2018 WI App 5

COURT OF APPEALS OF WISCONSIN
PUBLISHED OPINION

Case No.: 2016AP2257-CR

†Petition for Review Filed

Complete Title of Case:

STATE OF WISCONSIN,

DEFENDANT-RESPONDENT,

V.

TRAVIS J. ROSE,

DEFENDANT-APPELLANT.†

Opinion Filed:	December 13, 2017
Submitted on Briefs:	September 13, 2017

JUDGES:	Reilly, P.J., Gundrum and Hagedorn, JJ.
Concurred:	
Dissented:	

Appellant ATTORNEYS:	On behalf of the defendant-appellant, the cause was submitted on the briefs of *Hannah Schieber Jurss* of *Frank J. Remington Center*, Madison.
Respondent ATTORNEYS:	On behalf of the defendant-respondent, the cause was submitted on the brief of *Katherine D. Lloyd*, assistant attorney general, and *Brad D. Schimel*, attorney general.

2018 WI App 5

COURT OF APPEALS DECISION DATED AND FILED

December 13, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 2016AP2257-CR

Cir. Ct. No. 2016CF133

STATE OF WISCONSIN **IN COURT OF APPEALS**

STATE OF WISCONSIN,

DEFENDANT-RESPONDENT,

V.

TRAVIS J. ROSE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Washington County: JAMES K. MUEHLBAUER, Judge. *Affirmed.*

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

¶1 GUNDRUM, J. Travis Rose appeals from his judgment of conviction entered upon his guilty plea after the circuit court denied his motion to suppress evidence of illegal drugs found in his vehicle. He claims the evidence should have been suppressed because he was "unconstitutionally seiz[ed]" at the

time the officer asked him for, and he granted, consent to search his vehicle, which search led to the discovery of the drugs. We disagree and affirm.

Background

¶2 The arresting officer was the only witness to testify at the hearing on Rose's suppression motion. His relevant testimony is as follows.

¶3 Around 3:36 p.m. on February 7, 2016, the officer learned from dispatch that it had received two separate 911 calls regarding a silver Honda Civic driving "extremely erratically" on northbound I-41. The officer explained that the callers had described the Civic as

> being all over the road. One of the callers actually was saying that the defendant was slapping himself in the face trying to stay awake.… [O]ne of the callers also stated that when he pulled into [a gas station] he went off into the ditch a little bit, and he was all over all three lanes. Just kind of a huge hazard.

A caller followed the Civic to the gas station, and when the officer arrived there, "people [were] literally stopping out and yelling at [Rose] … because of his driving."

¶4 Approaching Rose, who was filling his vehicle with gasoline, the officer explained he was making contact due to Rose's erratic driving. Rose responded by indicating he had been sending text messages. The officer inquired as to why Rose went into the ditch when pulling into the gas station, and Rose responded that he was attempting to send one final text message before getting gasoline. In response to the officer's inquiry as to what may have been the cause of Rose's erratic driving, Rose also "said something about some prescription medication that he was on."

¶5 While interacting with Rose, the officer did not "smell any type of intoxicants emitting from his person," but Rose was "kind of swaying side to side" and slurring his speech, and it "appeared like he was under the influence of something," though the officer "wasn't sure what." The officer confirmed in his testimony that, based on his training and experience, the swaying and slurred speech, if not caused by "consuming intoxicants," could be caused by "narcotic usage."

¶6 Rose agreed to perform field sobriety tests (FSTs), and the officer and Rose walked into the gas station to do so. The officer observed that Rose's "walking … wasn't normal. He wasn't falling over, but he wasn't walking in a straight line or anything like that. He was kind of all over the place." Talking with Rose on the way into the station, the officer again observed "the slurred speech." Rose then performed the FSTs.

¶7 The officer confirmed that he had been trained with regard to the horizontal gaze nystagmus (HGN) field sobriety test as well as "physical signs a person displays when they are impaired by drugs." He observed no signs of impairment during the HGN test, but confirmed that the test was "relative to alcohol consumption," adding that HGN "is not present with narcotic usage." On the walk-and-turn test, the officer observed two out of eight possible "clues" of impairment, and on the one-leg-stand test, the officer observed no such clues.

¶8 After Rose completed the FSTs, he paid for his gasoline and then he and the officer began walking out of the station toward Rose's vehicle. The officer testified that at this point, the "operating while intoxicated portion of my investigation was done" and he believed he did not have probable cause to arrest Rose "for operating while intoxicated." The officer observed, however, that after

the FSTs, Rose's condition "appeared to be deteriorating"—his walking was "a little bit more labored" or "cumbersome," he was "stumbling more," and his speech was "a little bit more slurred." The officer testified he was "surprised" Rose had passed the FSTs, and he confirmed that his observations of Rose's "physical condition and behaviors on non-field sobriety related moving" were "different than how he did on field sobriety tests." Based on his training and experience, the officer "believe[d] that there was something else going on," but was not certain if it was "like some type of medical issue [or] a drug issue," although the officer confirmed at the hearing that Rose's condition was "consistent with narcotic ingestion."

¶9 The officer testified that the "next thing that I thought was appropriate to do would be to ask for consent to search" Rose's vehicle. As they walked toward the vehicle, the officer asked Rose "if there was anything in the car that … was illegal or [that he] wasn't supposed to have." Rose responded "no," and the officer then asked him for permission to search his vehicle, to which Rose consented. The officer asked Rose to lean up against Rose's vehicle and then briefly spoke with two other officers on the scene. The officer then again asked Rose for consent to search his vehicle, to which Rose again consented.

¶10 The officer testified he "was not going to allow [Rose] to drive" because, based upon his observations of Rose and the calls to 911, he did not believe Rose could drive safely. The officer further testified that if nothing was found during the search of Rose's vehicle that provided a basis to arrest Rose, "we would have found an alternate way for him to get home."

¶11 Rose's vehicle was searched and evidence was discovered that led to charges of possession of drug paraphernalia and possession of narcotic drugs.

Rose filed the suppression motion at issue in this case, and following the above-discussed evidentiary hearing, the circuit court denied the motion. Rose eventually pled guilty to possession of narcotic drugs, and he was subsequently sentenced. Rose appeals.

Discussion

¶12 Rose contends his consent to the search of his vehicle was invalid because he was "unconstitutionally seiz[ed]" at the time the officer asked him for consent. He insists the officer's authority to continue the temporary investigative seizure "ended when Rose passed the field sobriety tests." Rose acknowledges that his consent was valid if he was still lawfully seized when he gave it. We conclude he was lawfully seized at that time.

¶13 "When we review a circuit court's ruling on a motion to suppress evidence, we apply the clearly erroneous standard to the circuit court's findings of fact. However, we review the circuit court's application of constitutional principles to the findings of fact *de novo*." ***State v. Smiter***, 2011 WI App 15, ¶9, 331 Wis. 2d 431, 793 N.W.2d 920 (2010) (citations omitted).

¶14 A law enforcement officer may detain an individual for investigative purposes if reasonable suspicion or probable cause of criminal activity exists. *See* ***State v. Young***, 2006 WI 98, ¶¶20-21, 294 Wis. 2d 1, 717 N.W.2d 729. Reasonable suspicion exists if, under the totality of the circumstances, "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." ***State v. Post***, 2007 WI 60, ¶13, 301 Wis. 2d 1, 733 N.W.2d 634. Reasonable suspicion must be based on more than an officer's "inchoate and unparticularized suspicion or 'hunch.'" ***Id.***, ¶10 (citation omitted).

An 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." *See **id.*** (citation omitted); *see also* ***State v. Betow***, 226 Wis. 2d 90, 94-95, 593 N.W.2d 499 (Ct. App. 1999). Additionally, 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.

Young, 294 Wis. 2d 1, ¶21 (quoting ***State v. Anderson***, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990)) (alterations in ***Young***).

¶15 A determination of probable cause also requires consideration of the totality of the circumstances. ***State v. Lange***, 2009 WI 49, ¶20, 317 Wis. 2d 383, 766 N.W.2d 551. "Probable cause to arrest is the quantum of evidence within the arresting officer's knowledge at the time of the arrest which would lead a reasonable police officer to believe that the defendant probably committed or was committing a crime." ***State v. Secrist***, 224 Wis. 2d 201, 212, 589 N.W.2d 387 (1999). Like reasonable suspicion, probable cause is an objective standard that is based upon the information available to the officer. ***State v. Kutz***, 2003 WI App 205, ¶12, 267 Wis. 2d 531, 671 N.W.2d 660.

Reasonable Suspicion

¶16 As Rose points out, a temporary investigative seizure based on reasonable suspicion may last only for the amount of time "reasonably required to complete [the stop's] mission"—"a traffic stop 'prolonged beyond' that point is

'unlawful.'" *See* ***Rodriguez v. United States***, 135 S. Ct. 1609, 1616 (2015) (citation omitted). "[T]he 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." ***Id.*** at 1614 (citation omitted). The mission in this case was to determine why Rose had been driving his vehicle erratically and more specifically to determine whether he had been operating his vehicle unlawfully, such as in violation of WIS. STAT. § 346.63(1)(a) (2015-16),[1] which makes it unlawful for a person to operate a vehicle while under the influence of an "intoxicant" or a "controlled substance," or while under the influence of "any other drug to a degree which renders him or her incapable of safely driving."

¶17 According to the officer's testimony at the suppression hearing, he received a report from dispatch that two separate individuals had called 911 to complain about Rose's driving. The individuals collectively reported that Rose had been driving "extremely erratically" and "all over all three lanes," had been "slapping himself in the face trying to stay awake," and "went into the ditch a little bit" when he pulled into the gas station. Rose's driving was of such concern that when the officer arrived at the gas station, "people [were] literally stopping out and yelling at [Rose] ... because of his driving." When the officer confronted Rose about his reportedly erratic driving, Rose attributed it to texting. The officer had significant reason to doubt that texting was the sole cause of Rose's dangerous driving as Rose stood by the gasoline pump swaying and slurring his speech and it

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

appeared to the officer that he was "under the influence of something." More consistent with the 911 reports and the officer's own observations of Rose's condition, Rose presented the officer with another explanation for his erratic driving and seemingly impaired condition—prescription medication that Rose stated he was "on."

¶18 The officer smelled no alcohol on Rose; however, due to Rose's condition, the officer had him perform FSTs. The officer noticed no clues of impairment with the HGN test; however, his training informed him that the test does not give an indication if a person is impaired due to the use of narcotics. On the walk-and-turn test, the officer did observe indicia of impairment, but only two out of eight clues, and the officer observed no indicia of impairment on the one-leg-stand test. The officer was "surprised" by Rose's performance on the FSTs because it was not consistent with the officer's observations with regard to Rose's "non-field sobriety related moving." Following the conclusion of the FSTs, the officer observed that Rose's condition had worsened—his walking was more labored and cumbersome, he was stumbling more, and his speech was more slurred.

¶19 Despite Rose passing the FSTs and the officer apparently concluding Rose was not impaired due to alcohol, the officer, quite reasonably, "believe[d] there was something else going on," though he did not know if it was a "medical issue" or a "drug issue." The officer was aware Rose had not only indicated he was "on" prescription medication but also that he had done so in response to the officer's inquiry as to what may have been the cause of his erratic driving. Again, the officer also knew that two separate individuals had reported Rose's dangerous driving, and one reported that Rose had been "slapping himself in the face trying to stay awake." While drowsiness certainly can be due to a lack of sleep, it is

common knowledge—and a warning on many prescription drug bottles—that drowsiness also can be caused by ingestion of certain prescription medication. The officer was "not required to rule out the possibility of" an innocent cause of Rose's condition, such as a medical issue or perhaps lack of sleep, before continuing Rose's temporary detention for further investigation. *See* ***State v. Williams***, 2001 WI 21, ¶46, 241 Wis. 2d 631, 623 N.W.2d 106 (citation omitted).

¶20 Contrary to Rose's position, reasonable suspicion that Rose had been unlawfully operating his vehicle did not dissipate as a result of his performance on the FSTs. Under the totality of the circumstances, a reasonable law enforcement officer still would have reasonably suspected that Rose was "under the influence of something"—as this officer testified that he believed—even though the officer was not yet certain what that "something" was. While Rose had "passed" the HGN, one-leg-stand, and walk-and-turn FSTs—though exhibiting two out of eight clues of impairment on the walk-and-turn test—he had not passed the most common sense of tests—the being-able-to-walk-in-a-straight-line-and-not-stumble, the not-sway-while-standing, and the not-slur-speech "tests." From the totality of the circumstances, a "reasonable inference of wrongful conduct"—that Rose had driven while under the influence of a drug or drugs—could "be objectively discerned," and thus "the officer[] ha[d] the right" to continue the temporary detention of Rose for further investigation. *See* ***Young***, 294 Wis. 2d 1, ¶21 (citation omitted).

¶21 The officer had smelled no alcohol and detected no alcohol impairment through the HGN test. As the circuit court stated it, the officer essentially testified that his "OWI" investigation was complete following the FSTs. The court also recognized, however, that considering the "entire scenario," the FSTs were just the "initial investigation." The court found that after Rose

passed the FSTs, the officer continued to detain him to "investigate further," as well as for public safety. The court found that "[e]ven though the officer didn't say … in so many words [that he continued to detain Rose for the purpose of further investigation], that's clearly what he's doing. He's investigating … [a]nd still try[ing] to figure things out."

¶22 The circuit court's finding that the officer continued detaining Rose in part to "investigate further" is consistent with the officer's agreement at the hearing that his observations of Rose's condition were "consistent with narcotic ingestion," the officer's testimony that Rose had indicated he was "on" prescription drugs, and that following the FSTs the officer believed there was "something else going on," such as a medical or drug impairment issue, so the "*next thing* that [the officer] thought was appropriate to do" was to "ask for consent to search the vehicle." (Emphasis added.) Furthermore, on cross-examination, Rose's counsel asked: "And so at the time that he had completed the field sobriety tests essentially your—that investigation regarding his impairment and ability to drive safely was done, fair to say?" The officer responded: "The OWI or operating while *intoxicated portion* of my investigation was done, yes." (Emphasis added.) The officer's testimony was not that his investigation into the cause of Rose's seemingly impaired driving was completed with the conclusion of the FSTs as it is clear from the hearing transcript that when the officer used the word "intoxicated," he was referring only to *alcohol* intoxication, as opposed to intoxication due to drugs.[2] Such usage is consistent with WIS. STAT.

[2] [State:] What did you note about [Rose's] condition?

(continued)

§ 346.63(1)(a), which refers to an "intoxicant" separately from a "controlled substance" or "any other drug." Additionally, the fact that the officer asked to search Rose's vehicle also supports the circuit court's finding that the officer was in fact "investigating further," as evidence of the use of drugs, prescription or otherwise, might well be found in the vehicle. The circuit court correctly found

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> [Officer:] … I didn't *smell* any type of *intoxicants* emitting from his person. He was kind of swaying side to side. He was slurring his speech. He appeared like he was under the influence of something. I wasn't sure what.
>
> [State:] But no *odor* of *intoxicants*, correct?
>
> [Officer:] *Correct*.
>
> [State:] The swaying that you observed and the slurring of the speech, based on your training and experience is there *something else* that could be indicative of if it's not consuming *intoxicants*?
>
> [Officer:] *Yes*.
>
> [State:] And what would that be?
>
> [Officer:] It could have been *narcotic usage*.
>
> ….
>
> [State:] At the conclusion of [the field sobriety tests] what opinion did you form about how he performed on those tests?
>
> [Officer:] [M]y opinion was I did not have reason to arrest him for operating while *intoxicated*. But I also believed that there was something else going on. I wasn't sure what it was.
>
> ….
>
> [Defense counsel:] …. And so at the time that he had completed the field sobriety tests essentially your—that investigation regarding his impairment and ability to drive safely was done, fair to say?
>
> [Officer:] The OWI or operating while *intoxicated portion* of my investigation was done, yes. (Emphasis added.)

that the officer's investigation into Rose's seemingly impaired driving was not completed at the time the officer asked Rose for consent to search his vehicle. The officer was still in the midst of his very appropriate mission of investigating whether Rose had been unlawfully operating his vehicle.

¶23 Moreover, not only was the officer in fact not finished with his investigation when he asked Rose for consent to search his vehicle, he reasonably should not have been finished with it. *See* ***Rodriguez***, 135 S. Ct. at 1614 (holding that "[a]uthority for the seizure … ends when tasks tied to the traffic infraction are—or reasonably should have been—completed"). In light of the totality of the circumstances facing this officer, a reasonable officer would not have believed his/her tasks were completed as to an investigation of Rose for driving under the influence of a controlled substance or "under the influence of any other drug to a degree which render[ed] him … incapable of safely driving," *see* WIS. STAT. § 346.63(1)(a), simply because Rose passed the FSTs. Here, when the officer asked Rose for consent to search his vehicle, a reasonable officer would have been, and this officer was, still "addressing the infraction"—Rose's extremely erratic and dangerous driving, likely due to impairment by a substance. Thus, Rose remained lawfully seized when the officer asked him for consent to search his vehicle. *See* ***Rodriguez***, 135 S. Ct. at 1614.

Probable Cause

¶24 Although not addressed by either party, it is apparent that while Rose was not under arrest at the time the officer asked him for consent to search his vehicle, probable cause—a more stringent standard than reasonable suspicion—existed that Rose had violated WIS. STAT. §§ 346.63 and 346.89. The

officer's continued seizure of Rose at the time he requested Rose's consent was lawful on this basis as well.

¶25 Even with Rose's largely successful performance on the FSTs, at the time the officer asked Rose for consent to search his vehicle, the totality of the circumstances were such that not only would a reasonable officer have reasonably suspected Rose was under the influence of a controlled substance or "under the influence of any other drug to a degree which render[ed] him … incapable of safely driving," a reasonable officer would have had probable cause that Rose had violated this WIS. STAT. § 346.63(1)(a) provision. Though this officer apparently did not recognize that he had probable cause, our constitutional inquiry asks what a reasonable officer in the position of this officer would have determined, not what this particular officer subjectively determined. *See* ***State v. Repenshek***, 2004 WI App 229, ¶10, 277 Wis. 2d 780, 691 N.W.2d 369 ("[T]he existence of probable cause is determined objectively without regard to the 'actual motivations' or '[s]ubjective intentions' of the arresting officer." (quoting ***Whren v. United States***, 517 U.S. 806, 813 (1996))). Here, Rose admitted to the officer that he was "on" prescription medication and did so in the context of the officer's inquiry into what may have been the cause of his erratic driving. Furthermore, two witnesses had reported Rose's extremely erratic driving, including one witness reporting that he had driven partially into a ditch, and a witness reported that Rose had been "slapping himself in the face trying to stay awake." Additionally, the officer's own observations of Rose's condition clearly indicated Rose was incapable of safely operating a motor vehicle—indeed, the officer directly testified that he was not going to allow Rose to get back behind the wheel of his vehicle because "he did not appear safe to drive." The officer had probable cause to arrest Rose for a drug-based violation of § 346.63(1)(a).

¶26 In addition to probable cause to believe Rose had been unlawfully operating his vehicle while under the influence of drugs, the officer also had probable cause to believe Rose had violated Wisconsin law prohibiting texting while driving. WISCONSIN STAT. § 346.89(3)(a) provides: "No person may drive … any motor vehicle while composing or sending an electronic text message or an electronic mail message." Rose had indicated to the officer that his erratic driving was due to texting. This may in fact have been true in part—while Rose appeared to be impaired, he also may have been driving poorly due to texting while driving. Rose's statements to that effect and the 911 reports of his erratic driving provided the officer with probable cause to believe Rose had violated § 346.89(3)(a).

¶27 In ***State v. Baudhuin***, 141 Wis. 2d 642, 645, 416 N.W.2d 60 (1987), an officer stopped the defendant because he was driving in a manner which constituted impeding traffic. The officer testified he had only intended to ask the defendant what was wrong—not cite him for impeding traffic—but in speaking with the defendant, the officer began to suspect he was operating while intoxicated and, through investigation, eventually concluded the same. ***Id.*** at 646. The defendant was charged with OWI, he filed a motion to dismiss which was denied, and he ultimately was convicted following a court trial. ***Id.*** at 644-45. On appeal, our supreme court upheld the circuit court's denial of the motion to dismiss. The court determined that even though the officer did not stop the defendant for the purpose of issuing him an impeding traffic citation, the officer "had before him objective facts that *would have justified* a stop *if his purpose were* to issue a citation for impeding traffic." ***Id.*** at 649-50 (emphasis added). The court recognized that the officer "acted on a different theory," but stated:

> As long as there was a proper legal basis to justify the intrusion, the officer's subjective motivation does not require suppression of the evidence or dismissal. The

> officer's subjective intent does not alone render a search or seizure of an automobile or its occupants illegal, as long as there were objective facts that would have supported a correct legal theory to be applied and as long as there existed articulable facts fitting the traffic law violation.

Id. at 650-51.

¶28 In the case now before us, this particular officer's subjective basis for continuing the detention of Rose is not determinative of whether the detention was lawful at the time the officer asked Rose for permission to search his vehicle. As long as there was an objectively lawful basis to continue the detention at that time, Rose remained lawfully detained. Under the totality of the circumstances, a reasonable officer would have been entirely justified in continuing the detention of Rose for investigation related to a drug-based violation of WIS. STAT. § 346.63(1)(a) and/or a violation of WIS. STAT. § 346.89(3)(a), and to take the appropriate time to complete tasks related to such an investigation and/or the issuance of a citation.

¶29 Based on the foregoing, we conclude Rose was lawfully detained at the time the officer asked for his consent to search his vehicle. As a result, Rose's consent was valid and the search pursuant to that consent was lawful.

By the Court.—Judgment affirmed.