COURT OF APPEALS
DECISION
DATED AND FILED

November 24, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1593 **Cir. Ct. No. 2008TR7752**

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

COUNTY OF SAUK,

PLAINTIFF-RESPONDENT,

V.

JULIO LEON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Sauk County: PATRICK TAGGART, Judge. *Reversed and cause remanded*.

¶1 BLANCHARD, J.[1] Julio Leon appeals from a 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) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

(OWI), first offense, WIS. STAT. § 346.63(1)(a), and from an order denying his suppression motion. Leon's claims on appeal include one that the circuit court erred in concluding that a sheriff's deputy had reasonable suspicion to detain Leon for the purpose of performing field sobriety tests. Because we agree with Leon that all reasonable inferences from the facts fail to support a conclusion that the deputy had reasonable suspicion, based on the totality of the circumstances, that Leon's ability to operate his vehicle was impaired at the time the deputy requested the field sobriety tests, we reverse and remand for further proceedings.[2]

BACKGROUND

¶2 The only witness at the evidentiary hearing on Leon's motion to suppress was the arresting officer, Deputy Joseph Uminski. The deputy testified that he was on routine patrol at 11:04 p.m. on a Friday night on a four-lane portion of U.S. Route 12 when a truck on the passenger side of his squad car braked hard and activated its horn for an extended period. This drew the deputy's attention to the side of the highway, where a female (subsequently identified as Stacy) was "walking away, toward the edge of" a frontage road that was on the other side of a median from Route 12. It appeared to the deputy that the truck driver had braked and hit his horn because Stacy had been walking toward the highway just before the deputy saw her.

¶3 Deputy Uminski further testified that a vehicle associated with Stacy and the man she was with (subsequently identified as Leon) was parked in a lane

[2] Because we conclude that the officer's decision to prolong his encounter with Leon to conduct field sobriety tests was not supported by reasonable suspicion of impaired driving, we need not address Leon's additional claims on appeal.

of traffic on the frontage road. The deputy testified that between the first time he saw Stacy, and the time he pulled over and approached Leon and Stacy at the vehicle parked on the frontage road, Stacy had moved on foot "a couple hundred feet" from where the deputy first saw her.

¶4 The deputy testified that when he first saw them, Stacy and Leon were "flailing their arms" while they were on the frontage road, "right outside their vehicle" in what "appeared to be some type of argument alongside the roadway." On cross-examination, however, Uminski testified that he was not certain whether Stacy was in fact flailing her arms when he first saw her.

¶5 The deputy called for backup. He pulled over "to sort out what was taking place, [and] separate the parties." He believed that "there may [have] be[en] some type of disturbance in progress." When Uminski approached, Stacy was talking to Leon next to a vehicle subsequently identified as Leon's on a lane of the frontage road.

¶6 Deputy Uminski said he "separated" Leon and Stacy and began to try to communicate with Stacy, but this was difficult, because she was "acting frantically" and ignoring Uminski's directions. Stacy "appeared to be intoxicated, agitated, [and] highly excitable" and the deputy "couldn't gather much information from her." The deputy further testified that Stacy "continued to come toward me, highly agitated, flailing her arms around, and the like, to the point, [that] … [I] believed she may strike me for whatever reason." The deputy placed Stacy in custody "for her safety, and [the deputy's] safety, and continued sorting out what the on-going issue was."

¶7 When asked whether, while Stacy was acting in a wild manner, Leon "was standing there in a non-agitated state, calmly," Deputy Uminski responded,

"Yes, he was just standing there." Leon did not appear to have any difficulties with his balance.

¶8 After handcuffing Stacy and placing her in his squad car, Deputy Uminski spoke with Leon, who identified himself by way of an Indiana driver's license. The deputy testified that Leon made statements that included the following. Leon and Stacy had been at "Marley's," where Leon had seen another man with his arms around Stacy. Leon and Stacy headed back to the Holiday Inn Express, where they were apparently staying, but Leon could not find a parking spot, so he drove back to the frontage road. Stacy got out of the car. Leon turned the car around and stopped to get Stacy back into the car. He tried to "calm her down," but she headed on foot toward Route 12, where the deputy saw them.

¶9 The deputy testified that Leon's breath gave off an odor of intoxicants.[3] Leon said that he had consumed one beer between 8:30 and 9:30 that evening, while eating supper at Pizza Pub. As is his usual practice, the deputy asked Leon this question two or three separate times, and each time Leon responded that he had consumed one beer over supper.

¶10 The deputy asked if Leon would perform standard field sobriety tests. Before doing so, the deputy did not note any outward signs that Leon was intoxicated, such as trouble with balance, bloodshot eyes, watery eyes, or slurred speech. Leon also appeared to have no problem in promptly pulling out his wallet and retrieving his identification.

[3] Neither side attempted to have the deputy, an experienced law enforcement officer, characterize the odor as strong, moderate, or weak, which can be a factor in determining reasonable suspicion, and the deputy did not imply any particular level of intensity.

¶11 When specifically asked what he believed supported the decision to ask for field sobriety tests, the deputy responded:

> I detected an odor of intoxicants coming from his breath. He admitted to drinking. In regard to the statement, I had people admit many different levels how much they had to drink. So, to make sure he was safe to drive or not drive, I asked him to perform the tests.

¶12 In its written decision, the circuit court found that the deputy had reasonable suspicion to detain Leon for the purpose of performing field sobriety tests. The court focused on the "disturbance" involving Leon and Stacy that prompted the deputy's response.

DISCUSSION

¶13 Under the Fourth Amendment to the United States Constitution and article I, § 11 of the Wisconsin Constitution, an investigatory detention must be supported by the law enforcement officer's reasonable suspicion, grounded in specific, articulable facts and reasonable inferences from those facts, that a person is or was violating the law. ***State v. Colstad***, 2003 WI App 25, ¶8, 260 Wis. 2d 406, 659 N.W.2d 394. A request that a driver perform field sobriety tests constitutes a greater invasion of liberty than an initial police stop or encounter, and must be separately justified by specific, articulable facts showing a reasonable basis for the request. *See* ***id.***, ¶19.

¶14 "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[?]" ***Id.***, ¶8. 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 (citation omitted).

¶15 Before detaining a person to conduct field sobriety tests, an officer must have reasonable suspicion that the person has been driving after the person "has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle." *See* WIS. JI CRIMINAL 2663.

¶16 In reviewing the circuit court's determination that there was reasonable suspicion to prolong the stop to request field sobriety tests, we accept the circuit court's findings of historical fact unless they are clearly erroneous, and we review de novo the application of those facts to the constitutional standard. ***State v. Young***, 2006 WI 98, ¶17, 294 Wis. 2d 1, 717 N.W.2d 729. In this case, Deputy Uminski was the only witness and the circuit court clearly accepted his testimony as credible. We therefore apply the constitutional standard to the events and observations described by the deputy.[4]

¶17 Leon does not claim that the deputy acted unlawfully in approaching and questioning Stacy and Leon about the disturbance, or in placing Stacy in handcuffs. Instead, Leon argues that the deputy did not have reasonable suspicion

[4] We are not limited to the record before the circuit court at the time of the suppression hearing in our evaluation of the totality of circumstances facing the deputy when he extended his encounter with Leon to conduct field sobriety tests. Other information produced before or after the suppression hearing may be used to support the circuit court's decision. *See* ***State v. Gaines***, 197 Wis. 2d 102, 106-07 n.1, 539 N.W.2d 723 (Ct. App. 1995). However, the transcript of the trial in this case is not included in the appellate record, and the County does not direct our attention to any information outside the suppression hearing supporting its position on this issue. Therefore, we assume that the trial record did not include additional facts supporting the circuit court's decision.

that Leon was driving under the influence of an intoxicant when the officer detained him for the purpose of administering field sobriety tests. Based on the totality of the circumstances as reflected in the essentially uncontested factual record of this case, we agree.

¶18 We begin the analysis by noting that this case is somewhat unusual in that the deputy lacked proof of reckless or inattentive driving by Leon. The deputy was not aware of any driving behavior by Leon indicative of impaired driving, or even of imprudent driving.

¶19 This contrasts sharply with the many cases in which a law enforcement officer has observed weaving, evasive driving, speeding, excessively slow driving, or other erratic or dangerous behavior behind the wheel that might reasonably be thought to correlate with impaired driving, based on the training and experience of a reasonable officer. The vehicle that Leon acknowledged driving that night was parked on a frontage road, which is not ordinary. However, Leon gave a plausible explanation for why that was so, and the deputy appeared reasonably to credit Leon's account that Stacy had abruptly exited from the car during an argument, and that Leon was merely trying to get her back into the car. The circuit court made no factual finding raising doubt about the account given by Leon as to why his vehicle was parked where it was.

¶20 When an officer is not aware of bad driving, then other factors suggesting impairment must be more substantial. For example, a speeding or significant lane violation at bar time provides a far different context than is presented here. *See* ***State v. Waldner***, 206 Wis. 2d 51, 58, 556 N.W.2d 681 (1996) ("building blocks of fact" must accumulate, raising reasonable inferences about a cumulative effect creating reasonable suspicion of impaired driving); *see also*,

e.g., ***State v. Repenshek***, 2004 WI App 229, ¶30, 277 Wis. 2d 780, 691 N.W.2d 369 (officer possessed reasonable suspicion of impaired driving when driver likely caused serious vehicle accident by negligent operation of truck and refused to take a PBT).

¶21 Further, while the deputy was not required to credit Leon's claim of having had no more than one beer, along with food, approximately two hours earlier, the deputy was not presented with a suspiciously vague admission of "some" drinking or "a few" drinks, nor with an admission to multiple drinks or drinking hard liquor. Leon consistently provided the deputy with an explanation for the smell of alcohol that would not have supported an inference of impairment, and there was no evidence to the contrary, such as a statement from another witness or empty bottles or cans.

¶22 Turning to the point that apparently proved decisive to the circuit court, namely the roadside disturbance that drew the deputy to the scene, the deputy observed aberrant behavior by Stacy that appeared to be at least in part fueled by overconsumption of alcohol. Deputy Uminski acted lawfully and appropriately in stopping and responding to the Stacy's apparently dangerous conduct.

¶23 Yet the record is simply devoid of facts from which reasonable inferences could be drawn that Leon did anything in connection with his interactions with an apparently intoxicated Stacy suggesting impairment. Even assuming all reasonable inferences against Leon regarding his role in an argument that included "flailing" of arms by both parties, such facts would not suggest to a reasonable police officer, based on his or her training and experience, that Leon had been driving while impaired or with a prohibited blood alcohol level.

¶24 Depending on details, bizarre or unruly conduct can be viewed as indicia of impairment; this is consistent with the required "common sense" approach. *See*, *e.g.*, ***State v. Krause***, 168 Wis. 2d 578, 587-88, 484 N.W.2d 347 (officer's basis for reasonable suspicion that driver's blood contained evidence of OWI included driver's "unruly conduct" after being placed in squad car). Here, however, at most Leon apparently "flailed" his arms about in some manner while arguing with an apparently out-of-control Stacy. Upon encountering Stacy, the deputy learned that Stacy was out of control, but that Leon was not. The circuit court did not make any findings of fact tying Leon's conduct in connection with his interactions with Stacy to any particular indicia of Leon's suspected impairment or prohibited blood alcohol level.

¶25 One factor not explicitly mentioned by the deputy, nor cited by the circuit court or the County, but that could be considered at least to a small degree in favor of the circuit court's legal conclusion, is that this incident occurred late on a Friday evening. *See* ***State v. Lange***, 2009 WI 49, ¶32, 317 Wis. 2d 383, 766 N.W.2d 551 (common knowledge that overconsumption of alcohol occurs more frequently on Friday and Saturday nights).[5] Yet this incident occurred at around 11:00 p.m., some hours before "bar time," and even if it had occurred around bar time, such a contextual fact would not have been enough to fill in the missing elements needed to support reasonable suspicion on this record.

[5] In the absence of specific fact-finding, this court ordinarily assumes facts that are reasonably inferable from the record in a manner that supports the circuit court's decision. *See, e.g.*, ***State v. Wilks***, 117 Wis. 2d 495, 503, 345 N.W.2d 498 (Ct. App. 1984), *aff'd*, 121 Wis. 2d 93, 358 N.W.2d 273 (1984).

¶26 The totality of the circumstances on the undisputed facts suggest that at the time the deputy came upon them, Stacy was acting in a wild manner and Leon was simply reacting to that behavior. The deputy did not testify to the contrary, either in any detail or in summary fashion. When approached by the deputy, Leon's behavior was apparently calm and not unsteady. There was no testimony of exaggerated or suspiciously slow movements. Leon complied with directions from the deputy. So far as the record reflects, he produced his identification readily, without fumbling or confusion, and spoke without slurring his speech or a "thick tongue," and without betraying excessive drinking through bloodshot or watery eyes or drooping eyelids.

¶27 The County argues in part, that "if Deputy Uminski had not requested field sobriety tests and instead let the defendant go and there had been a horrible accident, he would be vilified for not properly investigating the situation before him." This is not the current legal standard in Wisconsin. Under the County's suggested standard, officers may, and perhaps should, require field sobriety tests of every motorist they encounter who smells of alcohol or admits to any drinking.

¶28 While officers need not observe unlawful conduct to support a finding of reasonable suspicion, ***Waldner***, 206 Wis. 2d at 57, officers do need an objectively reasonable inference of wrongful conduct. ***State v. Anderson***, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (Ct. App. 1990). Here, there were virtually no indicia of actual impairment. Without more, an admission of having consumed one beer with an evening meal, together with an odor of unspecified intensity, are not sufficient "building blocks" representing specific and articulable facts supporting reasonable suspicion that Leon had become less able to exercise the clear judgment and steady hand necessary to control his car due to drinking. *See*

WIS. STAT. § 346.63(1)(a) (does not prohibit operating a motor vehicle after having consumed alcohol, but instead prohibits driving "[u]nder the influence of an intoxicant … to a degree which renders [one] incapable of safely driving."). Simply put, the record does not include "facts which, taken together with rational inferences from those facts, reasonably warrant[ed] [the deputy's] intrusion." ***Terry v. Ohio***, 392 U.S. 1, 21 (1968).

CONCLUSION

¶29 We conclude that the deputy did not have reasonable suspicion to detain Leon to perform field sobriety tests, and that the circuit court erred in denying Leon's motion to suppress evidence on these grounds. We therefore reverse the judgment, reverse the order denying the motion to suppress, and remand to the circuit court for further proceedings.

By the Court.—Judgment and order reversed and cause remanded.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.