COURT OF APPEALS
DECISION
DATED AND FILED

February 22, 2017

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. 2016AP1933-CR **Cir. Ct. No. 2015CT1284**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS M. GIBSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: RALPH M. RAMIREZ, Judge. *Affirmed*.

¶1 GUNDRUM, J.[1] Thomas Gibson appeals from a judgment of conviction for operating a motor vehicle while intoxicated. He argues the circuit

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

court erred in denying his motion to suppress evidence, which was based upon his contention the arresting officer did not have reasonable suspicion to perform a traffic stop on him because the radar unit the officer was using to determine Gibson's speed while driving had not been calibrated or tested for accuracy within the preceding two decades. We affirm.

Background

¶2 An evidentiary hearing was held on Gibson's motion to suppress. The arresting officer, Sergeant Bradley Bautz, and Gibson testified. Their relevant testimony is as follows.

¶3 Bautz testified that in 1999 he had been trained at "radar certification school" on visually estimating the speed of vehicles "within plus or minus five miles an hour of the actual speed." At the time of the traffic stop at issue in this case, Bautz had been a law enforcement officer for seventeen years and had been "out on patrol" for fifteen of those years. He had conducted "maybe" thousands of traffic stops, the majority of which were for speeding.

¶4 On August 15, 2015, Bautz was stationed in his squad car when he visually estimated a vehicle—driven by Gibson—to be traveling approximately twenty-five miles per hour in a fifteen mile per hour speed zone. Bautz then utilized a handheld radar unit, which indicated Gibson was operating the vehicle at twenty-six miles per hour. Bautz kept the radar unit focused on the vehicle, which unit showed Gibson slowing to twenty-five miles per hour. Bautz performed a traffic stop on Gibson, which ultimately led to him being cited for operating while intoxicated and disorderly conduct with a motor vehicle.

¶5 On cross-examination, Bautz confirmed he had not had any training in radar or visual speed detection since 1999. Prior to stopping Gibson, Bautz had performed an internal test of the radar unit but no other tests, such as a "tuning fork" test. Bautz confirmed that an exhibit he reviewed showed that the most recent "calibration determination" on the radar unit he utilized was performed in 1994 and that he was unaware of any other calibration or servicing of the unit since then. Bautz also confirmed he did use tuning forks on the unit after the stop of Gibson, but the most recent calibration of them was also in 1994.

¶6 Gibson testified the digital speedometer in the vehicle he was driving indicated he was traveling at fifteen miles per hour, the legal speed limit, as he approached the area where Bautz pulled him over.

¶7 The circuit court based its denial of Gibson's motion "on what the radar gun said," stating with regard to Bautz's visual observation of Gibson's speed "plus or minus 5 when it's only 10 miles over the limit, that's not so reasonable." The court found that the radar unit read "26 and 25 miles per hour over the limit of 15." It also found that Bautz "did an internal test of the radar unit, that he used a tuning fork after the stop; and there isn't anything on this record that I can see or know that would tell me that that radar gun was not operating properly." The court concluded Bautz had reasonable suspicion, "actually probable cause," to believe Gibson was speeding when Bautz performed the traffic stop, basing its ruling on its specific finding "that the radar gun was operating properly."

¶8 Gibson moved for reconsideration, which motion the circuit court denied, observing that Bautz "had ample probable cause to believe" Gibson was "traveling … 10 miles over a speed limit." Gibson appeals.

Discussion

¶9 Reviewing a circuit court's ruling on a motion to suppress evidence, we apply the clearly erroneous standard to the court's factual findings. ***State v. Smiter***, 2011 WI App 15, ¶9, 331 Wis. 2d 431, 793 N.W.2d 920 (2010). Our review of whether the facts constitute reasonable suspicion, however, is de novo. ***State v. Powers***, 2004 WI App 143, ¶6, 275 Wis. 2d 456, 685 N.W.2d 869.

¶10 For an investigatory stop to be justified by reasonable suspicion, an officer must have more than an "inchoate and unparticularized suspicion or hunch," ***State v. Post***, 2007 WI 60, ¶10, 301 Wis. 2d 1, 733 N.W.2d 634 (citation omitted); rather, an officer must possess "specific and articulable facts which, taken together with rational inferences from those facts," warrant a reasonable belief that the person being stopped has committed, is committing, or is about to commit an offense. ***Id.***, ¶¶10, 13 (citation omitted). "[I]f any reasonable inference of wrongful conduct can be objectively discerned, … the officers have the right to temporarily detain the individual for the purpose of inquiry." ***State v. Young***, 2006 WI 98, ¶21, 294 Wis. 2d 1, 717 N.W.2d 729 (citation omitted). In determining whether reasonable suspicion exists, we look at the totality of the facts taken together and consider what a reasonable police officer would reasonably suspect given his or her training and experience. ***State v. Waldner***, 206 Wis. 2d 51, 56, 58, 556 N.W.2d 681 (1996). As facts accumulate, reasonable inferences about their cumulative effect can be drawn. ***Id.*** at 58.

¶11 Gibson correctly points out that the circuit court questioned the reasonableness and reliability of Bautz's visual estimate that he was traveling at twenty-five miles per hour. Specifically, the court indicated it is not as "easily discernible when somebody is traveling about 15 miles per hour to say they're 10

over" because "it's not that much of a difference … compared to doing 85 in a 25 zone … or 45 in a 25-mile-per-hour zone." The court found it "not so persuasive in terms of [Bautz's] ability to say, 'That guy is going 25.'"

¶12 While recognizing the circuit court was not convinced Bautz's visual estimation of Gibson's speed was in fact accurate, we note that the circuit court did not find that Bautz was not being truthful in his testimony that he visually estimated Gibson was traveling twenty-five miles per hour in the fifteen mile per hour zone; it did not find that Bautz himself did not reasonably believe Gibson was traveling at twenty-five miles per hour. Given that, had the issue before the court been whether the State had proven by clear, satisfactory, and convincing evidence that Gibson was in fact traveling sixteen miles per hour over the speed limit, the court presumably would have found the State did not prove its case (although the court may yet have been persuaded Gibson had been traveling at *some* speed over the speed limit). The issue before the court, however, was not whether Gibson was guilty or innocent of a speeding violation, but whether Bautz reasonably suspected Gibson was violating a law, in this case, whether Bautz reasonably suspected Gibson was traveling at some speed over fifteen miles per hour.

¶13 Gibson next turns to the circuit court's reliance upon Bautz's testimony that the radar unit showed Gibson was traveling twenty-six, and then twenty-five, miles per hour in the fifteen mile per hour zone. Gibson asserts the court improperly "shifted the burden" at the hearing, from the State to Gibson, "by requiring [Gibson] to show that the radar gun was not accurate, and thus that reasonable suspicion did not exist."

¶14 The circuit court did not shift the burden. The court found that the State had proven that Bautz had performed an internal test of the unit before the traffic stop and a "tuning fork" test after the stop. Gibson desired the circuit court, and desires for us on appeal, to *assume* the radar unit was not functioning properly for the sole reason it had not been "calibrated or tested in over 21 years." Yet, Gibson provided no basis for the court to conclude the unit likely would not be functioning properly if a certain number of years passed since calibration or testing. Indeed, the court had no reason to believe anything had changed in the reliability of the unit since it was calibrated in 1994. The court did not switch the burden; it simply determined Bautz reasonably relied on the reading of the radar unit for the purpose of determining he reasonably suspected Gibson was traveling at a speed greater than fifteen miles per hour.

¶15 Gibson repeatedly states in his brief-in-chief that when Bautz performed the traffic stop on Gibson, Bautz "knew" the radar unit "had not been calibrated" in over two decades. Gibson does not cite to the record for that assertion and it appears to us incorrect. We are unable to locate any evidence that when Bautz observed the reading on the radar unit indicating Gibson was traveling eleven, and then ten, miles per hour over the speed limit, he—at that moment—was aware the unit had not been calibrated since 1994, or had any reason whatsoever to doubt the accuracy of the unit. Rather, at the suppression hearing, Bautz was asked about his knowledge *at the time of the hearing*—not his knowledge at the time of the traffic stop—regarding the calibration history of the radar unit.[2] As Gibson properly acknowledges in his reply brief with regard to

[2] This questioning by Gibson's counsel related to whether Bautz was aware of calibrating or servicing of the radar unit being done since 1994 in light of the fact records produced subsequent to the traffic stop indicated it had not been calibrated since then.

another point, "[t]he relevant focus for any reasonable suspicion analysis is what was known to the officer at the time of the stop." *See* ***State v. Nordness***, 128 Wis. 2d 15, 35, 37 n.6, 381 N.W.2d 300 (1986) (holding that the constitutional inquiry related to a seizure by law enforcement turns on the facts and circumstances available to the officer at the time of the seizure). Without a reason to doubt the radar unit at the time of the stop, Bautz's reliance on the reading on the unit provided him with reasonable suspicion to temporarily detain Gibson for the purposes of inquiring further as to whether or not he had been speeding.

¶16 Reasonable suspicion can develop as facts accumulate. ***Waldner***, 206 Wis. 2d at 56. In this case, Bautz first concluded based upon his visual observation and training that Gibson was traveling at a speed of twenty-five miles per hour. Bautz did not rely on that visual estimation alone, however, in making the determination to stop Gibson for further investigation; rather, he next employed the radar unit, which showed that Gibson was traveling twenty-six miles per hour. It was then Bautz affected the traffic stop, and properly so.

¶17 The circuit court concluded Bautz had probable cause to believe Gibson was traveling over the fifteen mile per hour speed limit. All Bautz needed in order to lawfully perform the traffic stop was reasonable suspicion—a lower standard—that Gibson was traveling over that limit. Even if we were not to consider Bautz's visual estimate of Gibson's speed, as the circuit court properly concluded, based upon the reading on the radar unit alone, Bautz had reasonable suspicion to perform the traffic stop.

¶18 For the foregoing reasons, we affirm.

By the Court.—Judgement affirmed.

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