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June 20, 2018

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You are hereby notified that the Court has entered the following opinion and order:

2017AP1729-CR

State of Wisconsin v. Tony C. Witz (L.C. #2016CF569)

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

Summary disposition orders 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).

Tony C. Witz appeals from a judgment convicting him of operating a vehicle with a prohibited alcohol concentration (PAC), 7th, 8th, or 9th offense, and challenges the denial of his motion to suppress evidence. Witz argues that the traffic stop was unlawfully extended as the police officer had Witz perform field sobriety tests without reasonable suspicion. Based upon

our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).¹ We summarily affirm.

On May 6, 2016, Waukesha County Deputy David Schroeder conducted a traffic stop on Witz after he ran a check on the license plate registration and on the registered owner of the vehicle and discovered that the plates had expired and the owner's driver's license was revoked. When Schroeder asked Witz for his license and proof of insurance, Witz said he had neither and identified himself as Ronny A. VanZant. Schroeder ran a check on this name without success, at which time Witz provided him with an alternative spelling of the same false name. After neither spelling returned information on file, Schroeder investigated the registered owner of the vehicle and noted that the picture in the records matched Witz. At this time dispatch informed Schroeder that Witz had an open felony arrest warrant and that Witz had six prior operating while intoxicated (OWI) convictions and a .02 blood alcohol concentration (BAC) restriction. Even after Witz was confronted with this information, he identified himself with a second false identity, Donald Ross.

During Schroeder's contact with Witz he noted that Witz was using slow, "lethargic," slurred speech; had constricted pupils and glassy eyes; was "sweating profusely" and appeared "very nervous"; he was "continuously smoking cigarettes"; and he observed what he believed to be "a bottle of malt liquor" in a brown paper bag on the floor of the passenger side of the vehicle. Schroeder stated that he saw no evidence of bad driving nor did he smell alcohol on Witz.

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

Schroeder had Witz perform field sobriety tests and a preliminary breath test (PBT), which yielded a .079 result. Witz was arrested for OWI.

Witz filed a motion to suppress the evidence challenging the vehicle stop and the administration of the field sobriety tests.² The circuit court held a hearing and denied the motion. Witz was subsequently convicted of operating a vehicle with a prohibited PAC and sentenced to three years' initial confinement and three years and six months' extended supervision. Witz appeals.

Once a justifiable traffic stop has been made, the stop may be extended if additional suspicious factors come to the officer's attention that "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. Betow*, 226 Wis. 2d 90, 94-95, 593 N.W.2d 499 (Ct. App. 1999). Reasonable suspicion is satisfied if the officer is "able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" extending the traffic stop. *State v. Post*, 2007 WI 60, ¶10, 301 Wis. 2d 1, 733 N.W.2d 634 (citation omitted). "The determination of reasonableness is a common sense test. The crucial question is whether 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." *Id.*, ¶13. "The reasonableness of a stop is determined based on the totality of the facts and circumstances." *Id.* Knowledge of a prior conviction for OWI is a relevant factor to consider

² Witz does not challenge the legality of the initial traffic stop on appeal.

when determining whether reasonable suspicion exists. *State v. Goss*, 2011 WI 104, ¶22, 338 Wis. 2d 72, 806 N.W.2d 918. Further, it is not determinative that there may be innocent explanations for a suspect's behavior. *State v. Waldner*, 206 Wis. 2d 51, 59, 556 N.W.2d 681 (1996).

Given these governing principles and the facts as found by the circuit court, we conclude that reasonable suspicion existed sufficient to warrant the extension of the traffic stop to administer field sobriety tests and a PBT. Witz argues that his behavior during the stop had innocent explanations and that Schroeder did not smell alcohol on Witz. We are not permitted to consider each observation or behavior in a vacuum; we must consider the totality of the circumstances. Many of Witz's behaviors considered in toto indicated that it was reasonable for Schroeder to conclude that Witz was likely impaired: glassy eyes and constricted pupils, slurred and slow speech, nervousness, sweating, a bottle in a brown paper bag in the car, six prior OWI convictions, knowledge that Witz had a .02 BAC restriction, and Witz's repeated attempt to mislead Schroeder about his identity. As the court explained in *Waldner*, "[a]ny one of these facts, standing alone, might not add up to reasonable suspicion. But ... they do coalesce to add up to a reasonable suspicion." *Waldner*, 206 Wis. 2d at 61 (footnote omitted). Odor of intoxicants is not a prerequisite to a finding of reasonable suspicion, and further, Witz's constant smoking during the encounter likely masked the smell of any alcohol. Schroeder properly extended the traffic stop to investigate further and administer field sobriety and breathalyzer tests, and the circuit court properly denied Witz's motion to suppress.

IT IS ORDERED that the judgment of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals