COURT OF APPEALS
DECISION
DATED AND FILED

March 14, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1471 **Cir. Ct. No. 2015TR5650**

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

COUNTY OF MARATHON,

PLAINTIFF-RESPONDENT,

V.

ARMIN JAMES BALZAR,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Marathon County: GREGORY B. HUBER, Judge. *Affirmed*.

¶1 STARK, P.J.[1] Armin Balzar appeals a judgment convicting him of first-offense operating a motor vehicle while intoxicated (OWI). Balzar contends

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

the circuit court erred by denying his suppression motion because the officer who stopped his vehicle lacked reasonable suspicion for the stop. We disagree and affirm.

BACKGROUND

¶2 Marathon County sheriff's deputy Cassandra Bean was the only witness to testify at the suppression hearing. Bean testified she was driving north in her marked squad car on State Road 13 near the Village of Spencer at about 1:23 a.m. on November 11, 2015. She observed a vehicle, whose driver was later identified as Balzar, traveling southbound. As Balzar's vehicle passed her, it "swerved" about one foot over the fog line.

¶3 Bean testified she did not plan to stop Balzar's vehicle based on its deviation over the fog line. However, she turned around and began following Balzar's vehicle. As she was following him, Balzar turned into the parking lot of Bear Creek Canvas, a business that was closed at the time. According to Bean, Balzar "pulled into the front area of the business, the parking lot, and parked his vehicle." Bean testified she pulled into the parking lot "right after [Balzar] did" and activated her vehicle's lights. When asked why she did so, Bean responded, "Because I found it suspicious he was pulling into a closed business at 1:30 in the morning." When asked whether "the fact that you were behind him play[ed] a role in that as well," Bean answered, "I believe so."

¶4 The circuit court concluded Bean's testimony established that she had reasonable suspicion to stop Balzar's vehicle "based on what she observed and what her suspicions were, the time of night, [and] the location." The court therefore denied Balzar's suppression motion. Balzar was convicted of first-offense OWI, following a jury trial, and this appeal follows.

DISCUSSION

¶5 A traffic stop is constitutionally permissible when the officer has reasonable suspicion to believe a crime or traffic violation has been or will be committed. ***State v. Popke***, 2009 WI 37, ¶23, 317 Wis. 2d 118, 765 N.W.2d 569. "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" of the stop. ***State v. Young***, 212 Wis. 2d 417, 423-24, 569 N.W.2d 84 (Ct. App. 1997). "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 424.

¶6 An officer is not required to rule out the possibility of innocent behavior before initiating a traffic stop. ***State v. Waldner***, 206 Wis. 2d 51, 59, 556 N.W.2d 681 (1996). "[S]uspicious conduct by its very nature is ambiguous, and the [principal] function of the investigative stop is to quickly resolve that ambiguity." ***State v. Anderson***, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990). However, an officer's "inchoate and unparticularized suspicion or hunch" is insufficient to give rise to reasonable suspicion. ***Popke***, 317 Wis. 2d 118, ¶23 (quoting ***State v. Post***, 2007 WI 60, ¶10, 301 Wis. 2d 1, 733 N.W.2d 634).

¶7 Whether there was reasonable suspicion for a traffic stop is a question of constitutional fact, to which we apply a two-step standard of review. ***Post***, 301 Wis. 2d 1, ¶8. We uphold the circuit court's findings of historical fact unless they are clearly erroneous, but we independently review the application of those facts to constitutional principles. ***Id.***

¶8 Balzar argues Bean stopped him solely because he pulled his vehicle into the parking lot of a closed business at about 1:30 a.m. He argues the "act of simply turning into a closed business parking lot, without more," provides "nothing more than an inchoate and unparticularized hunch that criminal activity might be afoot."

¶9 Balzar's argument relies on an incomplete recitation of the facts. Bean testified she saw Balzar's vehicle cross over the fog line at about 1:30 a.m., which we note is shortly before "bar time." *See* ***id.***, ¶36; *see also* WIS. STAT. § 125.32(3). Based on that observation, Bean was concerned enough about Balzar's driving to turn her marked squad car around and follow his vehicle. Shortly after she did so, Balzar turned into the parking lot of a closed business and parked his vehicle.[2] On these facts, Bean could reasonably infer that Balzar pulled into the parking lot in attempt to avoid law enforcement contact. *See* ***Anderson***, 155 Wis. 2d at 88 ("[B]ehavior which evinces in the mind of a reasonable police officer an intent to flee from the police is sufficiently suspicious in and of itself to justify a temporary investigative stop by the police."). That reasonable inference, when combined with the time of night and Bean's previous observation of Balzar's vehicle crossing the fog line, gave rise to a reasonable suspicion that criminal activity, or as here, wrongful activity, was afoot—specifically, that Balzar was operating while intoxicated.

[2] To the extent Balzar argues on appeal that he did not park his vehicle, we observe Bean specifically testified at the suppression hearing that Balzar "pulled into the front area of the business, the parking lot, and parked his vehicle." There is no evidence to contradict Bean's testimony on that point, and the circuit court implicitly found her testimony credible. When the circuit court acts as factfinder, it is the ultimate arbiter of witnesses' credibility. *See* ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345.

¶10 Balzar asserts Bean acknowledged during the suppression hearing that the only reason she stopped his vehicle was because it pulled into the parking lot of a closed business at 1:30 a.m. However, Balzar ignores that, when subsequently asked whether "the fact that [she was] behind [Balzar] play[ed] a role in" her decision to stop his vehicle, Bean answered, "I believe so." More importantly, Balzar overlooks the fact that reasonable suspicion is an objective standard. *See* ***State v. Buchanan***, 178 Wis. 2d 441, 447 n.2, 504 N.W.2d 400 (Ct. App. 1993). "[I]t is the circumstances that govern, not the officer's subjective belief." ***Id.*** Bean's subjective reason for stopping Balzar's vehicle is therefore not dispositive of whether reasonable suspicion existed for the stop. Rather, for the reasons explained above, we conclude a reasonable officer in Bean's position could have reasonably suspected Balzar was operating while intoxicated. *See* ***Young***, 212 Wis. 2d at 424.

¶11 In addition, we observe that our decision in ***City of Mequon v. Cooley***, No. 2010AP2142, unpublished slip op. (WI App Feb. 23, 2011), contradicts Balzar's argument that reasonable suspicion cannot be based solely on the act of pulling into the parking lot of a closed business in the middle of the night.[3] In ***Cooley***, an officer was driving behind the defendant's vehicle at about 2:20 a.m. ***Id.***, ¶2. The officer did not notice anything unusual about the defendant's driving, but eventually the defendant turned into the parking lot of a closed movie theater. ***Id.*** The officer found that behavior "suspicious," so he made a U-turn and proceeded into the movie theater parking lot, where he saw the

[3] *See* WIS. STAT. RULE 809.23(3)(b) (permitting authored, unpublished opinions issued on or after July 1, 2009, to be cited for their persuasive value).

defendant's vehicle "in a parking stall with its running lights on." ***Id.*** The officer then initiated an investigatory stop. ***Id.***, ¶3.

¶12 The circuit court in ***Cooley*** concluded the officer had reasonable suspicion to stop the defendant's vehicle because the defendant "pulled into the parking lot of a closed movie theater late at night." ***Id.***, ¶6. We affirmed, concluding the officer's observations, along with the "rational inference that it is illogical for someone to park in the lot of a closed business at 2:20 a.m.," were sufficient to "warrant a belief that criminal activity was afoot." ***Id.***, ¶7. Although we acknowledged the defendant may have had a valid reason for pulling into the movie theater parking lot, we concluded the officer "was justified in 'freezing' the situation for a short period of time to determine if criminal activity was occurring." ***Id.***

¶13 The same principles are applicable here. Bean was driving behind Balzar late at night, when she saw Balzar pull into the parking lot of a closed business. That observation, along with the rational inference that Balzar's behavior was illogical, provided a basis to believe criminal activity was afoot and justified a brief investigatory stop to "freeze" the situation and determine whether criminal activity was, in fact, occurring. *See* ***id.***[4] In addition, unlike the officer in ***Cooley***, Bean observed an instance of concerning driving before she stopped

[4] Balzar argues ***City of Mequon v. Cooley***, No. 2010AP2142, unpublished slip op. (WI App Feb. 23, 2011), is distinguishable because Bean "immediately pulled into the lot behind [Balzar's] vehicle and contemporaneously initiated the traffic stop," whereas "[t]he pursuit in ***Cooley*** was not continuous." We do not find this distinction persuasive. Contrary to Balzar's assertion, the ***Cooley*** court did not rely on the fact that the defendant "remained" stopped in the movie theater parking lot with only her vehicle's running lights illuminated following the officer's U-turn. The crucial fact in ***Cooley*** was that the defendant turned into the movie theater parking lot at 2:20 a.m., when the theater was closed. *See* ***id.***, ¶7.

Balzar's vehicle. On these facts, we agree with the circuit court that reasonable suspicion supported the stop. Accordingly, the court properly denied Balzar's suppression motion.

By the Court.—Judgment affirmed.

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