COURT OF APPEALS
DECISION
DATED AND FILED

June 28, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 01-0108-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STUART M. BUZZELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dodge County: JOHN R. STORCK, Judge. *Affirmed.*

¶1 VERGERONT, J.[1] Stuart Buzzell appeals the judgment of conviction for operating a motor vehicle while under the influence of an intoxicant

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

(OWI) contrary to WIS. STAT. § 346.63(1)(a). He contends the trial court erred in denying his motion to suppress evidence because, he asserts, the evidence was the result of an unlawful detention. We conclude the officer had the reasonable suspicion required for a lawful detention, and we therefore affirm.

BACKGROUND

¶2 Robert Trevarthen, a City of Mayville police officer, was the only witness at the hearing. He testified as follows. On September 19, 1999, at approximately 1:00 a.m., he was westbound on Horicon Street in the City of Mayville. A white van, also going westbound, was directly in front of him. The van pulled onto the gravel shoulder of the road, without signaling, just west of the Piggly Wiggly Store. He had followed the van for a couple of blocks and observed nothing unusual about the driving. The van had maintained a regular position in the road, had not crossed the centerline, and had not weaved.

¶3 The officer pulled over behind the van with his red and blue lights on to see if there was a problem and if he could render aid. He went to the passenger side and saw a female in the passenger seat and a male, later identified as Buzzell, in the driver's seat. The officer knocked on the window and, when it was rolled down, he asked if there was a problem, if everything was all right. One of them, probably the female passenger, said she was looking for some fingernail polish that was rolling around in the van. When the window was rolled down, the officer smelled a strong odor of intoxicants coming from the interior of the van. He asked if anybody had been consuming intoxicants inside the vehicle and both answered yes. The officer then asked Buzzell to step out and meet him at the back of the van, and Buzzell complied. The officer's purpose in asking Buzzell to get out of the van was to detain him in order to conduct a drunk driving investigation.

The officer did not see Buzzell get out of the van, but he did see him walking to a position behind the van, and he did not observe Buzzell having any difficulty walking. Buzzell stood behind the van while the officer went back to his squad car for a short period of time. During this period of time the officer saw nothing out of the ordinary such as swaying, staggering, having trouble standing or doing anything else that might indicate some degree of intoxication. The officer had Buzzell perform field sobriety tests and asked him to submit to a preliminary breath test, which showed .08. The officer then arrested Buzzell for OWI.

¶4 On cross-examination the officer acknowledged that pure alcohol has very little odor, and from the odor that he smells he cannot tell what, when or how much somebody has been drinking.

¶5 The trial court decided the officer was performing a community caretaker function when he stopped behind the vehicle, approached it, and asked the occupants if there was a problem. The court concluded that the strong odor of intoxicants from the vehicle and the occupants' admission that they had been drinking created a basis for a reasonable suspicion that the driver was operating the vehicle under the influence of alcohol.[2]

[2] The court observed that its "recollection [was the officer] asked have they been drinking in the vehicle. They acknowledged that they had been drinking in the vehicle." However, the court decided that it was sufficient, for purposes of reasonable suspicion, that there was a strong odor of alcohol and the occupants admitted they had been drinking, and it did not discuss further the implications of drinking in a motor vehicle. *See* WIS. STAT. § 346.935(1) ("No person may drink alcohol beverages … while he or she is in any motor vehicle when the vehicle is upon a highway."). We assume for purposes of this decision that the occupants did not acknowledge they were drinking in the vehicle for the following reasons: the testimony is unclear as to whether the officer asked the occupants if they had been drinking or asked if they had been drinking in the vehicle; we are uncertain whether the court intended to find as a fact that the occupants acknowledged they were drinking in the vehicle; and the State appears to believe the testimony was that the occupants acknowledged only that they had been drinking.

DISCUSSION

¶6 An officer may stop a vehicle for questioning consistent with the Fourth Amendment protection against unreasonable searches and seizures when the officer has a reasonable suspicion that the occupants have engaged in or are engaging in criminal activity. ***Terry v. Ohio***, 392 U.S. 1, 20-22 (1968). Reasonable suspicion must be based on specific and articulable facts, which, taken together with rational inferences from those facts, reasonably warrant the intrusion. ***State v. Richardson***, 156 Wis. 2d 128, 139, 456 N.W.2d 830 (1990). Reasonableness is measured against an objective standard taking into consideration the totality of the circumstances. ***Id.*** 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. ***State v. Jackson***, 147 Wis. 2d 824, 831, 434 N.W.2d 386 (1989).

¶7 If the initial stop is lawful, and the reasons for the initial stop are resolved, the scope of the officer's inquiry may be broadened beyond the reasons for the initial stop only if additional factors come to the officer's attention that provide a basis for reasonable suspicion meeting the above test. ***State v. Betow***, 226 Wis. 2d 90, 94-95, 593 N.W.2d 499 (Ct. App. 1999).

¶8 We uphold the trial court's findings of fact unless they are clearly erroneous. ***State v. Guzy***, 139 Wis. 2d 663, 671, 407 N.W.2d 548 (1987). However, whether the facts as found by the trial court, or the undisputed facts, are sufficient to fulfill the constitutional standard is a question of law, which we review de novo. ***State v. Krier***, 165 Wis. 2d 673, 676, 478 N.W.2d 63 (Ct. App. 1991).

¶9 Buzzell agrees the court could reasonably decide that the officer's initial approach to the van and the initial questioning was justified by the community caretaker exception. *See* ***State v. Dull***, 211 Wis. 2d 652, 658, 565 N.W.2d 575 (Ct. App. 1997). However, he contends that the continued detention was not part of the community caretaker function and was unlawful because the officer did not have a reasonable suspicion that Buzzell was driving while under the influence of an intoxicant. Specifically, Buzzell argues that the evidence that he was drinking—even his admission that he was—does not constitute reasonable suspicion that he was intoxicated, and the officer observed no signs that he was impaired by alcohol prior to administering the field sobriety tests.

¶10 We disagree with Buzzell's analysis. It is not always necessary that an officer observe signs indicating that a driver is impaired by alcohol in order for an officer to have a reasonable suspicion that the driver is operating under the influence of an intoxicant. Buzzell relies on our statement in ***County of Jefferson v. Renz***, 222 Wis. 2d 424, 444, 588 N.W.2d 267 (Ct. App. 1998), *reversed on other grounds*, 231 Wis. 2d 293, 603 N.W.2d 541 (1999), that WIS. STAT. § 346.63(1)(a) does not prohibit operating a motor vehicle after having consumed alcohol, but prohibits driving "[u]nder the influence of an intoxicant … to a degree which renders [one] incapable of safely driving." However, the sentence directly following that sentence is: "Therefore, although it is undisputed that Renz said he had three beers earlier in the evening and the officer detected a strong odor of alcohol, more is needed to establish probable cause to believe Renz violated the

statute."[3] ***Id.*** Since we were concerned with the higher standard of probable cause to arrest, our statement provides no support for the proposition that an admission of drinking without evidence of impairment is insufficient for reasonable suspicion.

¶11 In this case, when the officer was performing his community caretaker function he noticed a strong odor of intoxicants coming from the vehicle, and Buzzell admitted he had been drinking. A reasonable officer could conclude from this that Buzzell had been drinking recently and drinking enough to affect his ability to drive safely. The officer's acknowledgment that he cannot tell from the odor what or how much was consumed or when does not mean that a strong odor of intoxicants is not enough to create a reasonable suspicion that enough was recently consumed to affect his ability to drive safely. Similarly, the lack of signs of impairment does not mean that the strong odor and the admission of drinking is not sufficient for reasonable suspicion. We conclude the officer had the reasonable suspicion necessary to lawfully detain Buzzell by asking him to step out of the van and perform field sobriety tests.

By the Court.—Judgment affirmed.

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

[3] We held in ***County of Jefferson v. Renz***, 222 Wis. 2d 424, 439, 588 N.W.2d 267 (Ct. App. 1998), *reversed on other grounds*, 231 Wis. 2d 293, 603 N.W.2d 541 (Wis. Dec. 22, 1999) (No. 97-3512), that the "probable cause" required by WIS. STAT. § 343.303 before an officer may ask a person to submit to a PBT was the same standard as the probable cause required for an arrest. We then concluded that the officer did not have probable cause to arrest Renz before performing the PBT. The supreme court reversed on the first issue, concluding that the "probable cause" in § 343.303 was a lesser standard than the probable cause needed to arrest, but it did not reverse our conclusion that the facts known to the officer at the time he administered the PBT were not sufficient to constitute probable cause to arrest.