COURT OF APPEALS
DECISION
DATED AND FILED

July 29, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP747-CR **Cir. Ct. No. 2008CF2032**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ERIC MICHAEL WEBLEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Rock County: JAMES P. DALEY, Judge. *Affirmed*.

¶1 SHERMAN, J.[1] Eric Webley appeals from a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant (OWI), fourth offense, contrary to WIS. STAT. § 346.63(1)(a), and disorderly

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

conduct, contrary to WIS. STAT. § 947.01. Webley contends the circuit court erred in denying his motion to suppress evidence obtained as a result of the stop of his vehicle.

¶2 Webley argued before the circuit court and does so now here that the arresting officer, Wisconsin State Patrol Trooper Mark Dolin, lacked reasonable suspicion to believe that Webley was driving while intoxicated at the time he was asked to submit to field sobriety tests and, therefore, suppression of evidence was warranted. The circuit court denied Webley's motion to suppress, concluding there was reasonable suspicion for the administration of the field sobriety tests.[2] We conclude that the circuit court's denial of the motion to suppress was warranted and, therefore, affirm Webley's conviction.

DISCUSSION

¶3 Webley challenges the denial of his motion to suppress and his judgment of conviction on the sole ground that, under the facts at hand, Dolin did not have reasonable suspicion to administer field sobriety tests.

¶4 When reviewing the denial of a motion to suppress, we uphold the circuit court's factual findings unless they are clearly erroneous. ***State v. Eckert***, 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996). We decide independently, however, whether, under those facts, reasonable suspicion exists. *See* ***State v. Young***, 2006 WI 98, ¶17, 294 Wis. 2d 1, 717 N.W.2d 729; ***State v. Martwick***, 2000 WI 5, ¶19, 231 Wis. 2d 801, 604 N.W.2d 552.

[2] Although the court used the words "probable cause" in its ruling, we assume the court meant "reasonable suspicion."

¶5 An officer has reasonable suspicion if he or she is "'able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant' the intrusion." ***State v. Post***, 2007 WI 60, ¶10, 301 Wis. 2d 1, 733 N.W.2d 634 (quoted source omitted). "[W]hat 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. Young***, 212 Wis. 2d 417, 424, 569 N.W.2d 84 (Ct. App. 1997).

¶6 Webley asserts that Dolin did not have reasonable suspicion because the facts do not show any of the "classic hallmarks of impairment," including erratic driving, slurred speech, red and watery eyes, and slow movements. The law does not require that those specific indicia of intoxication be present for there to exist reasonable suspicion to believe a driver is operating his or her motor vehicle while impaired. We agree with the circuit court that applying the "common sense test" of ***Young***, Dolin's decision to administer field sobriety tests was reasonable. ***Id.*** at 424.

¶7 The circuit court ruled that the original stop was proper. The court found that Dolin originally stopped Webley for speeding, and for no other reason.

¶8 The circuit court also found that Dolin had several justifiable reasons for seeking field sobriety testing: (1) Dolin observed an open 30-pack of beer beside Webley on the seat of the car; (2) Dolin smelled alcohol coming from the vehicle; (3) when Dolin asked for his license, Webley initially offered his credit card; (4) when Dolin ran Webley's driving record he discovered that Webley's driving privileges were presently revoked and that Webley had a number of prior

convictions for OWI, sufficient to lower the blood alcohol level for OWI from 0.08 to 0.02; and (5) although Dolin told Webley not to smoke, he did so anyway.

¶9 Webley originally admitted to consuming one beer, but later admitted to consuming two. Webley asserts that "[s]uch a minute amount of alcohol, without any information as to the timing, suggests neither impairment, or even a likelihood there is any alcohol still in his system." Dolin was not required to infer that Webley's consumption of alcohol occurred so far in advance of driving that the alcohol was no longer in his system. *See* ***State v. Anderson***, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990) (an officer is "not required to rule out the possibility of innocent behavior before initiating a brief stop").

¶10 Under all the facts and circumstances present, "a reasonable police officer [could] reasonably suspect in light of his or her training and experience" that Webley was driving with a blood alcohol level in excess of 0.02. ***Young***, 212 Wis. 2d at 424. Accordingly, we affirm the circuit court's denial of Webley's motion to suppress and the judgment of conviction.

By the Court.—Judgment affirmed.

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