COURT OF APPEALS
DECISION
DATED AND FILED

July 19, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-0457-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JOHN C. JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Affirmed.*

¶1 ANDERSON, J.[1] In this appeal, John C. Johnson raises several challenges to his conviction for a second-offense operating while intoxicated. First, he argues that probable cause is required to stop a driver suspected of

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

violating a noncriminal traffic offense. Because all that is required is a reasonable suspicion, we reject this argument. Second, he asserts that the maneuver he completed on the highway was not a violation of the traffic laws; therefore, the officer did not have either reasonable suspicion or probable cause to conduct a stop. Because Johnson's maneuver was an illegal turn, we conclude that the officer had a reasonable suspicion to support a stop. Finally, Johnson contends that the failure to perform field sobriety tests bars the administration of a preliminary breath test (PBT) and the admission of the results to show probable cause for arrest. Given that the failure to perform field sobriety tests is not a fatal defect and that under the totality of the circumstances the officer had probable cause to believe Johnson was operating while intoxicated, we hold that the circuit court did not err in denying Johnson's motions to suppress. Therefore, we affirm.

¶2 Lieutenant James A. Ritchie of the City of Delavan Police Department was on routine patrol in the business district at 2:15 a.m. when he observed a white Tahoe in an angled parking space adjacent to the eastbound traffic lane of Highway 11. The driver of the Tahoe backed out of the angled parking space across the eastbound traffic lane into the westbound traffic lane. The driver straightened the Tahoe and proceeded in a westerly direction. Ritchie concluded that the driver had made a prohibited turn in violation of WIS. STAT. § 346.33(1)(b) and activated his emergency lights to stop the Tahoe. The driver of the Tahoe did not immediately respond and finally stopped more than three blocks after Ritchie activated his emergency lights. Ritchie approached the vehicle and through a Wisconsin driver's license identified the driver as Johnson. Johnson became argumentative when the police officer told him he had been stopped for an illegal turn.

¶3 During these discussions, Ritchie detected the odor of intoxicants emanating from the interior of the Tahoe. Because there were three people inside of the vehicle, he asked Johnson to step out. Once Johnson was outside of the Tahoe, the officer detected the odor of intoxicants "emitting directly from … Johnson." He also observed that Johnson was unsteady in his movement and stance, had somewhat slurred speech and his eyes were bloodshot. When the officer asked Johnson if he had had anything to drink, Johnson responded, "[P]robably too much." In response to a question of when did he have his last drink, Johnson said "two seconds" before the traffic stop. Because the traffic stop was on a hill, Ritchie decided not to conduct any field sobriety tests. When asked, Johnson voluntarily submitted to a PBT and the result was a blood alcohol concentration of 0.17 grams. Based upon all of this evidence, Ritchie placed Johnson under arrest for drunk driving and transported him to the police station where he refused to submit to the primary chemical test.

¶4 Johnson was charged with his second offense of operating a motor vehicle while intoxicated in violation of WIS. STAT. §§ 346.63(1)(a) and 346.65(2). He moved to suppress the stop of the vehicle and all derivative evidence.[2] After a combined motion and refusal hearing, the circuit court found that, under the totality of the circumstances, there was probable cause to stop Johnson and that his refusal was unreasonable.

¶5 Johnson appeals the finding that there was probable cause to stop his vehicle. He contends that "there are two bas[es] upon which an officer may stop and detain an individual, reasonable suspicion and probable cause." He argues

[2] Johnson also filed motions to suppress the identification of the driver and any statements.

that the reasonable suspicion standard only applies if the officer reasonably believes that a crime may be occurring. He claims that because the officer perceived an ordinance violation and the stop of his vehicle was to issue a citation, the officer went beyond investigating suspicious activity to making an arrest, and the probable cause standard for the stop must be applied. Johnson insists that Ritchie lacked probable cause because the maneuver Johnson completed on the street did not violate WIS. STAT. § 346.33(1)(b) because it was not a "u-turn."

¶6 Johnson's argument that Ritchie needed probable cause for the traffic stop because he was intent upon issuing Johnson a citation for a violation of the city ordinance adopting WIS. STAT. § 346.33(1)(b) is plainly wrong. "[A]n officer may make an investigative stop if the officer 'reasonably suspects' … that a person is violating the non-criminal traffic laws." ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 310, 603 N.W.2d 541 (1999) (citation omitted). Therefore, we will analyze the stop made by Ritchie using the "reasonable suspicion" standard.

¶7 When reviewing a trial court's denial of a suppression motion, an appellate court "will uphold a trial court's findings of fact unless they are against the great weight and clear preponderance of the evidence." ***State v. Richardson***, 156 Wis. 2d 128, 137, 456 N.W.2d 830 (1990). Whether a search or seizure passes statutory and constitutional standards, however, is a question of law which this court reviews de novo. *See* ***id***. at 137-38.

¶8 The Fourth Amendment of the United States Constitution and article I, section 11 of the Wisconsin Constitution guarantee citizens the right to be free from unreasonable searches and seizures. *See* U.S. CONST. amend. IV; WIS. CONST. art. I, § 11. Although it has been held that an investigative stop is a "seizure" under the Fourth Amendment, a police officer may, under appropriate

circumstances, conduct an investigative stop when a lesser degree of suspicion exists. *See* ***Terry v. Ohio***, 392 U.S. 1, 22 (1968). The standard required for this exception is reasonable suspicion based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." ***Id.*** at 21. WISCONSIN STAT. § 968.24, the codification of ***Terry*** in Wisconsin, allows investigative stops based upon a standard of reasonableness.

¶9 The core of Johnson's argument is the proposition that the maneuver he completed was not a violation of WIS. STAT. § 346.33(1)(b). His second proposition relies upon a reading of ***State v. Longcore***, 226 Wis. 2d 1, 594 N.W.2d 412 (Ct. App. 1999), *aff'd*, 2000 WI 23, 233 Wis. 2d 278, 607 N.W.2d 620, as holding that an officer lacks probable cause to stop if the facts he or she observed do not relate to a specific offense in the traffic code. From these two propositions, he draws the conclusion that Ritchie lacked probable cause to support the stop. Johnson's logic is flawed.

¶10 The statute at issue prohibits midblock turns in a business district; specifically, it provides:

> **346.33 Where turns prohibited, exception. (1)** The operator of a vehicle shall not turn the vehicle so as to proceed in the opposite direction upon a highway at any of the following places:
>
> ….
>
> (b) In mid-block on any street in a business district, except where the highway is a divided highway and where the turn is made at an opening or crossover established by the authority in charge of the maintenance of the highway.

WIS. STAT. § 346.33(1)(b). Johnson expresses the opinion that the statute prohibits "u-turns" in midblock and not the maneuver he completed.

¶11 Ritchie testified that the maneuver Johnson completed began with his Tahoe parked in an angled parking stall adjacent to the eastbound traffic lane of Highway 11. Johnson backed his Tahoe out of the stall and across the eastbound traffic lane. Once across the eastbound traffic lane, he straightened the Tahoe so that he could proceed in the westbound traffic lane. The maneuver is depicted in Figure 1:[3]

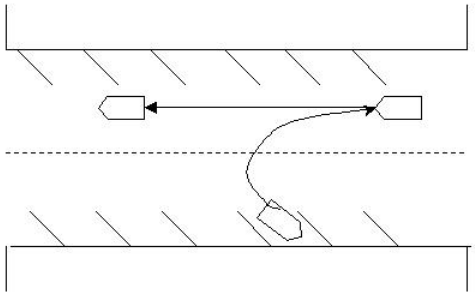

Figure 1 Johnson's Maneuver

¶12 Johnson attempts to bolster his argument that this maneuver is not a violation of the statute by relying on the WISCONSIN MOTORIST'S HANDBOOK published by the Department of Transportation. He finds support for his argument in the handbook's description of a "u-turn" as "a turn within the road, made in one smooth u-shaped motion, so as to end up traveling in the opposite direction." Johnson's reliance upon the handbook is misplaced. The handbook is not defining a violation of WIS. STAT. § 346.33(1)(b). The handbook is defining turns a motorist can make; on the same page defining "u-turn" are definitions of "left turns," "multiple lane turns" and "y-turns."

[3] Figure 1 is not an attempt to accurately depict Johnson's maneuver; rather, it is a portrayal of Ritchie's description of the maneuver.

¶13 The statute clearly and unambiguously prohibits any turn—not just a "u-turn"—midblock in a business district when at the conclusion of the turn the driver is traveling in the opposite direction from when the turn was started. The maneuver completed by Johnson violates the statute. First, Johnson does not dispute that the maneuver took place midblock in a business district. Second, Johnson was parked in an angled parking stall adjacent to the eastbound traffic lane of Highway 11; therefore, his direction of travel was easterly. Third, Johnson backed across the entire eastbound traffic lane. Fourth, after backing across the eastbound traffic lane, Johnson straightened his Tahoe in the westbound traffic lane so that he was ready to travel in a westerly direction—the direction opposite of his direction of travel at the start of the maneuver. The statute prohibits any turn midblock in a business district that results in the driver traveling in the opposite direction.

¶14 Johnson also challenges the officer's failure to administer field sobriety tests and the administration of the PBT. He contends that the administration of field sobriety tests is essential for probable cause to arrest. He relies on ***State v. Swanson***, 164 Wis. 2d 437, 475 N.W.2d 148 (1991). However, ***Swanson*** has been modified and does not stand for the proposition that under all circumstances the officer must first perform a field sobriety test before deciding whether to arrest for operating a motor vehicle while under the influence of an intoxicant. *See* ***State v. Wille***, 185 Wis. 2d 673, 684, 518 N.W.2d 325 (Ct. App. 1994). Thus, the question of probable cause is properly assessed on a case-by-case basis. In some cases, the field sobriety tests may be necessary to establish probable cause; in other cases, they may not. This case, we conclude, falls into the latter category.

¶15 Johnson also argues that the results of the PBT cannot be considered in the probable cause analysis because of the failure to administer the field sobriety tests. He cites ***Renz***, 231 Wis. 2d at 317, for the proposition that Ritchie's observations were not enough to constitute probable cause to believe that he was operating while under the influence and justify the administration of the PBT. ***Renz*** holds that an officer does not need probable cause to arrest before requesting a PBT; all that is required are several indicators of intoxication to establish "probable cause to believe" that a defendant was operating while under the influence. *See* ***id.*** at 316. An examination of the record demonstrates that Ritchie had a substantial amount of reliable, factual information indicating to a reasonable police officer that Johnson had probably violated the statute prohibiting driving while under the influence of an intoxicant.

¶16 In addition to the illegal turn, the indicators of intoxication available to Ritchie included: Johnson's immediate argumentative demeanor, Ritchie's detection of the odor of intoxicants "emitting directly from Mr. Johnson," and Ritchie's observations that Johnson was unsteady in his movement and stance, that he had somewhat slurred speech and that his eyes were bloodshot. Furthermore, when Ritchie asked Johnson if he had had anything to drink, Johnson candidly responded, "[P]robably too much." And, finally, in response to a question of when did he have his last drink, Johnson nonsensically responded "two seconds" before the traffic stop.

¶17 Each indicator alone would not be enough. But each indicator builds upon another, and, as they build up, reasonable inferences about the cumulative effect can be drawn. A point is reached where the sum of the whole is greater than the sum of its individual parts. In this case, the indicators of intoxication observed by Ritchie immediately after the stop build up to support probable cause to believe

that Johnson was operating while under the influence. Once that threshold was reached, Ritchie was justified in administering the PBT. Finally, when the PBT results are added to the indicators of intoxication, there is probable cause for an arrest for operating while intoxicated.

By the Court.—Judgment affirmed.

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