

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 19, 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. 2016AP2168

Cir. Ct. No. 2016TR4784

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

NEIL R. HEBERT,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Eau Claire County:
WILLIAM M. GABLER, SR., Judge. *Reversed and cause remanded for further proceedings.*

¶1 HRUZ, J.¹ The State appeals an order dismissing a citation against Neil Hebert for operating a motor vehicle while intoxicated (OWI), as a first

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.

offense, entered after the circuit court had granted Hebert's motion to suppress evidence. We conclude law enforcement had reasonable suspicion that Hebert was operating his vehicle while intoxicated, which permitted an extension of the initial traffic stop for further investigation of that suspicion. Therefore, Hebert's constitutional rights were not violated, and the suppression motion was incorrectly granted. We reverse and remand for further proceedings consistent with this opinion.

¶2 State trooper Joseph Desprez stopped a vehicle at about 2:30 a.m. when his radar showed the vehicle had been traveling at thirty-seven miles per hour in a thirty miles-per-hour zone. After the vehicle was stopped, Desprez approached its driver's side of the vehicle, spoke with the driver (Hebert), and asked Hebert for a driver's license. There was a passenger in the vehicle's front seat. Desprez smelled a "moderate" odor of alcohol coming from the vehicle and observed Hebert had glassy, but not bloodshot, eyes. Hebert told Desprez that he had consumed "a couple beers" at an event with co-workers that night. Upon Desprez's requests, Hebert exited the vehicle, performed standardized field sobriety tests, and submitted to a preliminary breath test. The results of these tests led to Hebert's arrest.

¶3 Desprez was the only witness at the hearing on Hebert's suppression motion. After making findings of fact consistent with Desprez's testimony, the circuit court concluded Desprez did not have reasonable suspicion that Hebert

committed an OWI offense so as to lawfully extend the stop.² The court explained Desprez merely knew Hebert had consumed alcohol that night and therefore had a mere “hunch” of intoxication. The court entered an order granting Hebert’s suppression motion, and it later entered another order dismissing the case with prejudice. The State now appeals.

¶4 In reviewing a motion to suppress evidence, we apply a two-step standard of review. *State v. Eason*, 2001 WI 98, ¶9, 245 Wis. 2d 206, 629 N.W.2d 625. We will uphold the circuit court’s findings of historical fact unless they are clearly erroneous. *Id.* We then review the application of constitutional principles to those facts de novo. *Id.*

¶5 The only issue on appeal involves the legality of the extension of the traffic stop. A lawful traffic stop may be extended if a law enforcement 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.” *State v. Colstad*, 2003 WI App 25, ¶19, 260 Wis. 2d 406, 659 N.W.2d 394 (quoting *State v. Betow*, 226 Wis. 2d 90, 94-95, 593 N.W.2d 499 (Ct. App. 1999)). We must ask whether a reasonable police officer would, in light of his or her training and experience, draw an inference of suspicious conduct under the totality of the facts and circumstances. *State v. Post*, 2007 WI 60, ¶13, 301 Wis. 2d 1, 733 N.W.2d 634. By contrast, an officer’s

² Before Desprez was cross-examined regarding the field sobriety tests Hebert performed, the circuit court halted Desprez’s testimony and ruled on whether there was reasonable suspicion to extend the traffic stop. The court ultimately did not discuss or rule on whether there was probable cause to arrest, having already concluded there was no reasonable suspicion to extend the stop.

inchoate and unparticularized suspicion, or hunch, is insufficient under this standard. *Id.*, ¶10. We do not distinguish or dismiss factors as innocent in isolation when evaluating reasonable suspicion. See *State v. Waldner*, 206 Wis. 2d 51, 58-59, 556 N.W.2d 681 (1996).

¶6 We conclude Desprez validly extended the stop in order to investigate a possible OWI offense. Desprez stopped Hebert’s vehicle at 2:30 a.m. It is common knowledge that incidents of OWI occur more often around 2:30 a.m. or “bar time.” See *Post*, 301 Wis. 2d 1, ¶36; WIS. STAT. § 125.32(3). Desprez noted the interior of the vehicle smelled of intoxicants. When questioned, Hebert admitted he had been drinking alcohol that night, thus allowing for a reasonable inference that he was a potential source of the odor. Importantly, Desprez further observed Hebert’s eyes were glassy, which is a possible physical cue of impairment. See, e.g., *State v. Haynes*, 2001 WI App 266, ¶12, 248 Wis. 2d 724, 638 N.W.2d 82. Hebert had also been speeding. See *State v. Valenti*, No. 2016AP662, unpublished slip op., ¶10 (WI App Sept. 7, 2016) (speeding may be relevant to suspicion of intoxication under totality of the circumstances).³ Any one factor may be insufficient to give rise to reasonable suspicion if considered alone, see *Waldner*, 206 Wis. 2d at 58, and they even may not reach probable cause to arrest when considered together, see *Eason*, 245 Wis. 2d 206, ¶19 (reasonable suspicion is a less demanding standard than probable cause). However, when the factors are evaluated as a whole, a reasonable inference arises that Hebert was intoxicated.

³ Unpublished, authored opinions issued on or after July 1, 2009, may be cited for persuasive value. WIS. STAT. RULE 809.23(3)(b).

¶7 In disputing this conclusion, Hebert notes that his eyes—while glassy—were not bloodshot, he did not slur his speech, and he did not fumble around when retrieving his driver’s license and giving it to Desprez. The absence of these facts is not controlling. “Suspicious conduct by its very nature is ambiguous, and the principal function of the investigative stop is to quickly resolve that ambiguity.” *Waldner*, 206 Wis. 2d at 60. Given Desprez’s observations, he was not required to credit Hebert’s admission of having consumed only “a couple” of beers, to assume the alcohol smell came only from the passenger, or to allow Hebert to leave without confirming or dispelling any suspicion that Hebert was committing an OWI offense. *See id.* at 60-61.

¶8 Hebert stresses that in *State v. Meye*, No. 2010AP336-CR, unpublished slip op., ¶1 (WI App July 14, 2010),⁴ we concluded an odor of intoxicants did not give rise to reasonable suspicion of OWI. In *Meye*, however, the officer solely smelled an odor of intoxicants after the driver and a passenger walked by the officer in a parking lot and the driver got into her vehicle. *Id.*, ¶2-3. No additional factors suggested the driver was intoxicated. *Id.*, ¶6. In this case, several factors in addition to the mere odor of intoxicants allowed Desprez to infer Hebert may have been engaged in an ongoing OWI violation. *See supra* ¶6.

¶9 Hebert’s comparison of this case to *Betow*, where we concluded reasonable suspicion did not exist, is similarly unconvincing. In *Betow*, officers relied only on vague facts during a traffic stop—the most significant being a picture of a mushroom on the defendant’s wallet—in suspecting the defendant

⁴ We remind Hebert that WIS. STAT. RULE 809.19(3)(b) requires inclusion of any cited unpublished opinion in the respondent’s appendix, which he has not done despite his discussion of *State v. Meye*, No. 2010AP336-CR, unpublished slip op. (WI App July 14, 2010).

possessed illicit drugs. *Betow*, 226 Wis. 2d at 95. The officers observed neither evidence of intoxication or drug use, nor anything specifically pointing to drug possession. *See id.* at 92, 95-97. Here, in contrast, Desprez observed multiple specific factors indicating Hebert was operating while intoxicated. *See supra* ¶6. Based upon these factors, Desprez had reasonable suspicion to extent the traffic stop.

By the Court.—Order reversed and cause remanded for further proceedings.

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

