COURT OF APPEALS
DECISION
DATED AND FILED

May 31, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP1284 **Cir. Ct. No. 2016TR1028**

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

IN THE MATTER OF THE REFUSAL OF
DAMIAN A. BETHKE:

DANE COUNTY,

PLAINTIFF-RESPONDENT,

V.

DAMIAN A. BETHKE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: CLAYTON P. KAWSKI, Judge. *Affirmed.*

¶1 BLANCHARD, J.[1] Damian Bethke appeals a refusal judgment and challenges the circuit court's order denying his motion to suppress evidence obtained by police leading up to his warrantless arrest on a drunk driving charge. Bethke argues that he was unlawfully seized without the justification of reasonable suspicion or probable cause. Because law enforcement was presented with reasonable suspicion to believe that a traffic violation had occurred, I conclude that law enforcement had a reasonable basis for the temporary investigatory detention. I also conclude that this temporary investigatory detention was not transformed into an arrest by police conduct that Bethke now challenges. Accordingly, I affirm.

¶2 The following undisputed, pertinent facts are taken from suppression hearing testimony. Early one typically cold January morning, Bethke was driving home from a bar with two companions in a black Ford F-150 pickup truck when the pickup became stuck in a roadside snow bank. Bethke started to walk home alone.

¶3 Sometime thereafter, multiple law enforcement officers responded to a missing person report. A woman reported that she and a friend had been out with her boyfriend earlier that evening, and that the boyfriend, who drove a black Ford F-150 pickup, was missing. One responder, a sheriff's deputy, came across a black Ford F-150 pickup, apparently abandoned in a roadside snow bank.

¶4 In the meantime, Bethke had fallen through ice on the surface of a pond in a farm field. He was able to get out of the pond. Continuing to walk on as

[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.

best he was able in heavy, wet clothing, Bethke eventually reached a residence. From the residence he saw the lights of a patrol car. Bethke ran from the residence, waving his arms, to successfully flag down the patrol car.

¶5 The patrol car that Bethke flagged down was driven by a state trooper, who was among the law enforcement officers responding to the report of the missing man with the black pickup. The trooper asked Bethke over the car loudspeaker if he was the owner of a black F-150 pickup truck. Bethke responded yes. The trooper ordered Bethke to the ground, and Bethke complied. The trooper placed a knee on Bethke's back and handcuffed him. The trooper helped Bethke to his feet and removed the handcuffs so that Bethke could receive medical treatment as other responders arrived on scene.

¶6 After events that do not matter to any issue that I decide, Bethke was formally placed under arrest by a sheriff's deputy and charged with operating while intoxicated. Bethke filed a motion to suppress evidence obtained during and following his detention by the trooper. The circuit court denied Bethke's suppression motion, concluding that the trooper had reasonable suspicion to conduct an investigatory stop and that the deputy had probable cause to arrest Bethke for operating while intoxicated.[2] Bethke was subsequently acquitted of operating while intoxicated and convicted of refusal, and now appeals.

[2] In denying Bethke's motion to suppress, the circuit court determined that the trooper could have reasonably suspected that Bethke had violated WIS. STAT. § 342.40(1m), by leaving the pickup unattended on a public highway "for such time and under such circumstances as to cause the vehicle to reasonably appear to have been abandoned." However, because I affirm the circuit court on a different ground, involving reasonable suspicion of the violation of other laws, I need not and do not address Bethke's argument that the circuit court erred because a person cannot be arrested for the "in rem violation" of vehicle abandonment. *See* ***State v. Gribble***, 2001 WI App 227, ¶27 n.10, 248 Wis. 2d 409, 636 N.W.2d 488 (court of appeals may affirm circuit court legal ruling on a ground different from the ground relied on by the circuit court).

(continued)

¶7 As pertinent to the issues I resolve, Bethke argues on appeal that the trooper "lacked an objectively reasonable suspicion of a violation of law to justify" his seizure and "did not have probable cause to make a warrantless arrest," with the brief handcuffing by the trooper constituting the alleged arrest.[3]

¶8 In reviewing a circuit court's denial of a motion to suppress, I will uphold the court's findings of fact unless they are clearly erroneous. ***State v. Young***, 212 Wis. 2d 417, 424, 569 N.W.2d 84 (Ct. App. 1997). Whether those facts satisfy the constitutional requirements of an investigatory stop is a question of law, subject to de novo review. ***Id.***

¶9 The first issue is whether the County proved that the trooper had reasonable suspicion of a law violation, a level of suspicion less than probable cause, to temporarily detain Bethke. In order for an investigatory stop to be justified by reasonable suspicion, police must possess "specific and articulable facts which, taken together with rational inferences from those facts," warrant a reasonable belief that the person being stopped has committed, is committing, or is about to commit an offense. ***State v. Post***, 2007 WI 60, ¶¶10, 13, 301 Wis. 2d 1, 733 N.W.2d 634 (citation omitted). "'[I]f any reasonable inference of wrongful conduct can be objectively discerned, ... the officers have the right to temporarily detain the individual for the purpose of inquiry.'" ***State v. Young***, 2006 WI 98, ¶21, 294 Wis. 2d 1, 717 N.W.2d 729 (quoted source omitted). In determining

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On a related point, the ground on which I rely is not one specifically argued by the County, but I conclude that the parties have discussed the pertinent facts and related legal doctrines in sufficient detail to support a decision on that ground. As I explain in the text, on the undisputed facts the trooper plainly had reasonable suspicion of a traffic violation.

[3] Bethke has abandoned on appeal an argument he made to the circuit court that the deputy lacked probable cause to arrest him for operating while intoxicated.

whether reasonable suspicion exists, courts consider the totality of the facts and what a reasonable police officer would reasonably suspect, given his or her training and experience. ***State v. Waldner***, 206 Wis. 2d 51, 56, 58, 556 N.W.2d 681 (1996).

¶10 I conclude that the County proved that the trooper was aware of specific and articulable evidence that, under the totality of the circumstances, would lead a reasonable officer in his position to suspect that Bethke had committed a traffic violation while operating the pickup truck. Thus, the trooper could reasonably detain Bethke for a brief investigation to determine whether a traffic violation had occurred.

¶11 Bethke concedes on appeal that there was a reasonable inference from the uncontested testimony that, at the time the trooper encountered Bethke, the trooper was part of a law enforcement effort that collectively was aware of a report of a missing person associated with a black Ford F-150 pickup, and that such a pickup had been found in the area, without any associated occupant, stuck in a roadside snow bank.[4] Thus, when Bethke identified himself as the owner of a vehicle matching this description found in the immediate area, this provided the trooper with a reasonable basis to suspect that Bethke had driven the pickup into the snow bank. *See* ***State v. Pickens***, 2010 WI App 5, ¶¶11-12, 15-17, 323

[4] Bethke acknowledges that "[t]he evidence showed the trooper knew other officers at another location had come upon a black truck stuck off the side of the road," but maintains that "[t]here was no evidence that the arresting trooper even had any knowledge of who had left that truck where it was." This "no evidence" claim is not accurate. Bethke testified that the trooper asked him over the loudspeaker if Bethke was the owner of a black F-150 pickup truck and Bethke replied that he was. This supports the reasonable inference that the trooper suspected that Bethke was the person who had last driven the pickup that police had discovered in the snow bank.

Wis. 2d 226, 779 N.W.2d 1 (2009) (explaining collective knowledge doctrine in the context of a stop based on reasonable suspicion).

¶12 On these facts, the trooper had reasonable suspicion to investigate a potential violation of traffic laws. When a vehicle is found stuck in a snow bank by the side of a road and appears to have been left unattended, it is reasonable for an officer to suspect that the last driver of the vehicle committed a traffic violation, absent evidence of extenuating facts. *See* WIS. STAT. § 346.13(3) (deviating from designated lane); WIS. STAT. § 346.57(2) (driving too fast for conditions); WIS. STAT. § 346.89(1) (inattentive driving); WIS. STAT. § 346.62 (negligent operation of a motor vehicle). And here there was no evidence of extenuating facts. There were alternative possible scenarios that would have involved no traffic violation—for example, hitting a patch of black ice that the driver could not have anticipated. However, "police officers are not required to rule out the possibility of innocent behavior before initiating a brief stop." *See* ***Waldner***, 206 Wis. 2d at 59.

¶13 I turn to the second issue, namely, whether the County proved that the trooper did not go beyond the permissible scope of a temporary investigatory stop by placing Bethke under arrest without probable cause. To repeat, Bethke's argument focuses entirely on the conduct of the trooper; Bethke does not contest that, after his initial interactions with the trooper, the deputy had probable cause justifying an arrest.

¶14 It is true that the trooper's handcuffing of Bethke amounted to a seizure. *See* ***State v. Williams***, 2002 WI 94, ¶20, 255 Wis. 2d 1, 646 N.W.2d 834 ("[t]he general rule is that a seizure has occurred when an officer, 'by means of physical force or show of authority, has in some way restrained the liberty of a

citizen'" (quoted source omitted)). However, depending on the circumstances, an officer may physically restrain an individual without necessarily transforming an investigatory stop into an arrest. *See* ***State v. Goyer***, 157 Wis. 2d 532, 538, 460 N.W.2d 424 (Ct. App. 1990). The issue is "whether a 'reasonable person in the defendant's position would have considered himself or herself to be "in custody," given the degree of restraint under the circumstances.'" *See* ***State v. Wortman***, 2017 WI App 61, ¶¶5, 7, 10, 378 Wis. 2d 105, 902 N.W.2d 561 (quoted source omitted) (concluding that officer's activation of squad lights, blocking of defendant's path by squad car, request that defendant ride in back of squad car to scene, and taking of defendant's driver's license did not constitute arrest).

¶15 I conclude that a reasonable person in Bethke's position would not have believed that he was under arrest during his initial interactions with the trooper. The circuit court here implicitly found that the trooper's use of handcuffs was brief and merely incidental to ensuring that the trooper could safely assess the unusual circumstances, and I conclude that the trooper's conduct in these circumstances did not constitute an arrest of Bethke. *See* ***State v. Blatterman***, 2015 WI 46, ¶31, 362 Wis. 2d 138, 864 N.W.2d 26 (explaining that use of handcuffs does not transform an investigatory stop into arrest, although "for such measures to be reasonable, they must be justified by particular circumstances, such as the risk of harm to the officers") (citations omitted).

¶16 Explaining further, an objective view of the totality of the circumstances shows that the trooper was presented with an unusual and potentially unsafe situation. The trooper was on patrol, looking for a missing man. A man who was, as Bethke testified about himself at the suppression hearing, "drenched [and] shaking uncontrollably," early on a cold January morning, came running out of a residence. As Bethke described the situation, "I took all of the

energy that I had and I hoofed it out there and started flagging my arms down along the side of the road," and gestured "by waving [my] arms over [my] forehead." Further, by his own account, he was suffering from extreme exhaustion—having begun "to go into a state of hypothermia" and having collapsed repeatedly while walking through the snow in his "extremely heavy" wet clothing. Thus, by his own description, he did not present himself to the trooper in a calm, readily cooperative manner.

¶17 The question is not what Bethke subjectively believed about his status at the time that the trooper ordered him to the ground and handcuffed him. Instead, the test is objective, asking what a reasonable person in Bethke's shoes would have recognized about his status under the circumstances. I conclude that a reasonable person would have recognized that the trooper was not arresting him, but instead executing on-the-spot safety decisions driven by unanswered questions. Was this the missing man, or instead someone who played a role in causing the man to go missing? Why was he wearing drenched, heavy clothing during the early morning hours of a cold winter day? Why had the drenched man, whether he was the missing man or not, emerged from a residence? Was he alone?

¶18 Further, as stated above, the totality of the circumstances included the following facts. The trooper removed the handcuffs from Bethke as soon as another officer arrived on scene. The trooper did not tell Bethke that he was under arrest, and did not place Bethke in a squad car. Instead, with the help of another officer, the trooper assisted Bethke in removing his wet clothes and led him to an ambulance for medical treatment. Bethke was not in handcuffs again until the deputy formally placed him under arrest.

¶19 Bethke argues that "[i]t would have been reasonable" for the trooper to have had "a conversation with [Bethke] as to why he was waving his hands, flagging down the trooper in a way a person does when they are seeking assistance." This conversation between police and Bethke occurred, but only after the trooper took reasonable steps to minimize safety concerns presented under the unusual circumstances, to give the trooper a chance to safely gather more information and assess potential risks. *See* ***Blatterman***, 362 Wis. 2d 138, ¶32 (Blatterman not under arrest, despite the fact that officers confronted him with firearms pointed at him, handcuffed him, and detained him in a squad car); *see also* ***State v. Quartana***, 213 Wis. 2d 440, 570 N.W.2d 618 (Ct. App. 1997) (police did not exceed scope of investigatory stop in going to defendant's home, collecting his driver's license, and driving him in squad car back to the scene where defendant had abandoned vehicle).

¶20 For all of these reasons, I conclude that the trooper had reasonable suspicion to conduct a temporary investigatory detention and that the trooper did not place Bethke under arrest. Accordingly, I affirm the refusal judgment.

By the Court.—Judgment affirmed.

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