopped ya, is the ah, registered owner of the vehicle comes back as revoked. *Is that you?*
>
> A. No.
>
> F. (female) *That's me. I'm sorry.*
>
> Q. Okay. You have an ID on you sir?
>
> A. Yeah.
>
> Q. You have an ID on you ma'm [sic]?
>
> F. Yes, sir.

(Emphasis added.) We agree with the State that Bjorkman's single, three-word initial question, and ten-second colloquy, viewed objectively under the circumstances, did not unreasonably extend the traffic stop. In ***Griffith***, our supreme court rejected an argument that a citizen's expectations of privacy barred law enforcement from asking "What is your name," of the occupant of a stopped vehicle. *See* ***Griffith***, 236 Wis. 2d 48, ¶¶68-69.

¶18 We agree with the State that this short colloquy did not unreasonably extend the traffic stop beyond the initial contact, especially since there were two occupants of the vehicle and one was female, matching the gender of the registered owner. Regarding the three-word question, nothing in ***Williams*** supports the conclusion that, while an officer may ask for a driver's identification, the officer cannot ask a question if he or she is subjectively aware of what the answer to that question is likely to be. *See* ***Williams***, 258 Wis. 2d 395, ¶22; s*ee also* ***Griffith***, 236 Wis. 2d 48, ¶54. Moreover, law enforcement officers may "demand the name and address of the [stopped] person and an explanation of the person's conduct." WIS. STAT. § 968.24. Even if it appeared unlikely Winberg was the owner operating the vehicle without a valid license, it would defy common sense to bar Bjorkman from being able to question the occupants to

clarify the identity of the owner or operator and, if neither occupant was the owner, to ask how or why Winberg was operating the vehicle. *See* ***Griffith***, 236 Wis. 2d 48, ¶¶38-39. Bjorkman's questions about where Winberg had been that evening and where he was travelling were reasonable regardless of the underlying reason for the traffic stop, as the initial contact only lasted slightly over one minute and did not extend the stop beyond the time necessary to fulfill its purpose. *See* ***Betow***, 226 Wis. 2d at 93.

¶19 This brings us to the issue that required our remand in the first place; that is, whether Bjorkman possessed reasonable suspicion based on any other factors he observed, after initially stopping the vehicle, to extend the stop to investigate whether Winberg was intoxicated.[3] *See* ***id.*** at 94-95 (cited in ***Winberg I***, ¶22 n.5). Whether a search or seizure passes muster under the Fourth Amendment depends on whether it is reasonable. ***Whren v. United States***, 517 U.S. 806, 810 (1996). To that end, law enforcement officers may briefly detain an individual when, based on their training and experience, specific, articulable facts allow them to draw a rational inference of wrongful conduct. ***Terry v. Ohio***, 392 U.S. 1, 21-22 (1968); *see also* ***State v. Waldner***, 206 Wis. 2d 51, 60, 556 N.W.2d 681 (1996). This test is one of common sense, meant to strike "a balance between individual privacy and the societal interest in allowing the police a reasonable scope of action in discharging their responsibility." ***Waldner***, 206 Wis. 2d at 56. Under the totality of the circumstances, factors that are innocent when considered in isolation may be taken together to constitute suspicious conduct. ***Id.*** at 58. Once such suspicious conduct has been observed, law enforcement officers are not

[3] Winberg does not argue that Bjorkman improperly conducted any field sobriety tests after Winberg was removed from the vehicle.

required to hypothesize explanations that may dispel suspicion, as the purpose of a temporary detainment is to resolve such ambiguity. ***State v. Anderson***, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990).

¶20 The State first argues the circuit court's findings regarding Bjorkman's testimony are clearly erroneous because the video recording shows Bjorkman looked into the driver side window and the audio corroborates that Winberg's speech was slurred. On that point, we disagree with the State. The circuit court's findings regarding Winberg's eyes and speech were matters of credibility concerning the officer's observations. The circuit court, having observed Bjorkman's demeanor as he testified and as he viewed the video, is entitled to resolve any credibility issues. *See* ***State v. Baudhuin***, 141 Wis. 2d 642, 647, 416 N.W.2d 60 (1987); *see also* ***State v. Walli***, 2011 WI App 86, ¶17, 334 Wis. 2d 402, 799 N.W.2d 898 (circuit court's findings based upon a video recording versus witness testimony are reviewed under the "clearly erroneous" standard). The circuit court was well within its authority when it made a different factual finding from that of the first hearing when it reviewed the video and heard Bjorkman's own concessions on those facts during the second hearing. *See* ***State v. Wenk***, 2001 WI App 268, ¶8, 248 Wis. 2d 714, 637 N.W.2d 417 ("[W]e are bound to accept the trial court's inferences unless they are incredible as a matter of law."). On this record we cannot say the circuit court's credibility findings were clearly erroneous.

¶21 Even though the circuit court found Bjorkman's observations lacked credibility regarding Winberg's eyes and speech, we nevertheless agree with the State that under the totality of the circumstances, Bjorkman had a basis to reasonably suspect Winberg was intoxicated in order to extend the stop for field sobriety testing. First, the circuit court found that Bjorkman detected an odor of

intoxicants emanating from the vehicle. Although the court also determined Bjorkman failed to distinguish whether the source of that odor was Winberg, the passenger, or both of them, Bjorkman was entitled to investigate further as to whether Winberg was under the influence of an intoxicant as the driver, quite apart from whether the passenger may also have been impaired. *See* ***Anderson***, 155 Wis. 2d at 84. Second, Winberg admitted to drinking, specifically that he "had a couple beers."[4] Finally, the time of the stop was 12:50 a.m., relatively close to "bar closing time," and that may lend credence to possible intoxication if other factors are observed. *See* ***Post***, 301 Wis. 2d 1, ¶36 (cited in ***Winberg I***, ¶¶22 n.5).

¶22 Rather than deny that Bjorkman had detected the odor of intoxicants at all, the circuit court determined that Bjorkman failed to narrow the odor to Winberg specifically because Bjorkman had not removed either occupant from the vehicle to narrow the smell. However, Winberg admitted to drinking himself. Even discounting the non-credible testimony regarding bloodshot eyes and slurred speech, it would be reasonable at that point for Bjorkman to suspect Winberg was at least one of the sources of the odor of intoxicants. *See* ***Anderson***, 155 Wis. 2d at 84.

¶23 Drinking alcoholic beverages does not necessarily mean one is impermissibly intoxicated under WIS. STAT. § 346.63(1)(a), but that alone does not bar an officer from investigating drunk driving on the facts of this case. The State, of course, has a strong public safety interest in enforcing drunk driving laws. *See* ***State v. Carlson***, 2002 WI App 44, ¶23, 250 Wis. 2d 562, 641 N.W.2d 451 ("It is

[4] Winberg additionally admitted he had been to "Whiskey Dicks" when asked by Bjorkman "[w]here were you having beers at?" during the stop.

clear that a serious threat to human life and well-being is posed by drunk drivers."). If Bjorkman had not continued his investigation after smelling an odor of intoxicants and Winberg's admission to drinking alcohol, he would have been placed in the intolerable position of either initiating field sobriety tests or allowing Winberg to leave and hope Winberg was not intoxicated to the point that he could not drive safely. Public safety concerns justify the limited scope of the detention here since Bjorkman became aware of factors that would reasonably lead to an inference of wrongful conduct. Bjorkman's observations under the totality of the circumstances, that Winberg exhibited an odor of intoxicants and admitted to drinking alcohol near bar closing time, permitted a continued investigation into possible intoxication after the initial stop.

¶24 We therefore reverse the order suppressing the evidence and remand this matter to the circuit court for further proceedings consistent with this decision.

By the Court.—Order reversed and cause remanded for further proceedings.

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