COURT OF APPEALS
DECISION
DATED AND FILED

September 14, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP2480-CR **Cir. Ct. No. 2013CT261**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SCOTT A. BRANDSMA,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Columbia County: W. ANDREW VOIGT, Judge. *Affirmed*.

¶1 BLANCHARD, J.[1] Scott Brandsma appeals a judgment of conviction for two offenses: refusal to submit to a test for intoxication after his

[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.

arrest for driving under the influence and resisting or obstructing an officer. Brandsma contends that the circuit court erred when it denied his motion to suppress evidence obtained during an investigatory stop prompted by allegations conveyed in a police dispatch report. I disagree and affirm the circuit court's ruling.

BACKGROUND

¶2 At the suppression hearing, two sheriff's deputies testified to the following undisputed, pertinent facts.

¶3 One Tuesday evening at approximately 7:00 p.m., deputies received a report from dispatch that Brandsma had been involved in a domestic disturbance in the Village of Rio and that a responding officer reported that Brandsma was intoxicated. Shortly thereafter, the deputies stopped Brandsma's car. He was the only person in the car.

¶4 Following the stop, the deputies requested that Brandsma perform field sobriety tests. Brandsma told deputies that he had a leg injury that could compromise his ability to complete the tests. One deputy observed that Brandsma had an "unusually wide stance" and Brandsma pointed out to the deputies a scar on the allegedly injured leg, although there was no testimony about the apparent vintage or nature of the scar. During testing, Brandsma passed the horizontal gaze nystagmus test, but failed the walk-and-turn test and the one leg stand test.

¶5 A deputy asked Brandsma to take a preliminary breath test, which he agreed to do. The test indicated that his blood alcohol content was .048, which was under the ordinary limit of .08. The deputies initially decided not to arrest Brandsma for operating a vehicle while intoxicated. However, Brandsma

remained at the scene of the stop, after a deputy informed him that he could no longer drive that night and needed to arrange for someone to pick him up. While Brandsma was waiting for a ride, dispatch informed deputies that Brandsma's driving record included three prior operating while intoxicated convictions, establishing his prohibited alcohol concentration level as .02 or higher. *See* WIS. STAT. § 340.01(46m)(c). Deputies placed Brandsma under arrest for operating a vehicle with a prohibited alcohol concentration.

¶6 In the circuit court, Brandsma moved to suppress the evidence obtained during the stop on two grounds. First, Brandsma argued that officers did not have reasonable suspicion of driving under the influence of alcohol to justify conducting field sobriety tests. Second, he argued that, even if police did have reasonable suspicion to justify the field sobriety tests, they did not have the requisite probable cause to request a preliminary breath test.

¶7 After holding an evidentiary hearing the circuit court denied Brandsma's motion. The court made findings that included the following: (1) at the time of the stop, Brandsma was a "suspect" in a domestic incident; (2) Brandsma "denied the allegations" that he had been involved in a domestic incident; (3) dispatch reported that Brandsma "was intoxicated" at that time of the domestic incident; (4) after the stop, a deputy "detected an odor from [Brandsma's] truck that could have been caused by alcohol or a whole number of other things";[2] (5) Brandsma denied to the deputies that he had consumed "any

[2] Brandsma argues that I should not consider the could-have-been-alcohol-odor testimony, because the deputy acknowledged on cross examination that the odor could have had a source other than alcohol. However, so far as the transcript reveals, this cross examination testimony was a qualification and not a repudiation of the initial testimony. The deputy merely softened the degree of certainty he initially suggested in his testimony about whether the odor was alcohol. Moreover, the circuit court made a finding that the deputy detected an odor that (continued)

alcohol"; and (6) the deputies did not personally observe bad driving or traffic violations by Brandsma. Brandsma pled no contest to refusal to take a test for intoxication after arrest, and resisting or obstructing an officer.[3] Brandsma appeals the motion to suppress evidence, advancing the same two arguments rejected by the circuit court.

DISCUSSION

¶8 In reviewing a challenge to a circuit court suppression decision, this court will "uphold the trial court's findings of fact unless they are clearly erroneous, but review de novo whether those facts warrant suppression." *See* ***State v. Bullock***, 2014 WI App 29, ¶14, 353 Wis. 2d 202, 844 N.W.2d 429 (citation omitted).

A. Reasonable Suspicion To Conduct Field Sobriety Tests

¶9 Police may conduct an investigatory traffic stop if they have a reasonable suspicion that criminal activity is afoot. ***Terry v. Ohio***, 392 U.S. 1, 21 (1968); ***State v. Post***, 2007 WI 60, ¶¶10-13, 301 Wis. 2d 1, 733 N.W.2d 634. In the context of an investigatory stop, reasonable suspicion is established by the presence of "'specific and articulable facts [and] rational inferences from those facts'" that would lead a reasonable police officer to suspect the stopped individual of criminal activity. ***Post***, 301 Wis. 2d 1, ¶¶10-13 (quoting ***Terry***, 392

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could have been alcohol. Brandsma fails to persuade me that this finding was clearly erroneous. For these reasons, I conclude that the deputy's odor-related testimony has some weight in the analysis.

[3] The plea to the refusal is puzzling to the extent that the allegations in the criminal complaint indicate that Brandsma in fact consented to take a test for intoxication after his arrest. However, Brandsma does not challenge his plea, and therefore I do not address this further.

U.S. at 21). Officers are to consider the totality of the circumstances at the time of the stop and may investigate when there is a reasonable inference that criminal conduct has occurred, is occurring, or is about to occur. *See* ***State v. Jackson***, 147 Wis. 2d 824, 835, 434 N.W.2d 386 (1989).

¶10 Here, reasonable suspicion that Brandsma was driving while under the influence rests on the veracity of the dispatch report. Obviously, if the contemporaneous report that Brandsma was intoxicated were true, that report, when combined with the deputies' observation that Brandsma was driving, would provide "specific and articulable facts" giving rise to a reasonable suspicion of operating a vehicle while intoxicated. Therefore, because the deputies received an unqualified, albeit non-detailed, report that an identified driver was intoxicated, the dispositive question is whether the dispatch report was credible.

¶11 Assessing the dispatch report in this case is similar to the legal analysis of tips provided by informants, which can provide a basis for reasonable suspicion to stop. *See* ***State v. Rutzinski***, 2001 WI 22, ¶21, 241 Wis. 2d 729, 623 N.W.2d 516 ("[I]n some circumstances, an informant's veracity can afford a tip with sufficient reliability to justify an investigative stop. That is, if there are strong indicia of the informant's veracity, there need not necessarily be any indicia of the informant's basis of knowledge."). Identified informants are generally reliable, absent evidence to the contrary. *See* ***State v. Kerr***, 181 Wis. 2d 372, 381, 511 N.W.2d 586 (1994).

¶12 Here, the source of the report was a presumptively credible person, an identified Rio police officer, and therefore the dispatch report was sufficiently reliable to credit in the reasonable suspicion analysis. Moreover, the deputies could rely on the possible odor of intoxicants and Brandsma's denial of any

drinking. For these reasons, the field sobriety tests conducted in furtherance of the investigation were not subject to exclusion under the relatively low bar for reasonable suspicion.[4]

B. Probable Cause To Administer Preliminary Breath Test

¶13 Brandsma argues that officers lacked "probable cause to believe" that Brandsma was operating a vehicle while intoxicated when they administered a preliminary breath test, and therefore were not justified in doing so under WIS. STAT. § 343.303.[5]

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[4] I now briefly address a collateral argument that Brandsma makes, which I conclude has no merit, based on the collective knowledge doctrine. As part of his reasonable suspicion argument, Brandsma contends that the circuit court erred by crediting the deputies with knowledge of the statement of a police officer, conveyed by dispatch, that Brandsma was intoxicated. *See* ***State v. Mabra***, 61 Wis. 2d 613, 625, 213 N.W.2d 545 (1974) ("The arresting officer may rely on all the collective information in the police department."). More specifically, Brandsma apparently intends to argue that, under the collective knowledge doctrine, the court should have ignored this evidence absent proof from the State demonstrating a witness's personal knowledge that Brandsma was intoxicated. However, the State is not required under the collective knowledge doctrine to present such testimony. Instead, it is required only to present evidence constituting "specific, articulable facts to which the court can apply the reasonable suspicion standard." *See* ***State v. Pickens***, 2010 WI App 5, ¶¶12-17, 323 Wis. 2d 226, 779 N.W.2d 1. Here, the State provided an evidentiary basis to credit the deputies with knowledge of the report of intoxication. Admittedly, the collective knowledge evidence here is not as strong as it would have been if the observation passed along through dispatch had included details on the topic of Brandsma's alleged intoxication. But that weakness goes only to the weight of this specific, articulated fact.

[5] WISCONSIN STAT. § 343.303 provides in part:

> If a law enforcement officer has *probable cause to believe* that the person is violating or has violated s.346.63(1) or (2m) ... the officer, prior to an arrest, may request the person to provide a sample of his or her breath for a preliminary breath screening test using a device approved by the department for this purpose.

(Emphasis added.)

¶14 When reviewing probable cause determinations, courts operate "on a case-by-case basis, looking at the totality of the circumstances. Probable cause is a 'flexible, common-sense measure of the plausibility of particular conclusions about human behavior' ... considering the information available to the officer and the officer's training and experience." ***State v. Lange***, 2009 WI 49, ¶20, 317 Wis. 2d 383, 766 N.W.2d 551 (quoted sources and footnotes omitted).

¶15 Turning to the specific variety of probable cause at issue here, the level of probable cause required to justify administering a preliminary breath test is not the same as probable cause to arrest. Under WIS. STAT. § 343.303, "probable cause to believe" refers to "a quantum of proof greater than the reasonable suspicion necessary to justify an investigative stop ... but less than the level of proof required to establish probable cause for arrest." ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 316, 603 N.W.2d 541 (1999).

¶16 The State points to Brandsma's deficient performance in two field sobriety tests as a basis for probable cause to believe that Brandsma was operating a vehicle while intoxicated. If credited, these tests would provide officers with probable cause to believe that Brandsma was intoxicated, when combined with the dispatch report indicating that Brandsma was intoxicated, the possible odor of intoxicants emanating from the vehicle, and Brandsma's denial of any drinking despite that possible odor. *See* ***Renz***, 231 Wis. 2d 293, 310.

¶17 In response to the State's argument, Brandsma contends that the field sobriety tests are of little or no evidentiary value because Brandsma allegedly had a leg injury that interfered with his ability to perform some of the tests. However, Brandsma appears not to recognize that whether his alleged leg injury interfered with the ability of the deputies to conduct reliable field sobriety tests is a

question of fact, or to recognize that the circuit court implicitly found that Brandsma presented deputies with insufficient evidence for them to question the reliability of the field sobriety tests. And, Brandsma provides me with no basis to conclude that the circuit court's implicit finding was clearly erroneous.

By the Court.—Judgment affirmed.

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