COURT OF APPEALS
DECISION
DATED AND FILED

March 1, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1720 **Cir. Ct. No. 2016CV725**

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

CITY OF WAUKESHA,

PLAINTIFF-RESPONDENT,

V.

DEREK R. PIKE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County: MICHAEL P. MAXWELL, Judge. *Affirmed*.

¶1 GUNDRUM, J.[1] Derek Pike appeals from an order of the circuit court finding he improperly refused to submit to a chemical test. He argues the

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

circuit court erred in denying a motion to suppress evidence he filed in relation to the refusal. We disagree and affirm.

Background

¶2 City of Waukesha Police Officer Bradley Fisher performed a traffic stop on Pike that ultimately led to charges for operating a motor vehicle while intoxicated and refusing to submit to chemical testing. The case began in Waukesha Municipal Court, where Pike filed a motion to suppress evidence. An evidentiary hearing was held, at which Fisher was the only witness to testify. He testified that he executed a traffic stop on Pike at approximately 1 a.m. on February 14, 2014, on the basis that the vehicle Pike was operating did not have a front license plate. When Fisher asked Pike where he was coming from, Pike responded, "Rooters" nightclub/bar. When Fisher asked Pike how much he had to drink, Pike admitted consuming "one to two beers." Pike was alone in the vehicle, and after Fisher detected an odor of intoxicants, he requested Pike perform field sobriety tests, which ultimately led to the charges referenced above.

¶3 The municipal court denied Pike's suppression motion. The court subsequently held a trial and refusal hearing, at which it found that the City failed to meet its burden of proof on the charge of operating while intoxicated but Pike improperly refused to submit to a chemical test.

¶4 Pike requested a record review by the circuit court on the refusal determination.[2] The circuit court concluded, contrary to Pike's position, that

[2] The City did not appeal the municipal court's determination that Pike was not guilty of operating while intoxicated.

Fisher had reasonable suspicion Pike was operating a motor vehicle while under the influence of an intoxicant, which provided Fisher with the lawful authority to extend the traffic stop to include field sobriety testing. The court also concluded that after conducting the field sobriety testing, the officer had probable cause to arrest Pike for operating a motor vehicle while intoxicated and, therefore, the officer lawfully asked Pike to submit to a chemical test, which test Pike unlawfully refused. Pike appeals.

Discussion

¶5 Reviewing a decision of the municipal court, we apply the same standard as the circuit court. ***Village of Williams Bay v. Metzl***, 124 Wis. 2d 356, 361-62, 369 N.W.2d 186 (Ct. App. 1985). We give due regard to the municipal court's opportunity to evaluate the credibility of witnesses and we accept the court's factual findings unless they are clearly erroneous. ***Id.*** However, we independently consider questions of law, ***id.*** at 360, such as whether the evidence an officer possessed satisfied the reasonable suspicion requirement for a temporary investigative detention.

¶6 Pike states, "The sole issue on appeal is whether Officer Fisher had the requisite level of suspicion to continue to detain Mr. Pike for field sobriety testing." We conclude Fisher had reasonable suspicion.

¶7 As Pike notes:

> If, during a valid traffic stop, the officer becomes aware of additional suspicious factors which are sufficient to give rise to an articulable suspicion that the person has committed or is committing an offense or offenses separate and distinct from the acts that prompted the officer's intervention in the first place, the stop may be extended and a new investigation begun.

State v. Betow, 226 Wis. 2d 90, 94, 593 N.W.2d 499 (Ct. App. 1999). For a temporary investigative detention 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. In determining whether a police officer had reasonable suspicion, we must consider what a reasonable officer would have reasonably suspected given his or her training and experience. ***State v. Waldner***, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996). We must look at the totality of the facts taken together. ***Id.*** at 58. As facts accumulate, reasonable inferences about their cumulative effect can be drawn. ***Id.***

¶8 In the case before us, after pulling over Pike for operating without a front license plate, Fisher learned that Pike was coming from a nightclub/bar and had consumed alcoholic beverages. While Pike told Fisher he had only "one to two beers," Fisher was not obligated to assume Pike was telling the truth as to the amount he consumed. And while a mere hunch does not amount to reasonable suspicion, Fisher was "not required to rule out the possibility of innocent behavior" before extending a temporary detention for purposes of further investigation. *See* ***State v. Young***, 2006 WI 98, ¶21, 294 Wis. 2d 1, 717 N.W.2d 729 (citation omitted). Our supreme court has explained:

> [S]uspicious conduct by its very nature is ambiguous, and the [principal] function of the investigative stop is to quickly resolve that ambiguity. Therefore, if any reasonable inference of wrongful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, the officers

> have the right to temporarily detain the individual for the purpose of inquiry.

Id. (citation omitted). Indeed, "[i]t has been termed 'the essence of good police work' to briefly stop a suspicious individual 'in order … to maintain the status quo momentarily while obtaining more information.'" ***State v. Williamson***, 58 Wis. 2d 514, 518, 206 N.W.2d 613 (1973) (quoting ***State v. Chambers***, 55 Wis. 2d 289, 294, 198 N.W.2d 377 (1972)). What Fisher knew was that while drinking at the bar, Pike had consumed enough alcoholic beverages to emit a noticeable odor of intoxicants. Furthermore, Fisher pulled over Pike at approximately 1 a.m., a time of day that lends to suspicion Pike may have been drinking intoxicants in an amount greater than one might consume at other times of the day. *See* ***Post***, 301 Wis. 2d 1, ¶36 (time of night "does lend some further credence" to an officer's suspicion of intoxicated driving); *see also* ***State v. Lange***, 2009 WI 49, ¶32, 317 Wis. 2d 383, 766 N.W.2d 551 (concluding the time of day is relevant for an OWI probable cause (or reasonable suspicion) determination).

¶9 While the evidence available to Fisher at the time he extended the traffic stop for field sobriety tests did not amount to probable cause that Pike had been operating while under the influence of an intoxicant or with a prohibited alcohol concentration, it was enough for a reasonable police officer to reasonably suspect Pike might have been in violation of those laws. Extending the traffic stop briefly to confirm or allay this suspicion was reasonable and thus lawful.

By the Court.—Order affirmed.

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