COURT OF APPEALS
DECISION
DATED AND FILED

January 23, 2018

Diane M. Fremgen
Acting Clerk of Court of Appeals

Appeal No. 2017AP001047
2017AP001048

Cir. Ct. No. 2015TR007965
2015TR007966
2015TR007967

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

COUNTY OF MILWAUKEE,

PLAINTIFF-RESPONDENT,

V.

NICHOLAS O. MORAN,

DEFENDANT-APPELLANT.

APPEALS from judgments of the trial court for Milwaukee County: MICHELLE ACKERMAN HAVAS, Judge. *Affirmed*.

¶1 DUGAN, J.[1] In these consolidated appeals, Nicholas Moran appeals his convictions for operating while under the influence of an intoxicant (OWI)—first offense, operating with a prohibited alcohol concentration—first offense and

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

inattentive driving. Moran challenges the trial court's denial of his motion to suppress evidence that law enforcement officers obtained after he was detained for the purpose of administering field sobriety tests, and the denial of his subsequent motion for reconsideration. Moran contends that the deputy investigating the automobile accident in which Moran was involved was not credible and the deputy did not have reasonable suspicion to believe that Moran was operating his vehicle while under the influence of an intoxicant. Therefore, Moran asserts that Kellner could not further detain Moran to administer field sobriety tests.

¶2 We conclude that the deputy had reasonable suspicion to detain Moran. We also hold that the trial court properly exercised its discretion in determining the historical facts, including credibility determinations, and we uphold those findings. Therefore, we affirm the judgments of conviction.[2]

BACKGROUND

¶3 At a January 2016, evidentiary hearing on Moran's motion to suppress, the sole witness, Milwaukee County Sheriff's Deputy Nicholas Kellner, testified that on the evening of April 23, 2015, at about five o'clock, he was dispatched to investigate a traffic accident on westbound interstate I-94 near Hawley Road. Having been employed as a deputy sheriff for fifteen years, Kellner had investigated "[w]ell over a thousand" accidents.

[2] Although Moran's notice of appeal states that he is appealing the three convictions, he does not make any arguments regarding his conviction for inattentive driving. Therefore, he has conceded that he was properly convicted of that charge. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (stating that "[i]ssues not addressed are deemed conceded").

¶4 When Kellner arrived at scene, he observed two cars partially in traffic on the westbound Hawley Road entrance ramp. Moran's vehicle had struck the other vehicle from behind. Kellner approached Moran's vehicle and Moran identified himself. Kellner then checked on the people in the other vehicle who stated they were not injured.

¶5 Kellner then returned to Moran's vehicle and asked him what happened. Kellner testified that,

> [Moran] started telling me more of a longer, vague story than specifically how the crash occurred. I tried to ask him more specific questions. He stated that they were going to get off at Bluemound Road or Highway 100, which is maybe three or four miles away. It really wasn't anywhere near the area that we were sitting in, which was kind of weird.

Moran then told Kellner that he was coming from a Brewers' game that had just ended.

¶6 Kellner went on to testify that,

> When [Moran] was speaking to me, a lot of the times he would turn his head away and start fumbling with either items that were on his passenger seat or in between the seats in the console, which was kind of weird to me. Usually people at accident scenes are very direct and specific in getting their side of the story out.

When asked if he could smell any odor, Kellner stated that "[Moran] was chewing some gum at the time, so all I could smell was the mint coming from the gum."

¶7 When asked what Moran said about the accident, Kellner stated that,

> The most specific that he got was that he came up upon the car in front of him too fast because he was looking down for a minute. I asked him what he was looking down at.

> He said he was checking his wallet to see if he had enough money to go to a bar.

¶8 In response to Kellner's question about how much he had to drink that day, Moran said "four beers." In response to the State's question, "in your course of OWI investigations, are people typically truthful with how much they've drank?," Kellner answered, "No." Moran said he started drinking around eleven that morning and stopped at four that afternoon. When Kellner asked Moran what time it was, Moran estimated it was six, when in fact it was around "5:20, 5:30."

¶9 Kellner testified that at that point he formed the opinion that the next appropriate step would be to perform field sobriety tests. Kellner stated that he formed the opinion based on the following:

> Moran not speaking to me directly, looking away, chewing the mint gum, and the vagueness of lack of detail in what he was saying happened in the accident, in conjunction with the original call that I was dispatched to in the CAD [computer aided dispatch] information that somebody on scene believed that the operator of the black vehicle was drinking or had been drinking, all those put together.…

Kellner went on to testify that he does not always suspect that the driver who causes an accident is impaired or that someone who is chewing gum has been drinking.

¶10 After the evidentiary hearing, the trial court issued an oral decision finding that Kellner was credible and that reasonable suspicion that Moran had been operating a motor vehicle while under the influence of an intoxicant justified Kellner's decision to administer the field sobriety tests to Moran. The trial court found that Kellner's testimony demonstrated the existence of additional particularized and objective suspicious facts.

¶11 The trial court found that Moran (1) gave "a vague and rambling explanation as to how the accident occurred" which required Kellner to ask more pointed questions to narrow down the facts about what actually happened, (2) turned his head away from Kellner when providing answers to his questions, (3) was chewing a minty gum, (4) was looking down at his wallet to see if he had enough money to go to a bar, (5) had consumed four beers (and Kellner knew that it is not uncommon for people to minimize the number of drinks they consume), (6) was coming from a Brewers game at Miller Park where people are known to consume beer, and (7) incorrectly stated the time (which is another factor that supported Kellner's suspicion that Moran was intoxicated and perhaps confused). The trial court concluded that these facts constituted specific and articulable facts that warranted a reasonable belief that Moran was operating his vehicle under the influence of an intoxicant.

¶12 This appeal followed. Moran raises some additional facts that will be discussed below.

DISCUSSION

¶13 The issue on appeal is whether Kellner had a reasonable suspicion that Moran operated his vehicle while under the influence of an intoxicant to justify the administration of the field sobriety tests. Moran argues that Kellner did not have reasonable suspicion to detain him for the purpose of administering the sobriety tests and Keller's testimony was not credible because it included facts that were not in Kellner's report. Moran also contends that Kellner could not rely on

the information that someone on scene believed that the operator of the black vehicle (apparently Moran's vehicle) was drinking or had been drinking. [3]

¶14 We uphold the trial court's factual findings and credibility determination because they are not clearly erroneous. Furthermore, based on our *de novo* consideration of the facts as found by the trial court, we conclude that, under the totality of the circumstances, a reasonable law enforcement officer would have reasonable suspicion that Moran was operating a vehicle while under the influence of an intoxicant which justified Kellner's request that Moran perform field sobriety tests.

Standard of Review

¶15 The question of whether the deputy had reasonable suspicion to administer the field sobriety test to Moran presents issues of constitutional fact. ***State v. Bailey***, explains, "[a] finding of constitutional fact consists of the [trial] court's findings of historical fact, and its application of these historical facts to constitutional principles." *See* ***id.***, 2009 WI App 140, ¶26, 321 Wis. 2d 350, 773 N.W.2d 488 (citations omitted). "We review the former under the clearly erroneous standard, and the latter independently." *See* ***id.***

¶16 This court further stated,

> We review factual findings and credibility determinations of the trial court under a 'clearly erroneous' standard. *See* WIS. STAT. § 805.17(2). A trial court properly exercises

[3] Because we affirm the trial court's decision and that decision did not mention the information in CAD report that someone anonymously reported that the operator of the black vehicle was drinking or had been drinking as a basis for concluding that reasonable suspicion existed, we do not address Moran's contention that Kellner could not rely upon that information.

> its discretion when it examines the relevant facts, applies a proper standard of law, and, using a demonstrated rational process, reaches a conclusion that a reasonable court could reach. ***Anderson v. Circuit Court for Milwaukee County***, 219 Wis. 2d 1, 9, 578 N.W.2d 633 (1998). '[W]hen the trial judge acts as the finder of fact, ... [it] is the ultimate arbiter of the credibility of the witnesses.' ***Gehr v. City of Sheboygan***, 81 Wis. 2d 117, 122, 260 N.W.2d 30 (1977).

See ***Bailey***, 321 Wis. 2d 350, ¶15. However, the determination of "[w]hether a stop or detention meets statutory and constitutional standards, however, is a question of law subject to *de novo* review." ***State v. Betow***, 226 Wis. 2d 90, 93, 593 N.W.2d 499 (Ct. App. 1999).

Standard for Investigative Stops

¶17 In ***Bailey***, we explained:

> In ***Terry*** [***v. Ohio***], the United States Supreme Court recognized that there were some circumstances in which police officers may conduct a valid investigatory stop without a warrant and in the absence of probable cause to arrest. The stop is permissible if the officer, in light of his or her experience, had reasonable suspicion based on 'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.' We review the facts under the totality of the circumstances. Whether the intrusion is warranted is a common sense test. '[I]n assessing the officer's actions, we should give weight to his or her training and experience, and the knowledge acquired on the job.' An investigatory stop is permissible for a violation of the non-criminal traffic laws as well as criminal.

Bailey, 321 Wis. 2d 350, ¶25 (citations and explanatory parentheticals omitted).

¶18 "Reasonable suspicion requires that a police officer possess specific and articulable facts that warrant a reasonable belief that criminal activity is afoot." ***State v. Young***, 2006 WI 98, ¶21, 294 Wis. 2d 1, 717 N.W.2d 729. A hunch is not enough. ***Id.*** "On the other hand, 'police officers are not required to

rule out the possibility of innocent behavior before initiating a brief stop.'" ***Id.*** (citation omitted).

¶19 Moreover, as the court in ***Betow*** explained,

> If, during a valid traffic 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, the stop may be extended and a new investigation begun. The validity of the extension is tested in the same manner, and under the same criteria, as the initial stop.

Id., 226 Wis. 2d at 94-95.

¶20 For example, in ***County of Jefferson v. Renz***, police pulled Renz over for a loud muffler—a violation of traffic laws. *See* ***id.***, 231 Wis. 2d 293, 296, 603 N.W.2d 541 (1999). The court discussed the steps an officer may take when the officer has reasonable suspicion that a traffic law was violated. *See* ***id.*** at 310-11. The court explained,

> First, an officer may make an investigative stop if the officer 'reasonably suspects' that a person is violating the non-criminal traffic laws. After stopping the car and contacting the driver, the officer's observations of the driver may cause the officer to suspect the driver of operating the vehicle while intoxicated. If his observations of the driver are not sufficient to establish probable cause for arrest for an OWI violation, the officer may request the driver to perform various field sobriety tests.

Id. at 310.

Kellner had Reasonable Suspicion that Moran was Operating a Vehicle While Intoxicated

¶21 Moran argues that this case involves nothing more than a "minor fender-bender" accident that should not have evolved into an OWI investigation.

He argues that Kellner's observations of Moran do not rise to the level of providing him with reasonable suspicion to further detain Moran in order to conduct field sobriety tests.

¶22 In this case, Kellner was investigating a motor vehicle accident where both involved vehicles had pulled to the side of the entrance ramp and stopped before he arrived. He was trying to determine if Moran had violated a traffic law when he rear-ended the other vehicle. A key component in that determination was what caused the accident. One cause of the accident was that Moran was inattentive in his driving—he was looking in his wallet to see if he had enough money to go to a bar. However, as Kellner began talking with Moran, he became suspicious that Moran may have been operating his vehicle while under the influence of an intoxicant.

¶23 Moran argues that Kellner was not credible because his testimony included facts that were not in his police report. The trial court rejected that argument and specifically found Kellner's testimony to be credible. It noted that there was nothing inconsistent between the testimony and the report, and that "the written report just doesn't contain all the details that came out in testimony."

¶24 As noted, we review factual findings and credibility determinations of the trial court under a "clearly erroneous" standard. *See* WIS. STAT. § 805.17(2). A trial court properly exercises its discretion when it examines the relevant facts, applies a proper standard of law, and, using a demonstrated rational process, reaches a conclusion that a reasonable court could reach. ***Anderson v. Circuit Court for Milwaukee Cty.***, 219 Wis. 2d 1, 9, 578 N.W.2d 633 (1998). "[W]hen the trial judge acts as the finder of fact, ... [it] is the ultimate arbiter of the

credibility of the witnesses." ***Gehr v. City of Sheboygan***, 81 Wis. 2d 117, 122, 260 N.W.2d 30 (1977). In ***Gauthier v. State***, the court stated,

> The credibility of the witnesses is properly the function of the jury or the trier of fact, in this case the trial judge. It is only when the evidence that the trier of fact has relied upon is inherently or patently incredible that the appellate court will substitute its judgment for that of the fact finder, who has the great advantage of being present at the trial.

Id., 28 Wis. 2d 412, 416, 137 N.W.2d 101 (1965).

¶25 We conclude that the evidence relied upon by the trial court was not inherently or patently incredible. The trial court examined the relevant facts, applied a proper standard of law and used a rational process, and reached a conclusion that a reasonable court could reach—that Kellner's testimony was credible. Moran did not testify and the defense called no witnesses. There is, therefore, no contradictory evidence in the record. The trial court's findings are supported by the record. Accordingly, the trial court's findings of historical fact, including its credibility determination, stand.

The Trial Court Properly Applied Its Findings of Historical Fact to the Constitutional Issue in this Case

¶26 After making its findings of fact the trial court found that, based on those facts, Kellner possessed specific and articulable facts that warranted a reasonable belief that Moran was operating his vehicle while under the influence of an intoxicant and that reasonable belief justified administering field sobriety tests to Moran. We agree.

¶27 Rather than review the totality of the circumstances, Moran examines each individual factual finding and argues that none of them rises to the level of reasonable suspicion. However, it is well established that each fact must

not be reviewed individually but rather under the totality of the circumstances. *See* ***Bailey***, 321 Wis. 2d 350, ¶26. The record reflects that Kellner was well aware of the proper approach to view the facts when contemplating a stop, as demonstrated with respect to Kellner's observation that Moran was chewing gum. Kellner stated,

> I mean, people chew gum all the time. It's in itself not a stand-alone indication of somebody who's impaired or trying to mask that they were drinking, but putting that together with … Moran not wanting to look in my direction when he's talking and so his breath isn't coming into my direction and again the vagueness of his storytelling of the accident, *those things all put together are more indicative of impairment or somebody who's hiding impairment.*

In its decision, the trial court also explained that although merely chewing minty gum is not in and of itself indicative that Moran trying to hide something, but it is "a piece" of the totality of the circumstances. It noted that Moran was also turning his head away from Kellner when answering questions. Kellner could reasonably believe that Moran was trying to mask or otherwise avoid having the deputy detect alcohol on his breath.

¶28 Citing ***Betow***, Moran also argues that his being nervous is not sufficient to expand Kellner's investigation into an OWI investigation. ***Betow*** held that the driver's nervousness and the mushroom symbol sewn into the driver's wallet did not establish reasonable suspicion that the driver possessed controlled substances. ***Id.*** 226 Wis. 2d at 92, 98. However, the instant case is factually distinguishable from ***Betow***.

¶29 Betow was initially stopped for speeding. ***Id.*** The court held that under those facts the officer reasonably could ask questions related to the speeding violation. *See* ***id.*** at 93-94. While questioning Betow, the officer noticed that

Betow had a mushroom symbol on his wallet. ***Id.*** at 92. The State argued that because some people signal their use of drugs by displaying a mushroom symbol, it was possible that Betow was sending the same signal by having the symbol on his wallet. ***Id.*** at 95. The State then argued that the possibility that Betow was sending the same signal about drug use, gave the officer a specific articulable reason to at least suspect that Betow might be a drug user. ***Id.*** The court rejected the State's argument stating that the officer's knowledge that some people may use the mushroom symbol as a signal of drug use "is inadequate to support Betow's continued detention in this case—especially when, at the time he made the decision to extend the detention, [the officer] had absolutely no evidence that Betow was 'using'" any drugs. ***Id.*** at 95.

¶30 By contrast, Moran was involved in an accident and Kellner was investigating the cause of the accident. Although Moran told Kellner that he looked down at his wallet briefly to see if he had enough money to go to a bar which supports the inattentive driving charge, that statement did not require that Kellner end the investigation of the cause of the accident. Accidents can have many causes—one cause is operating a vehicle while under the influence of an intoxicant. Kellner considered the facts under the totality of the circumstances, as does this court. *See* ***Bailey***, 321 Wis. 2d 350, ¶26.

¶31 We hold that under the totality of the circumstances, including Kellner's experience, Kellner had reasonable suspicion, based on specific and articulable facts which taken together with rational inferences from those facts, that Moran was operating his vehicle while under the influence of an intoxicant. That reasonable suspicion justified administering the field sobriety tests to Moran. Kellner had been a deputy for fifteen years and assigned to the patrol bureau for

eight years. He had investigated over a thousand traffic accidents and performed thirty-five to forty OWI investigations.

¶32 The facts known to Kellner included that Moran (1) was involved in a rear-end accident, (2) had just left a Brewers baseball game, (3) admitted consuming four beers—(Kellner was also aware that people are not typically truthful with how much they have consumed), (4) had been drinking for approximately five hours, (5) gave a "weird," vague and rambling explanation as to how the accident occurred and where he intended to exit the highway, which required Kellner to ask more pointed questions to ascertain what actually happened, (6) turned his head away and fumbled with items in his vehicle when he spoke—conduct that Kellner found "weird" because "[u]sually people at accident scenes are very direct and specific in getting their side of the story out," (7) was chewing minty gum, and (8) was unsure of the time of day—which the trial court found reflected that Moran was intoxicated, perhaps confused. The facts of this case are unlike those of ***Betow***, where the suspected drug use was unrelated to the purpose of the initial stop—speeding, *and* there was no evidence Betow was using drugs at the time or any time.

¶33 Moran argues that the County "cherry-picks" the facts. He argues that, under the totality of the circumstances, the record shows that "all other indicia of impairment are either (1) absent, or (2) are the product of a conveniently fabrication recollection of 'facts' which were so endemic and important to the deputy's determination to detain that he elected *not* to include them in his report…." He lists the following absent indicia of impairment as (1) slurred speech, (2) bloodshot and/or glassy eyes, (3) difficulty producing his driver's

license or fumbling with his wallet, (4) any difficulty with his mind, and (5) any problem with coordination.

¶34 First, Moran fails to cite any authority for his implicit argument that without some combination of the foregoing indicia of impairment being present in each case there can never be reasonable suspicion that the person is operating while under the influence. "Arguments unsupported by references to legal authority will not be considered." ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

¶35 Secondly, his argument ignores case law. As stated in ***Young***, 294 Wis. 2d 1, ¶21,

> [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.

¶36 We review the facts under the totality of the circumstances and if there are any reasonable inferences of wrongful conduct that can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, then Kellner had the right to detain Moran and administer the field sobriety tests to him. *See* ***id.*** For the reasons stated above, we hold that reasonable inferences support a finding that Moran was operating while under the influence of an intoxicant. The fact that innocent inferences could also be drawn does not change that analysis.

CONCLUSION

¶37 We hold that, under the totality of the circumstances including Kellner's experience, Kellner had reasonable suspicion, based on specific and articulable facts taken together with rational inferences from those facts, that Moran was operating his vehicle while under the influence of an intoxicant. That reasonable suspicion justified further detaining Moran so that he could administer field sobriety tests to Moran. We also hold that the trial court properly exercised its discretion in determining the historical facts, including credibility determinations, and we uphold those findings. Therefore, we affirm the trial court's judgments.

By the Court.—Judgments affirmed.

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