COURT OF APPEALS
DECISION
DATED AND FILED

May 10, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP1375-CR **Cir. Ct. No. 2016CF202**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ELDON ARTHUR HOLT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Grant County: ROBERT P. VAN DE HEY, Judge. *Affirmed*.

Before Lundsten, P.J., Blanchard and Kloppenburg, 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. Eldon Arthur Holt appeals a judgment of conviction for operating with a prohibited blood alcohol concentration (PAC) as a

seventh, eighth, or ninth offense. Holt contends that the results of his blood test should have been suppressed because the blood draw was conducted in violation of Holt's Fourth Amendment rights. Specifically, Holt contends that: (1) police lacked reasonable suspicion to extend the traffic stop by asking whether Holt had been drinking; and (2) police lacked probable cause to arrest Holt for PAC. We reject Holt's Fourth Amendment arguments and affirm.

¶2 Holt was charged with PAC as a seventh, eighth, or ninth offense, and operating a motor vehicle while revoked. Holt moved to suppress the evidence obtained as a result of a blood draw following his arrest.

¶3 The arresting officer testified to the following at Holt's suppression hearing. At 9:30 p.m. the officer observed a vehicle travelling on the highway without working tail lights. The officer followed the vehicle, and noticed that the vehicle "made some small corrections within its lane of travel." The officer stopped the vehicle and identified the driver as Holt. Holt was unable to produce a driver's license, but provided the officer with his Department of Natural Resources hunting license.

¶4 Holt exited the vehicle to check the tail lights. The officer observed that Holt had slightly slurred speech and appeared to be unsteady on his feet, such that he needed to hold onto the vehicle to stabilize himself.

¶5 The officer returned to his squad and checked Holt's information. The officer learned that Holt did not have a valid driver's license. The officer returned to Holt, and verified with Holt that he did not have a valid driver's license and had been cited for driving without a license in the past. During that interaction, the officer noticed that Holt's eyes were bloodshot and glassy, and the officer also detected a slight odor of intoxicants. The officer asked Holt if he had

been drinking, and Holt stated that he had not. The officer returned briefly to his squad, then exited and returned to Holt to inform him that he needed to call a valid driver for a ride home.

¶6 The officer then returned to his squad, and learned from other officers that Holt was subject to a .02 blood alcohol concentration (BAC) restriction and that his driver's license was revoked. The officer approached Holt again, and asked him to submit to a preliminary breath test (PBT). Holt refused. The officer then placed Holt under arrest.

¶7 The circuit court determined that the officer's question as to whether Holt had been drinking was reasonable. The court also determined that, after the officer learned that Holt was subject to a .02 BAC, the officer had probable cause to request that Holt perform a PBT and then probable cause for the arrest. The court therefore denied the suppression motion. Holt pled no-contest and was sentenced to four years of initial confinement and four years of extended supervision. Holt appeals.

¶8 Holt argues first that the officer extended the stop in violation of his Fourth Amendment right to be free from unreasonable seizures by asking him if he had been drinking. Holt contends that the officer lacked reasonable suspicion to deviate from the purpose of the stop, which was to resolve the issues of Holt driving with inoperable tail lights and with a revoked license. He argues that the information known by the officer did not amount to reasonable suspicion that Holt was driving while impaired or with a prohibited blood alcohol concentration. He points out that the officer did not observe Holt driving erratically, and that, rather, the officer observed Holt make the reasonable decision to pull safely into a parking lot rather than onto the side of the highway for the traffic stop. He points

out that slurred speech and unsteadiness may have innocent explanations unrelated to drinking. Holt argues that, in total, the facts known by the officer might support a reasonable belief that Holt had consumed alcohol, but not that he was impaired or had a prohibited blood alcohol concentration. We disagree.

¶9 The State argues that the officer's question whether Holt had been drinking did not extend the stop at all. It points out that the officer made the inquiry while the traffic stop based on the inoperable tail lights was still ongoing, as the officer was still awaiting Holt's driver's license information necessary to complete the citation. The State also argues that, if the question about drinking did extend the stop, it did so by mere seconds. Holt replies that the reasonableness of the extension of the investigation into a new matter is not based solely on the amount of time the new investigation takes. We will assume without deciding that the officer extended the stop by asking the question, such that reasonable suspicion of an intoxicated driving offense was required.

¶10 An officer may extend a traffic stop to investigate matters distinct from the original stop if "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" a separate offense. ***State v. Colstad***, 2003 WI App 25, ¶19, 260 Wis. 2d 406, 659 N.W.2d 394 (quoted source omitted). Thus, the question of whether the officer had reasonable suspicion to ask Holt whether he had been drinking turns on whether the officer "discovered information subsequent to the initial stop which, when combined with information already acquired, provided reasonable suspicion that [Holt] was driving while under the influence of an intoxicant." *See* ***id.*** We independently review whether undisputed facts establish reasonable suspicion. ***Id.***, ¶8.

¶11 "The question of what constitutes reasonable suspicion is a common sense test: under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience." ***Id.***, ¶8 (quoted source omitted). Here, the officer had observed Holt driving at night without working tail lights and noted that Holt had deviated within his lane of travel prior to the officer initiating the stop. After the officer stopped Holt and made contact with him, the officer learned that Holt did not have a valid driver's license. Additionally, the officer observed that Holt was unsteady when exiting his vehicle and had slightly slurred speech and bloodshot eyes, and the officer detected a slight odor of intoxicants. These facts, taken together, would cause a reasonable police officer to reasonably suspect that Holt was driving while intoxicated. Accordingly, the question to Holt of whether he had been drinking was supported by reasonable suspicion.

¶12 We disagree with Holt's contention that the officer lacked reasonable suspicion because the officer did not observe any erratic driving and observed Holt make the safe driving decision to pull into a parking lot, and because there were reasonable innocent explanations for Holt's unsteady balance and slurred speech. When the facts support reasonable inferences of both lawful and unlawful conduct, an officer is entitled to draw the inference of unlawful conduct and "temporarily detain the individual for the purpose of inquiry." *See* ***State v. Anderson***, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990). Accordingly, we reject Holt's Fourth Amendment challenge based on the officer asking Holt whether he had been drinking.

¶13 Next, Holt contends that the officer lacked probable cause to arrest Holt for PAC. He argues that the facts set forth above, together with the officer learning that Holt was subject to a .02 restriction and Holt's refusal of the PBT,

did not establish probable cause to arrest for PAC. Holt asserts that the facts known to the officer, at most, suggested that Holt *possibly* was driving with a prohibited BAC. He contends that his refusal of the PBT should not be considered as a factor supporting probable cause, because a reasonable basis for refusing a PBT is that the results may be unreliable. Holt argues that, because he denied that he had been drinking and refused the PBT, the officer could only speculate as to when Holt had been drinking or how much he had to drink. Holt argues that the "slight" odor of intoxicants indicated that his drinking had not been recent or heavy, and thus it was likely that the alcohol had already been metabolized. Holt argues that the lack of details as to when Holt had been drinking and how much alcohol he consumed precluded probable cause to arrest for PAC. Again, we disagree.

¶14 "Probable cause to arrest ... refers to that quantum of evidence within the arresting officer's knowledge at the time of the arrest that would lead a reasonable law enforcement officer to believe that the defendant was operating a motor vehicle [at a prohibited alcohol concentration]." ***State v. Blatterman***, 2015 WI 46, ¶34, 362 Wis. 2d 138, 864 N.W.2d 26 (quoted source omitted). The facts known to the officer "must be sufficient 'to lead a reasonable officer to believe that guilt is more than a possibility.'" ***Id.***, ¶35 (quoted source omitted).

¶15 Here, at the time of arrest, the officer had observed Holt driving at night without working tail lights and noted that Holt had deviated within his lane of travel, knew that Holt did not have a valid driver's license, had observed that Holt was unsteady when exiting his vehicle and had slightly slurred speech and bloodshot eyes, and had detected a slight odor of intoxicants. Additionally, the officer knew that Holt was subject to a reduced blood alcohol concentration of .02 based on prior drunk driving offenses and that Holt had refused a PBT. Those

facts, together, would lead a reasonable officer to believe that Holt was guilty of PAC.

¶16 We are not persuaded by Holt's argument that the officer could not have probable cause for the arrest absent any specific details as to when Holt drank or how much he had to drink. As Holt concedes, .02 is a low threshold and very little alcohol consumption is required to exceed that amount. *See* ***State v. Goss***, 2011 WI 104, ¶¶2, 26, 28, 338 Wis. 2d 72, 806 N.W.2d 918. Thus, even if the "slight" odor of intoxicants supported only the reasonable inference that Holt had drank little or not recently, that inference would still support probable cause to believe that Holt's BAC was over .02. While the officer could have inferred that any alcohol that Holt had consumed had already metabolized, the officer was not required to make that inference, particularly in light of the other facts set forth above. *See* ***Anderson***, 155 Wis. 2d at 84. Additionally, we are not persuaded that Holt's PBT refusal is inconsequential to the analysis. Again, while the officer could have inferred that Holt refused the PBT because he did not believe the results would be reliable, the officer also could have inferred that Holt refused the PBT because Holt had been drinking and knew that his blood alcohol concentration would register at no less than .02.

¶17 Holt also argues that the details known to the officer fell short of the facts found to establish probable cause to arrest for PAC in ***Blatterman*** and that, therefore, probable cause was lacking in this case. Holt points to facts present in ***Blatterman***, 362 Wis. 2d 138, ¶37, that are not present here: Blatterman was uncooperative during a traffic stop and police had received a report that Blatterman may be intoxicated. However, as the supreme court explained in ***Blatterman***, the determination of probable cause "is case-specific: '[t]he quantum of information which constitutes probable cause to arrest must be measured by the

facts of the particular case.'" ***Id.***, ¶35 (quoted source omitted). Thus, the absence of particular facts that supported probable cause in another case does not dictate the absence of probable cause here. As set forth above, we conclude that the facts known to the officer at the time of the arrest established probable cause. We affirm.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16).