COURT OF APPEALS
DECISION
DATED AND FILED

February 14, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP594 **Cir. Ct. No. 2015CV1436**

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

VILLAGE OF ASHWAUBENON,

PLAINTIFF-RESPONDENT,

V.

MARK J. BOWE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County: TAMMY JO HOCK, Judge. *Affirmed*.

¶1 SEIDL, J.[1] Mark Bowe appeals a judgment finding him guilty of one count of first-offense operating a motor vehicle while intoxicated (OWI). Bowe asserts a standardized field sobriety test constitutes a "search" within the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(g) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

meaning of the Fourth Amendment and, therefore, he argues the quantum of evidence necessary to request a field sobriety test should be probable cause. He also argues the circuit court erred by denying his suppression motion because, regardless of the quantum of evidence necessary to request a field sobriety test, the officer unlawfully requested he perform field sobriety tests. We reject Bowe's arguments and affirm.

BACKGROUND

¶2 At the suppression hearing, officer Chris Sands testified that at around midnight on January 18, 2015, he observed a vehicle without an illuminated passenger side headlight traveling north on South Ashland Avenue in the Village of Ashwaubenon. Sands began following the vehicle and while doing so, he conducted a vehicle registration check with the Department of Transportation and learned the vehicle's registration was canceled.

¶3 Due to the unlit headlight and canceled vehicle registration, Sands initiated a traffic stop. When Sands approached the vehicle and made contact with the vehicle's driver (and sole occupant), later identified as Bowe, Sands observed that Bowe had bloodshot, glossy eyes and a flushed face. Sands also noticed an opened case of beer in the vehicle's back seat partially covered by a blanket, but he did not observe any opened beer cans in the vehicle. In talking with Bowe, Sands noticed Bowe was slurring his words. Sands also detected a light odor of alcohol coming from the vehicle, but he could not specifically localize the smell to Bowe. Bowe admitted to consuming alcohol sometime that night.

¶4 While Bowe was still seated inside his vehicle Sands asked him to count backward from seventy-one to fifty-nine; recite a portion of the alphabet; and perform a fingertip dexterity test. Bowe was able to satisfactorily complete

these tasks. Sands then asked Bowe to exit the vehicle so he could administer standardized field sobriety tests. After failing the field sobriety tests, Bowe was arrested.

¶5 At the suppression hearing, Bowe argued a standardized field sobriety test constitutes a search within the meaning of the Fourth Amendment. Bowe contended that, because field sobriety tests are searches, Sands needed probable cause before he could request that Bowe participate in the tests. Alternatively, Bowe argued that even if the correct standard was reasonable suspicion, Sands did not have enough objective evidence of intoxication before asking Bowe to perform standardized field sobriety tests.

¶6 The circuit court denied Bowe's suppression motion. It first determined that only reasonable suspicion—not probable cause—is required before an officer requests that an individual perform standardized field sobriety tests. The court then concluded, based on the totality of the circumstances, that Sands had reasonable suspicion to request Bowe perform standardized field sobriety tests. Finally, assuming probable cause was required for an officer to conduct field sobriety tests, the court concluded Sands had probable cause to request Bowe perform field sobriety tests.

¶7 After the circuit court denied Bowe's suppression motion, the parties entered into a stipulation and judgment adjudging Bowe guilty of OWI or PAC, both first-offenses, with the PAC charge dismissed.[2] Bowe now appeals.

[2] The circuit court stayed the sentence pending the outcome of this appeal. *See* WIS. STAT. § 808.07(2).

DISCUSSION

¶8 The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons … against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause …." U.S. CONST. AMEND. IV. A "search" under the Fourth Amendment occurs when the police infringe on an expectation of privacy that society considers reasonable. ***United States v. Jacobsen***, 466 U.S. 109, 113 (1984). Whether a search has occurred is a question of law subject to independent review. ***State v. Richardson***, 156 Wis. 2d 128, 137-38, 456 N.W.2d 830 (1990).

¶9 Bowe first asserts that standardized field sobriety tests are searches within the meaning of the Fourth Amendment. He cites a number of cases from other jurisdictions purportedly supporting this argument.[3] The Village does not rebut Bowe's assertion that a standardized field sobriety test is a search within the meaning of the Fourth Amendment. Therefore, for purposes of this appeal, we assume, without deciding, that a standardized field sobriety test is a search under

[3] The brief-in-chief from Attorney John Carroll of behalf of Bowe is virtually identical to the briefs-in-chief Attorney Carroll filed in two other cases. *See* Brief of Appellant at 5-12, ***Village of Little Chute v. Rosin***, No. 2013AP2536, unpublished slip op. (WI App Feb. 25, 2014); Brief of Appellant at 5-12, ***Town of Freedom v. Fellinger***, No. 2013AP614, unpublished slip op. (WI App Aug. 6, 2013). In ***Rosin*** and ***Fellinger***, we rejected the defendants' respective arguments and affirmed the circuit courts' decisions to deny the defendants' suppression motions. *See* ***Rosin***, No. 2013AP2536, unpublished slip op., ¶1; ***Fellinger***, No. 2013AP614, unpublished slip op., ¶1. Although we are not bound by ***Rosin*** and ***Fellinger*** because they are unpublished opinions, *see* WIS. STAT. RULE 809.23(3)(b), we conclude they provide additional (persuasive) authority for our ultimate determination, *see* ***Rosin***, No. 2013AP2536, unpublished slip op., ¶¶9-24; ***Fellinger***, No. 2013AP614, unpublished slip op., ¶¶9-24.

We also note that some of Bowe's legal citations fail to include an appropriate pinpoint citation. *See* WIS. STAT. RULE 809.19(1)(e); SCR 80.02(3)(a)-(c). We admonish Bowe's counsel that future violations of the Rules of Appellate Procedure may result in sanctions. *See* WIS. STAT. RULE 809.83(2).

the Fourth Amendment. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 108-09, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded).

¶10 Assuming a standardized field sobriety test is a search under the Fourth Amendment, pointing to ***People v. Carlson***, 677 P.2d 310, 317-18 (Colo. 1984), Bowe urges us to conclude that standardized field sobriety tests must be supported by probable cause. We decline to do so. First, ***Carlson*** has no binding effect on us. *See* ***Alberte v. Anew Health Care Servs., Inc.***, 2000 WI 7, ¶7, 232 Wis. 2d 587, 605 N.W.2d 515 (recognizing that authority from other jurisdictions are not binding on Wisconsin courts). Second, Wisconsin cases have held that an officer may request a driver to perform standardized field sobriety tests when the officer has reasonable suspicion that the driver is impaired. *See, e.g.*, ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 310, 603 N.W.2d 541 (1999); *accord* ***State v. Colstad***, 2003 WI App 25, ¶¶19-21, 260 Wis. 2d 406, 659 N.W.2d 394.

¶11 Finally, Bowe argues that, if the correct standard is reasonable suspicion, Sands did not reasonably suspect Bowe was operating while intoxicated so as to lawfully administer the standardized field sobriety tests. An officer has reasonable suspicion that an individual is impaired if he or she is "'able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant' the intrusion." ***State v. Post***, 2007 WI 60, ¶10, 301 Wis. 2d 1, 733 N.W.2d 634 (citation omitted). Whether reasonable suspicion exists is a question of constitutional fact. ***State v. Popke***, 2009 WI 37, ¶25, 317 Wis. 2d 118, 765 N.W.2d 569. We will uphold the circuit court's factual findings unless they are clearly erroneous; however, whether those facts amount to reasonable suspicion is a question of law we review independently. ***Id.***, ¶10.

¶12 While Sands may not have suspected Bowe was driving while under the influence before Bowe was stopped, prior to Sands requesting Bowe perform standardized field sobriety tests Sands smelled alcohol coming from Bowe's vehicle, he observed Bowe had bloodshot, glossy eyes and a flushed face, was slurring his words, and Bowe admitted to drinking alcohol earlier that night. Under the totality of the circumstances, Sands had a reasonable, articulable basis to suspect that Bowe was operating a vehicle while intoxicated. *See* ***Renz***, 231 Wis. 2d at 316 (indicators of intoxication include odor of intoxicants and admission of drinking); *see also* ***State v. Hughes***, No. 2011AP647, unpublished slip op., ¶21 (WI App Aug. 25, 2011) (concluding that the "odor of alcohol, glassy eyes, and admission of drinking earlier" are indicia which support the conclusion that a driver operated with too much alcohol in his or her system).

¶13 Bowe nonetheless argues that because he satisfactorily counted backward from seventy-one to fifty-nine, recited a portion of the alphabet, and performed a fingertip dexterity test, Sands did not have a reasonable basis to suspect Bowe was impaired and to request Bowe perform standardized field sobriety tests. However, this argument ignores Sands' other observations, which gave rise to reasonable suspicion. *See supra* ¶12. Sands was "not required to rule out the possibility of innocent behavior before initiating" the field sobriety tests. *See* ***State v. Waldner***, 206 Wis. 2d 51, 59, 556 N.W.2d 681 (1996). Therefore, Sands lawfully requested Bowe to perform field sobriety tests, and the circuit court properly denied Bowe's suppression motion.

By the Court.—Judgment affirmed.

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