COURT OF APPEALS
DECISION
DATED AND FILED

November 27, 2001

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1908-FT **Cir. Ct. Nos. 00-TR-8003, 01-TR-228**

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

CITY OF MENOMONIE,

PLAINTIFF-RESPONDENT,

V.

JENO D. HERMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dunn County: WILLIAM C. STEWART, Judge. *Affirmed*.

¶1 HOOVER, P.J.[1] Jeno Herman appeals a judgment convicting him of operating a motor vehicle while intoxicated and operating a motor vehicle with

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c). All reference to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted. Furthermore, this is an expedited appeal under WIS. STAT. RULE 809.17.

a prohibited alcohol concentration, contrary to WIS. STAT. §§ 346.63(1)(a) and 346.63(1)(b). He argues that the trial court erred by denying his motion to suppress because the arresting officer did not have reasonable suspicion to request and administer field sobriety tests. This court rejects Herman's argument and affirms the judgment.

BACKGROUND

¶2 On December 22, 2000, City of Menomonie police officer Aaron Bergh responded to a call regarding a fight at Burger King. When Bergh arrived, two vehicles were parked one behind the other in the drive-through window lane. Everyone involved in the incident had moved away from the vehicles. Another officer already at the scene asked Bergh to identify two of the people.

¶3 Bergh identified the two subjects as Herman and Hosea Santos by checking their driver's licenses. Bergh spoke with Herman for about five minutes. Bergh testified that, during their conversation, Herman gave him three versions of the events leading up to the fight. In one version, Herman said he was pulled out of the driver's side window. In another, Herman honked the horn before being dragged out of the window. Bergh suspected that Herman was driving the vehicle because he said he was pulled out of the driver's side window and that he honked the horn.

¶4 Bergh further testified that he noticed Herman had "an odor of intoxicants about him and also that his eyes were slightly bloodshot." Bergh testified that he asked Herman if he had consumed any alcohol, and Herman admitted that he had had five drinks. Because of these observations, Bergh asked Herman to perform field sobriety tests. Herman agreed and Bergh conducted the tests.

¶5 Herman subsequently was arrested and charged with operating a motor vehicle while intoxicated and operating with a prohibited alcohol concentration. Herman filed a motion to suppress all evidence derived from and subsequent to the field sobriety tests. The trial court denied the motion and concluded that Bergh was justified in asking for the field sobriety tests because he had a reasonable, articulable suspicion that Herman was driving the vehicle and was under the influence of intoxicants.

¶6 Herman pled no contest to the charges and was adjudged guilty of both offenses. The trial court entered judgment against him, and Herman now appeals.

DISCUSSION

¶7 Herman argues that Bergh did not have reasonable suspicion regarding who was driving the vehicle. He contends that Bergh failed to articulate facts to justify further inquiry into whether Herman operated a motor vehicle while intoxicated. This court disagrees and affirms the judgment.

¶8 A law enforcement officer may detain someone for field sobriety tests only if he reasonably suspects, in light of his or her experience, that some kind of criminal activity has taken or is taking place. *See* ***State v. Richardson***, 156 Wis. 2d 128, 139, 456 N.W.2d 830 (1990). This court must determine whether the specific and articulable facts, taken together with rational inferences from those facts, constitute reasonable suspicion. ***State v. Dunn***, 158 Wis. 2d 138, 146, 462 N.W.2d 538 (Ct. App. 1990). Any reasonable inference of wrongful conduct that can be objectively discerned justifies the officer's temporary detention of an individual for purposes of inquiry into whether something is afoul. ***State v. Anderson***, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990).

¶9 The fundamental focus of the Fourth Amendment and WIS. STAT. § 968.24 is reasonableness. ***Anderson***, 155 Wis. 2d at 83. "Reasonableness" is subject to a common sense evaluation. ***Id.*** At issue is what a reasonable police officer would reasonably suspect in light of his or her training and experience. ***Id.*** at 83-84. This common sense approach strikes a balance between individual privacy and the societal interest in allowing the police a reasonable scope of action in discharging their responsibility to effectively yet constitutionally prevent and detect crime. ***State v. Waldner***, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996). This objective evaluation focuses

> on the reasonableness of the officer's intrusion into the defendant's freedom of movement: "Law enforcement officers may only infringe on the individual's interest to be free of a stop and detention if they have a suspicion grounded in specific, articulable facts and reasonable inferences from those facts, that the individual has committed [or was committing or is about to commit] a crime. An 'inchoate and unparticularized suspicion or "hunch" ... will not suffice.'"

Id. (citation omitted).

¶10 The reasonableness of a stop depends upon the facts and circumstances of the situation. *See* ***State v. Guzy,*** 139 Wis. 2d 663, 677, 407 N.W.2d 548 (1987). Based upon the totality of the circumstances, the whole picture, detaining officers must have a particularized and objective basis for suspecting the particular person of criminal activity. ***United States v. Cortez***, 449 U.S. 411, 417-18 (1981). Where the facts are undisputed, as here, whether the stop was valid is a question of law this court reviews without deference to the circuit court's decision. *See* ***State v. Jackson,*** 147 Wis. 2d 824, 829, 434 N.W.2d 386 (1989).

¶11 This court has no difficulty agreeing with the trial court's conclusion that the facts Bergh articulated were sufficient for him to conduct an investigatory inquiry, administer field sobriety tests and arrest Herman. In one version of the events leading up to the fight at Burger King, Herman said he was pulled out of the driver's side window. In another version, Herman said he honked the horn. These facts support a reasonable inference that Herman was driving a motor vehicle. In addition, Bergh had reasonable suspicion that Herman was operating while intoxicated. Bergh noticed the odor of intoxicants and Herman's bloodshot eyes, and Herman admitted he consumed five drinks that night. The facts Bergh adduced at Burger King more than justified the request that Herman submit to field sobriety tests.

By the Court.—Judgment affirmed.

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