COURT OF APPEALS
DECISION
DATED AND FILED

November 30, 2017

Diane M. Fremgen`
Clerk of Court of Appeals

NOTICE

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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. 2016AP2529-CR **Cir. Ct. No. 2015CF404**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIAM CHARLES BRINK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Monroe County: TODD L. ZIEGLER, Judge. *Affirmed*.

Before Lundsten, Sherman, and Blanchard, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. William Brink appeals a conviction for operating while intoxicated-6th offense, in violation of WIS. STAT. § 346.63(1)(a) (2015-16),[1] as a repeater, and an order denying his motion to suppress evidence. Brink does not challenge the validity of the initial stop of his vehicle by police, based on an alleged equipment violation. Instead, he argues that (1) after the lawful stop, police prolonged his detention to conduct field sobriety tests without reasonable suspicion, and (2) police arrested him without probable cause. We conclude that police had both reasonable suspicion to conduct field sobriety tests and probable cause to arrest. Accordingly, we affirm the circuit court's suppression decision.

BACKGROUND

¶2 One witness, a Sparta Police Department officer, testified at both the preliminary hearing and the suppression hearing. With one exception, addressed below at footnote 2, the officer's testimony was generally consistent in each hearing and generally consistent between the two hearings. The circuit court implicitly or explicitly found his testimony to be credible in both hearings, and the parties on appeal do not dispute the pertinent facts, which we now summarize.

¶3 The officer testified that he had more than four years of law enforcement experience, including police training in an advanced roadside impaired driving enforcement program, which involved learning methods to detect the influence of intoxicants on people, as well as on-duty experience interacting with people under the influence.

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶4 On a Wednesday in October 2015, at 8:05 p.m., the officer was operating a squad car. He noticed a Buick sedan with a high-mounted stop lamp that failed to light up during stops. The officer followed the Buick. The Buick's route seemed "awkward" to the officer, in that it appeared to trace "a big loop" covering approximately one mile before the officer stopped it. However, aside from the potential high-mounted stop lamp violation, the officer did not notice any violations of the traffic law, nor any signs of impaired driving.

¶5 After the officer pulled the Buick over, he made contact with Brink, the car's sole occupant. Before making this stop, the officer did not recall ever encountering Brink.

¶6 The officer asked Brink "[w]here he was coming from [and] where he lived in the city." Brink responded that he had been at a friend's house, and that he was returning to his residence. Brink pointed in the general direction of his residence, although he was not able to give the officer a street address. Brink told the officer that he was on parole and had a revoked driver's license.

¶7 Brink spoke slowly ("had slow speech") and his movements were "very slow," "like he was fatigued," both of which led the officer to believe that Brink was "[p]ossibly impaired."[2] However, the officer did not testify to any other outward signs of impairment from any cause, or of inebriation in particular.

[2] At the preliminary hearing the officer answered yes when asked, "When you spoke with Mr. Brink, you indicated that you thought he had slurred speech and slow movement?" However, this reference to *slurred* speech is inconsistent with other testimony that the officer gave at both the preliminary hearing and the suppression hearing, as well as with the findings of the circuit court following the suppression hearing, which were all to the effect that the officer witnessed only *slow* speech (and slow movement), not slurred speech. Moreover, the State does (continued)

¶8 The officer returned to his squad car to obtain a summary of Brink's driving record, and learned that Brink had "five prior OWIs" and "revoked driving status," which was "alcohol related."[3] However, the officer did not testify that he was aware of any dates or other details regarding the "five prior OWIs" or the revocation. Brink was 46 years old at the time of the encounter.

¶9 After completing the record check, the officer returned to Brink's vehicle and had him perform "the standardized field sobriety tests," starting with the horizontal gaze nystagmus test. This produced no sign of intoxication.

¶10 During the course of this first test, Brink told the officer "that he had no … physical ailments at that time."

¶11 After the officer conducted this test, Brink told the officer "that he was prescribed" Gabapentin, which the officer was aware is a medication to treat "nerve pain."

¶12 The officer then conducted the walk and turn test. During this test Brink "was not able to maintain balance during the instruction phase, and … used

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not argue on appeal that it could rely on an observation of slurred speech. Therefore, we ignore this isolated reference to slurred speech.

[3] The acronym OWI in Wisconsin means "operating while intoxicated." *See, e.g.*, ***City of Eau Claire v. Booth***, 2016 WI 65, ¶1, 370 Wis. 2d 595, 882 N.W.2d 738. However, this is shorthand, because WIS. STAT. § 346.63(1)(a), the OWI statute, prohibits not only driving under the influence of an intoxicant (*see* WIS JI—CRIMINAL 2663), but also driving under the influence of a controlled substance (*see* WIS JI—CRIMINAL 2664), under the combined influence of an intoxicant and a controlled substance (*see* WIS JI—CRIMINAL 2664A), and under the influence of a drug (*see* WIS JI—CRIMINAL 2666). In this context, "intoxicant" means "alcoholic beverage." WIS JI—CRIMINAL 2663. As we discuss below, the State's strongest argument on appeal, which we conclude has merit, is premised on reasonable suspicion of Brink's impairment due to the influence of *an intoxicant* and on the concept that his five prior OWIs were convictions for driving under the influence of *an intoxicant*.

his arms for balance while walking," raising his arms "approximately six inches away from his body," both of which suggested to the officer, based on his training and experience, that "there could possibly be impairment." Up to this point in the field sobriety tests Brink did not indicate to the officer that he had any medical conditions that might have affected his performance on field sobriety tests.

¶13 The officer then conducted the one leg stand test. During this test Brink "[s]wayed while balancing, used arms while balancing, placed his foot down, and then hopped up and down," which the officer considered "poor performance," showing all four clues of impairment associated with this test.

¶14 The officer then conducted two additional field sobriety tests designed to potentially detect impairment due to drug consumption. These were the lack-of-convergence test and the modified Romberg test.

¶15 Brink passed the lack-of-convergence test, meaning that his eyes converged as he stared at the tip of the officer's finger while the officer brought the finger toward Brink's nose.

¶16 The modified Romberg test seeks to test the accuracy of a person's "internal clock"—his or her ability to gauge the passage of time—by asking the person (with closed eyes and head tilted back) to estimate the passage of 30 seconds, as silently timed by the officer. The officer testified that Brink "was slow by 12 seconds." This indicated to the officer that Brink was "possibly" under the influence of a "depressant or a drug that slows the system down," because Brink failed to give an estimate that was no more than "four to five seconds" off from 30.

¶17 After the field sobriety tests, Brink told the officer that he suffered from back pain as a result of a workplace injury, and that this might have had a negative effect on the result of his field sobriety tests.[4]

¶18 Brink was charged, based in part on evidence obtained from a sample of blood taken from Brink following his arrest. He filed a motion to suppress, arguing that the officer "lacked the reasonable suspicion of intoxicated or impaired driving necessary to extend the stop" to conduct the field sobriety tests that led to his arrest and also that police lacked probable cause to arrest him.

¶19 The circuit court denied the suppression motion. On the reasonable suspicion issue, the court concluded that, while the facts do not present "the clearest case for reasonable suspicion to conduct field sobriety tests," the State had produced sufficient evidence to meet the relatively low standard of reasonable suspicion. On the probable cause issue, the court deemed this another "close call," but concluded that the State had demonstrated probable cause to arrest. Brink appeals both decisions.

[4] In their appellate arguments, the parties refer to testimony of the officer about police finding a prescription bottle that apparently contained Gabapentin pills in Brink's vehicle at some point during the encounter with Brink. However, the State failed to elicit testimony from the officer reasonably establishing *when* police found this bottle, relative to the field sobriety testing or to the arrest. In addition, there is some ambiguity in the testimony surrounding pertinent details regarding the bottle. The circuit court appears to have made an implicit finding that police found the bottle during the course of the field sobriety tests, but made no explicit finding along these lines. Taking all of these factors into account, in Brink's favor we ignore the bottle-related testimony and the State's related arguments.

DISCUSSION

I. REASONABLE SUSPICION

¶20 Even brief police detention of a person during a traffic stop "constitutes a 'seizure' of 'persons'" under the Fourth Amendment. ***State v. Gaulrapp***, 207 Wis. 2d 600, 605, 558 N.W.2d 696 (Ct. App. 1996) (quoted source omitted). However, Brink does not challenge the traffic stop here based on the officer's observation of the defective high-mounted stop lamp. He also does not dispute that, after the stop, it was reasonable for the officer to engage with him and take other actions necessary to complete the mission of investigating and addressing the equipment violation. *See* ***Rodriguez v. United States***, 575 U.S. ___, 135 S. Ct. 1609, 1614 (2015) ("the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's 'mission'—to address the traffic violation that warranted the stop, and attend to related safety concerns ....") (citations omitted).

¶21 However, an officer's request to conduct field sobriety tests following an initially valid stop may exceed the permissible scope and duration of an initial lawful seizure, which is what Brink contends occurred here after the officer completed the mission of addressing the equipment violation. *See* ***State v. Colstad***, 2003 WI App 25, ¶19, 260 Wis. 2d 406, 659 N.W.2d 394. An officer may lawfully prolong a valid traffic stop if, during the 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.'" ***Id.*** (quoted source omitted). Thus, the continuation of Brink's detention for the field sobriety tests was lawful if the

officer "discovered information subsequent to the initial stop which, when combined with information already acquired, provided reasonable suspicion that" Brink had committed or was committing an offense or offenses separate and distinct from the equipment violation. *See* ***id.***

¶22 The State has the burden of proof in addressing a motion to suppress. *See* ***State v. Post***, 2007 WI 60, ¶12, 301 Wis. 2d 1, 733 N.W.2d 634.

¶23 Turning to the substance of the test for reasonable suspicion, our supreme court has explained the following:

> The determination of reasonableness is a common sense test. The crucial question is whether the facts of the case would warrant a reasonable police officer, in light of his or her training and experience, to suspect that the individual has committed, was committing, or is about to commit a crime. This common sense approach balances the interests of the State in detecting, preventing, and investigating crime and the rights of individuals to be free from unreasonable intrusions. The reasonableness of a stop is determined based on the totality of the facts and circumstances.

Post, 301 Wis. 2d 1, ¶13 (citations omitted). Reasonable suspicion requires more than an officer's "'inchoate and unparticularized suspicion or "hunch."'" ***Id.***, ¶10 (quoting ***Terry v. Ohio***, 392 U.S. 1, 27 (1968)). "Rather, the officer 'must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant' the intrusion of the stop." ***Id.*** (quoting ***Terry***, 392 U.S. at 21).

¶24 We generally apply this common sense test using an objective yardstick. That is, the general rule is that "the subjective belief of an officer" may not "provide the court with sufficient evidence of probable cause or reasonable suspicion when there is an insufficient objectively reasonable basis for that

conclusion." ***State v. Kramer***, 2009 WI 14, ¶36, n.9, 315 Wis. 2d 414, 759 N.W.2d 598. "Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." ***Id.*** (quoting ***Whren v. United States***, 517 U.S. 806, 813 (1996)).

¶25 As noted above, neither side challenges any fact found or implicitly found by the circuit court, leaving only the question of whether the undisputed facts here establish that the prolonged detention violated the constitutional standards outlined above, a question that we decide de novo. *See* ***State v. Asboth***, 2017 WI 76, ¶10, 376 Wis. 2d 644, 898 N.W.2d 541.

¶26 We agree with the State that, before conducting the field sobriety tests, the officer had enough evidence to support reasonable suspicion that Brink had operated his car *while intoxicated*, as opposed to operating while under the influence of other substances. We first explain why focusing on suspicion of impairment through intoxication makes sense on these facts.

¶27 As a matter of common sense, it adds to the power of the inference of driving under the influence of any particular category of substance if all five of Brink's OWI convictions were for driving while impaired by the *same category* of substance (whether alcohol, a controlled substance, or another drug). In addition, again as a matter of common sense, there is nothing about slow speech and movement, per se, that would seem to suggest the influence of any one of the three categories over the others. Thus, the question here is: *which* single category of substance would best support reasonable suspicion on these facts?

¶28 The answer is alcohol, for two reasons. First, when the substance at issue is "any other drug," then liability attaches only if the person is "under the influence" "'to a degree which renders him or her incapable of safely driving,'" as

opposed to the less restrictive "ability to operate is impaired" standard when the substance at issue is alcohol. *See* WIS—JI CRIMINAL 2666 and WIS—JI CRIMINAL 2663, n.7; ***State v. Hubbard***, 2008 WI 92, ¶¶42, 46, 52, 313 Wis. 2d 1, 752 N.W.2d 839 (quoted source omitted). Second, the officer learned that Brink's driver's license had been revoked for an *alcohol*-related event.

¶29 Having established that the State's best argument is suspicion of impairment through intoxication, we now explain why we conclude that the State presented sufficient evidence to establish reasonable suspicion that Brink was "under the influence of an intoxicant," meaning that his "ability to operate a vehicle was impaired because of consumption of an alcoholic beverage." *See* WIS JI—CRIMINAL 2663.

¶30 As an initial matter on the reasonable suspicion of intoxication topic, we note that the State limits its argument to discussion of the officer's observations of Brink's slow speech and slow movements, and the five prior OWIs. However, we conclude that the following additional facts add to the total picture in favor of reasonable suspicion, even though they are not argued by the State: that this stop occurred during the evening hours and that Brink said he was coming from a friend's residence, which is timing and a setting in which social drinking is more likely to occur than in many other contexts; that Brink appeared to the officer to trace "a big loop" over the course of approximately one mile of observed driving, while being followed by the officer; that Brink had a revoked driving status as a result of an alcohol-related offense; and that Brink was not able to give the officer a street address for his residence.

¶31 While none of the above factors is individually weighty, together they at least contribute to a reasonable suspicion of impairment through

intoxication. Moreover, we conclude that these facts are sufficient, when added to the facts that the State does point to: the officer's observations of Brink's slow speech and slow movements, and the five prior operating while intoxicated convictions.

¶32 Brink contends in part that "[t]here was zero evidence of impaired driving … but significant evidence of *un*impaired driving," and that "the fact of prior convictions for drinking [alcohol] and driving" are irrelevant because of the lack of evidence that Brink had been drinking, much less that he was impaired through intoxication. Brink points to the observed unremarkable driving over an extended distance; apparently prompt and effective cooperation with the stop and other interactions with the officer; no visible completely or partially empty alcohol containers; no smell of alcohol; and no glassy or bloodshot eyes, or other outward signs of intoxication such as incoherent behavior or slurred speech, with the possible exception of slow speech and movement.

¶33 As to the slow speech and slow movement evidence, we recognize that a weakness in the State's argument is that the officer's testimony was generic. The officer did not testify to any particular length of time between words or sentences spoken by Brink, nor did he describe any particular slow movement. And, the small descriptive detail that the officer did provide appears to add little: Brink spoke and acted slowly, as if "fatigued." Moreover, as Brink points out, the officer had no prior experience interacting with or observing Brink, and therefore could not assess whether he was speaking or moving unusually slowly compared to his normal, sober behavior. Brink also points out that there can be "many reasonable explanations for slow speech and movement—including a natural predisposition for a slower pace, fatigue, disability, or injury."

¶34 At the same time, however, the circuit court credited the officer's slow speech and movement testimony as indicia of impairment, which represents an implicit finding that the officer made an intelligent, good-faith assessment that the slowness was caused by impairment from some source or other, as opposed to being the result of a natural predisposition. Moreover, as the State notes and Brink acknowledges, officers are not required to rule out the possibility of innocent behavior in order to justify a continued seizure. *See* ***State v. Young***, 2006 WI 98, ¶21, 294 Wis. 2d 1, 717 N.W.2d 729. Further, it is significant that the circuit court had a factual basis to conclude that the officer had more than a mere snatch of conversation with Brink on which to base his impressions of slowness; the officer testified to several exchanges of information between the two over a period of time that was not merely fleeting.

¶35 Considering all these factors, we conclude that the slow speech and movement evidence, while less weighty than it would have been if not generic, constitutes significant evidence weighing in favor of reasonable suspicion.

¶36 Turning to the prior convictions evidence, Brink does not dispute the State's argument that prior convictions can support reasonable suspicion determinations, *see* ***State v. Blatterman***, 2015 WI 46, ¶36, 362 Wis. 2d 138, 864 N.W.2d 26, but contends that the prior convictions here did not support reasonable suspicion at all.

¶37 As an initial matter on the convictions topic, we reject Brink's argument that the prior convictions are irrelevant because the officer's testimony suggested that he may have decided to conduct field sobriety tests before he learned of the prior convictions. Assuming without deciding that Brink does not misinterpret the pertinent testimony, this argument still fails because it runs afoul

of the general rule, stated above, that we review the objective actions of the police, not what officers were thinking or intended.

¶38 It is true that the State did not present explicit evidence that the officer was aware that Brink, age 46, had been convicted of impaired operation through intoxication even once in recent years. As a matter of common sense, older convictions would have less weight. However, it was a reasonable inference here, based on the alcohol-related revocation, that Brink had at least one fairly recent conviction for impairment through intoxication, and that he might have had other recent convictions. This adds to the reasonable inference that Brink was more likely to be impaired through intoxication than the average driver on the road that evening.

¶39 Reasonable suspicion is assessed under a common sense test that sets a relatively low bar. We conclude that all of the evidence referenced above, when considered in the aggregate, passes muster.

II. PROBABLE CAUSE

¶40 "There is probable cause to arrest 'when the totality of the circumstances within [the] officer's knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant probably committed a crime.'" ***State v. Sykes***, 2005 WI 48, ¶18, 279 Wis. 2d 742, 695 N.W.2d 277 (quoted source omitted). "'The objective facts before the police officer need only lead to the conclusion that guilt is more than a possibility.'" ***Id.*** (quoted source omitted). Whether a given set of facts satisfies the constitutional standard for probable cause to arrest is a question of law for de novo review. *See* ***State v. McAttee***, 2001 WI App 262, ¶8, 248 Wis. 2d 865, 637 N.W.2d 774.

¶41 We conclude that this common sense standard is met here, based on the aggregate evidence of driving while impaired due to intoxication. To all of the evidence discussed above in connection with reasonable suspicion, which we will not repeat, the State adds the clues of intoxication in the field sobriety tests and the officer's assessments of Brink's performance, which were credited by the circuit court. Especially notable are the four-of-four clues of intoxication during the one leg stand test. In addition, the officer could reasonably have concluded that the abnormally slow count during the modified Romberg test contributed to a suspicion that Brink had ingested an excess of a depressant, a category of substances that includes alcohol.

¶42 Brink now emphasizes the officer's testimony that, after he completed the field sobriety tests, Brink explained to the officer that he had injured his back and was taking prescription medication, Gabapentin, for nerve pain. However, Brink told the officer during the first field sobriety test that he had no physical ailments. In addition, there was no evidence tying Brink's alleged back injury to any particular deficiency in the field sobriety tests. In short, Brink fails to persuade us that, on these facts, the officer was obligated to credit Brink's apparently generic post-testing excuse for the deficiencies.

¶43 Brink also contends that, in making its probable cause determination, the circuit court improperly relied on or plainly misinterpreted evidence about the bottle of Gabapentin that police recovered. However, as explained above, we ignore this evidence.

CONCLUSION

¶44 For these reasons, we affirm the circuit court's suppression decisions.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.