COURT OF APPEALS
DECISION
DATED AND FILED

August 2, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2017AP12-CR **Cir. Ct. No. 2016CM123**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JESSE U. FELBAB,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: THOMAS J. GRITTON, Judge. *Affirmed*.

¶1 HAGEDORN, J.[1] Jesse Felbab appeals from a judgment convicting him of possession of tetrahydrocannabinol (THC). Felbab moved to suppress

[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.

evidence obtained during a traffic stop. After a suppression hearing, the circuit court granted the motion. However, the court allowed the State to submit additional evidence in a second suppression hearing, and afterwards, reversed itself and denied Felbab's motion. On appeal, Felbab maintains that the circuit court erroneously exercised its discretion by allowing the State to submit additional testimony at the second suppression hearing and further argues that the decision to extend the traffic stop was not supported by reasonable suspicion. We disagree and affirm.

BACKGROUND

¶2 The State charged Felbab with possession of THC and possession of drug paraphernalia stemming from evidence recovered during a traffic stop. Felbab filed a motion to suppress all evidence collected during the stop on the grounds that the deputy did not have the reasonable suspicion necessary to extend the traffic stop.

¶3 The circuit court held a suppression hearing on April 6, 2016. Deputy Kyle Schoonover testified that he was on patrol around 7:48 p.m. on December 4, 2015. Schoonover explained that he was passed on Highway 10 by a vehicle with a front headlight out. He proceeded to follow the vehicle and observed somewhat errant driving patterns, such as inconsistent speeds between fifty and sixty miles per hour in a sixty-five miles per hour zone, intermittently turning on and off the right turn signal when no exit was nearby, and traveling on the shoulder. After two or three minutes, the vehicle exited onto Highway 45 and increased its speed—traveling seventy miles per hour in a sixty-five miles per hour zone. Schoonover then pulled the vehicle over and approached the passenger-side window.

¶4 As he talked to the driver and the passenger, Schoonover noticed that the driver had bloodshot eyes, and both the passenger and the driver had recently lit cigarettes. A veteran of 200 to 300 operating while intoxicated investigations and a certified drug recognition expert of about two and one-half years, Schoonover testified that lighting cigarettes is a common tactic used to hide other odors inside the vehicle, such as drugs or alcohol. He also testified that bloodshot eyes are an indication of drug use. Schoonover asked where the occupants were headed, and they said they had gone to Fleet Farm in Waupaca and were "driving around in the Waupaca area and that they were going back to Sheboygan … where they reside[d]." Schoonover found this explanation unusual given "the relatively long distance between Sheboygan and Waupaca" and the fact that there were Fleet Farm locations "much closer" to Sheboygan. Schoonover then collected the occupants' information and returned to his vehicle to run the information through the system. Upon running the information, Schoonover discovered that Felbab had a felony record.[2]

¶5 From his patrol car, Schoonover called for backup so he could safely perform field sobriety tests on the driver. He testified that the erratic driving and the "very unusual story of driving from Sheboygan all the way to Waupaca for no other reason other than to go to Fleet Farm or drive around," combined with the above factors, led him to determine that field sobriety tests and a drug-detecting dog were warranted. Once the second officer arrived at the scene, Felbab agreed to submit to the field sobriety tests and consented to be searched. Prior to being

[2] Schoonover also observed from the system entry that the passenger of the vehicle was on probation for possession of narcotic drugs. This observation later turned out to be incorrect.

searched, Felbab admitted that he had a pipe and marijuana in his pocket. After conducting field sobriety tests, Schoonover determined that Felbab was operating under the influence of drugs and placed him under arrest.

¶6 At the conclusion of the hearing, the matter was adjourned until the court rendered a decision. However, at some point before granting the motion, the court conferred with the attorneys in chambers and informed both parties that it would be willing to grant a motion to reopen if the losing party sought to enter more evidence into the record. When the circuit court reconvened the matter, it observed that the State had presented no evidence regarding how long the stop was actually extended. Because the State did not carry its burden to show that the initial stop was not unreasonably extended, the circuit court granted Felbab's motion to suppress. Based on the previous interchange, the State requested the circuit court reopen the suppression motion and receive further testimony about the duration of the stop. The circuit court granted this request and ordered another hearing.

¶7 The second hearing was conducted on July 5, 2016. Schoonover again testified and supplemented his previous testimony, explaining the timeline the night of Felbab's arrest. Aided by the police department's event details report—a document prepared by the department's computer system—Schoonover stated that he called out the traffic stop at 7:48 p.m. According to the system, he placed the call for an additional officer at 7:51 p.m. The system recorded the additional officer's arrival at 7:59 p.m. Schoonover attested that he began the field sobriety tests shortly after the additional officer arrived.

¶8 In light of the additional timeline presented at the hearing, the circuit court explained it was "able to make a determination" concerning the

reasonableness of the stop and determined that the stop was reasonably extended by Schoonover's call for backup. Accordingly, the circuit court changed its decision and denied Felbab's motion to suppress. Felbab subsequently pled no contest to the possession of THC charge and now appeals.

DISCUSSION

¶9 Felbab first argues that the circuit court erroneously exercised its discretion by reopening the case and allowing the State to submit additional testimony at the second suppression hearing. He maintains that the circuit court did not adequately explain its reasons for doing so on the record and therefore must be reversed. He does not, however, suggest that the circuit court could not have done so given the circumstances of the case. Felbab next challenges Schoonover's decision to extend the stop. He insists that Schoonover lacked reasonable suspicion that Felbab was operating under the influence of drugs and therefore had no constitutional reason to extend the stop.[3]

A. Motion To Reopen

¶10 A court may, on its own motion or on the motion of the parties, "reopen [a case] for further testimony in order to make a more complete record in the interests of equity and justice." *See* ***State v. Hanson***, 85 Wis. 2d 233, 237, 270 N.W.2d 212 (1978). "[A] litigant has no strict right to reopen a case for the

[3] While Felbab argues that Schoonover lacked reasonable suspicion to extend the stop, he does not argue that the eleven-minute extension of the stop was an unreasonable amount of time. He merely contends that—excluding the record from the second hearing, which he maintains was improper—"one cannot fairly determine how long the traffic stop took." As we reject Felbab's contention that the circuit court erred in reopening the case, this argument fails.

purpose of introducing additional evidence," but the circuit court has the power to reopen in its sound discretion. ***State v. Vodnik***, 35 Wis. 2d 741, 746, 151 N.W.2d 721 (1967). An appellate court will only reverse a court's decision to reopen a matter if "there [is] no reasonable basis for that decision." ***Stivarius v. DiVall***, 121 Wis. 2d 145, 157, 358 N.W.2d 530 (1984) (citing ***Wisconsin Public Serv. Corp. v. Krist***, 104 Wis. 2d 381, 395, 311 N.W.2d 624 (1981)). Indeed, even "when a circuit court does not explain its reasons for a discretionary decision, we may search the record to determine whether it supports the court's decision." ***Ulrich v. Zemke***, 2002 WI App 246, ¶20, 258 Wis. 2d 180, 654 N.W.2d 458.

¶11 Although Felbab chastises the circuit court for not explaining its decision in greater detail, our own independent review reveals that the circuit court stated its reasons for reopening the case on several occasions during the second suppression hearing. The court explained that it could not make an informed decision without testimony on the timeframe: "The law says that I'm required to consider the length of the stop and what amount of time is permissible…. [T]here was no time frame, and as a result I couldn't make a finding." The court concluded:

> I'm going to allow the testimony regarding the timeframe issue…. Ultimately I think we need to have the entire fact circumstances litigated here, and I think everybody deserves that, the State deserves that right as much as Mr. Felbab and as a result we're going to proceed with some minimal testimony.

Thus, contrary to Felbab's assertion, the record clearly reflects the court's reasoning in granting a new hearing—it didn't have sufficient evidence to make a decision consistent with the law and recognized that a second hearing would

provide the necessary information.[4] The court's decision had a reasonable basis and therefore, the court did not erroneously exercise its discretion by granting the motion to reopen.

B. Reasonable Suspicion

¶12 The Fourth Amendment of the United States Constitution protects citizens from unreasonable searches and seizures. Temporary detention during a traffic stop is a seizure, and therefore it must conform to this constitutional requirement of reasonableness. ***State v. Popke***, 2009 WI 37, ¶11, 317 Wis. 2d 118, 765 N.W.2d 569. A police officer may stop a vehicle when he or she reasonably believes a traffic violation has occurred, as Schoonover did here.[5] ***State v. Hogan***, 2015 WI 76, ¶34, 364 Wis. 2d 167, 868 N.W.2d 124. However, expanding "the scope of the inquiry, when accompanied by an extension of time longer than would have been needed for the original stop, must be supported by reasonable suspicion." ***Id.***, ¶35. In other words, if a police officer wishes to extend a lawful traffic stop beyond its original purpose, he or she must have reasonable suspicion to do so. *See* ***id.***

¶13 Reasonable suspicion is "a suspicion grounded in specific, articulable facts and reasonable inferences from those facts, that the individual has committed [or was committing or is about to commit] a crime." ***State v. Waldner***,

[4] To the extent Felbab contends that the court needed to reference the specific statutes and cases it considered, that is not the standard. We may only reverse the circuit court's decision if it has no reasonable basis in the record.

[5] Felbab does not challenge the validity of the initial stop; he merely argues that it was unreasonably extended.

206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996) (citation omitted; alteration in original). In determining whether the extension of the stop was too long in duration, "a court must consider whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it is necessary to detain the suspect." ***State v. Colstad***, 2003 WI App 25, ¶16, 260 Wis. 2d 406, 659 N.W.2d 394 (citations omitted).

¶14 Taking both hearings together, it is clear that Schoonover had reasonable suspicion to extend the stop, which lead to Felbab's arrest. Schoonover observed several specific, articulable facts—the erratic driving patterns including driving on the shoulder, the freshly-lit cigarettes, the bloodshot eyes, and the unusual explanation of Felbab's whereabouts—which, based upon his training and experience, gave rise to a reasonable suspicion that Felbab was operating while under the influence of drugs. Of particular note, the lighting of cigarettes—which Schoonover explained is often done to conceal suspicious odors—indicated that Felbab and his companion were attempting to hide the odor of drugs or alcohol. When combined with Felbab's bloodshot eyes—a sign of drug use—Schoonover reasonably suspected that Felbab was driving under the influence. Based on this suspicion, Schoonover extended the concededly-valid stop, called for backup, and conducted the field sobriety tests. While Felbab is correct that each of Schoonover's observations might have had an innocent explanation unrelated to the illicit use of drugs, it is well-established that "a combination of behaviors—all of which may provide the possibility of innocent explanation—can give rise to reasonable suspicion." ***Hogan***, 364 Wis. 2d 167, ¶36.

¶15 We similarly conclude that the duration of the extension was reasonable in light of the timeline established at the second hearing. The circuit court found that the stop was only extended by eleven minutes, during which time

the second officer traveled to the scene—a necessary step in confirming or dispelling the deputy's suspicion that the driver was intoxicated. This short duration is completely reasonable under the circumstances, and Felbab does not contend otherwise.

¶16 Because Schoonover had reasonable suspicion to extend the stop, the court properly denied Felbab's motion to suppress.

By the Court.—Judgment affirmed.

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