COURT OF APPEALS
DECISION
DATED AND FILED

March 24, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1844-CR **Cir. Ct. No. 2007CT522**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JASON M. GLOVER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Columbia County: ALAN J. WHITE, Judge. *Affirmed*.

¶1 BLANCHARD, J.[1] Jason Glover appeals a judgment of conviction for operating a motor vehicle while intoxicated, second offense, in violation of

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

WIS. STAT. § 346.63(1)(a). Glover contends that the circuit court erred in denying his motion to suppress all evidence obtained after he was stopped for speeding. Glover argues that the officer: (1) illegally expanded the scope of the detention by asking whether he had been drinking alcohol; (2) lacked reasonable suspicion to conduct field sobriety tests; and (3) lacked "probable cause to believe" that Glover was operating a vehicle while under the influence before requesting that Glover take a preliminary breath test (PBT). However, under the applicable legal standards the officer reasonably extended the scope of the detention, and possessed the requisite levels of "reasonable suspicion" to conduct field sobriety tests and "probable cause to believe" to request the PBT. Accordingly, the circuit court is affirm.

BACKGROUND

¶2 The controlling facts are not in dispute, and this appeal does not involve relevant credibility determinations by the circuit court. An officer stopped Glover at approximately 1:19 a.m. for speeding (thirty-four miles per hour in a twenty-five-mile-per-hour zone). Upon making contact with Glover, the officer detected a slight odor of intoxicants emanating from the cab area of his vehicle. The officer also observed a passenger in the front seat.

¶3 When the officer asked Glover where he was coming from, Glover said the Cottonwood Bar. The officer then asked Glover if he had been drinking and Glover acknowledged that he had been. The officer did not remember whether he asked Glover what time he had been drinking or how many drinks he had consumed.

¶4 The officer asked Glover to perform field sobriety tests, beginning with the horizontal gaze nystagmus (HGN) test. Glover failed the first test

because he exhibited six out of six clues of intoxication. Glover passed the next test, the walk and turn test, because he exhibited one clue. For a driver to fail the test, the officer must observe at least two clues. Glover failed the last test, the one-leg-stand test, because he exhibited three clues: swaying while balancing, using his arms for balancing, and hopping.

¶5 Thereafter, the officer asked Glover to submit a breath sample for a PBT. Glover agreed and the PBT result was 0.12. The officer arrested Glover for operating while intoxicated (OWI).

¶6 Glover filed a motion to suppress for unlawful detention and arrest. The circuit court denied the motion following a hearing, concluding that the officer was permitted to ask Glover if he had been drinking, possessed the requisite "reasonable suspicion" to request field sobriety tests, and, based on those results, had "probable cause to believe" that Glover was operating while intoxicated so as to justify use of a PBT.

DISCUSSION

¶7 In reviewing a denial of a motion to suppress, we uphold the circuit court's findings of fact unless they are clearly erroneous. ***State v. Popke***, 2009 WI 37, ¶10, 317 Wis. 2d 118, 765 N.W.2d 569. Whether those facts satisfy the constitutional requirement of reasonableness is a question of law that we review de novo. ***State v. Guzy***, 139 Wis. 2d 663, 671, 407 N.W. 2d 548 (1987).

¶8 Under the Fourth Amendment, the "seizure" of "persons" is unlawful if it is not "reasonable." ***Whren v. United States***, 517 U.S. 806, 809-10 (1996). To determine whether a search or seizure is "reasonable," we first examine whether the initial interference with an individual's liberty was justified.

Terry v. Ohio, 392 U.S. 1, 19-20 (1968). If not, seizure was not reasonable. ***Id.*** If the initial interference was justified, we then determine whether subsequent police conduct was "reasonably related" in scope to the circumstances that justified the initial interference. ***Id.***; ***State v. Arias***, 2008 WI 84, ¶30, 311 Wis. 2d 358, 752 N.W.2d 748.

¶9 Turning to the specific context of a traffic stop, temporary detention of individuals by the police during an automobile stop constitutes a "seizure" of "persons." ***Whren***, 517 U.S. at 810. Therefore, to determine if the temporary detention of individuals is "reasonable," we must first examine if the officer has "probable cause to believe" that a traffic violation has occurred, ***id.***, or if the officer "reasonably suspects," based on the totality of the circumstances, that the motorist has committed, is in the process of committing, or is about to commit an unlawful act. *See* WIS. STAT. § 968.24; ***State v. Krier***, 165 Wis. 2d 673, 677-78, 478 N.W.2d 63 (Ct. App. 1991). "'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. Colstad***, 2003 WI App 25, ¶8, 260 Wis. 2d 406, 659 N.W.2d 394 (citation omitted).

Scope of Detention to Ask Question

¶10 Glover concedes that the initial stop was justified, either because the officer possessed "probable cause to believe" or, at the lower level of suspicion, because the officer reasonably suspected that Glover had committed a speeding violation. However, Glover argues that the officer illegally expanded the scope of detention by asking whether Glover had been drinking. Glover asserts that in order to expand the scope of detention, an officer must possess reasonable

suspicion of a new offense outside the scope of the original offense, and cites ***State v. Betow***, 226 Wis. 2d 90, 593 N.W.2d 499 (Ct. App. 1999), for this proposition. Glover refers to the following language in ***Betow***: "Once a justifiable stop is made—as is the case here—the scope of the officer's inquiry, *or the line of questioning*, may be broadened beyond the purpose for which the person was stopped *only if additional suspicious factors* come to the officer's attention …." ***Id.*** at 94 (emphasis added). Glover argues that in order to expand the scope of detention, the officer must have had facts objectively justifying his reasonable suspicion that Glover's ability to drive was impaired as a result of alcohol consumption.

¶11 Glover asks this court to apply an incorrect standard for determining whether the officer's question exceeded the scope of the initial detention. Our supreme court explained in ***Arias*** that the "broad dicta" in ***Betow*** that Glover relies on "misstates the manner in which courts are to evaluate the reasonableness of the continuation of a seizure that was lawful at its inception." ***Arias***, 311 Wis. 2d 358, ¶45. Instead, this court must examine whether the "incremental liberty intrusion" that resulted from the investigation was unreasonable. ***Id.***, ¶38. A seizure is unreasonable if the incremental liberty intrusion to the individual from the police investigation "supersedes the public interest served by the investigation." ***Id.***

¶12 Therefore, the relevant inquiry is not whether the officer posed a question on a permissible topic, but instead whether the officer acted unreasonably in detaining Glover for the length of time it took to ask the question and receive an answer. In analyzing the reasonableness of the detention, this court must examine the totality of circumstances to determine: (1) the public interest served by asking the question; (2) the degree to which the continued seizure advances the public interest; and (3) the severity of the interference with Glover's liberty interest

resulting from asking a question. ***Id.***, ¶39. In this case, the length of time it took for the officer to ask the question and receive an answer was reasonable.

¶13 The analysis is effectively completed by ***State v. Griffith***, 2000 WI 72, ¶61, 236 Wis. 2d 48, 613 N.W.2d 72. In that case, our supreme court held that, as a general matter, the time it takes an officer to ask a question "is not sufficiently intrusive to transform a reasonable, lawful stop into an unreasonable, unlawful one." ***Id.***; *see also* ***State v. Gaulrapp***, 207 Wis. 2d 600, 609, 558 N.W.2d 696 (Ct. App. 1996).

¶14 Further, proceeding under the applicable ***Arias*** standard, the length of time involved to ask the question in this case was plainly reasonable. One public interest served when an officer asks a motorist whether he or she has been drinking is to detect and thereby prevent intoxicated persons from operating vehicles on our state roads. Another public interest served is that it reminds the motorist that impaired driving is illegal and dangerous. Finally, the severity and duration of interference with Glover's liberty by the officer asking and Glover answering one short, uncomplicated question was minimal.

¶15 For these reasons, the circuit court's finding that the officer permissibly, and only minutely, expanded the scope of detention by asking Glover whether he had been drinking is affirmed.

"Reasonable Suspicion" for Field Sobriety Tests

¶16 Glover argues that the officer lacked the requisite reasonable suspicion that he was operating a vehicle while intoxicated to legally administer field sobriety tests because the only factor suggesting that the defendant might be impaired in his ability to drive was a slight odor of intoxicants emanating from

within the vehicle. However, this was not the only factor, and based on the totality of the facts the deputy had the necessary reasonable suspicion to conduct the field sobriety tests.

¶17 To possess the requisite reasonable suspicion, an officer must be able to point to "specific and articulable facts" and "*rational inferences* from those facts" to reasonably suspect that the motorist had drunk enough to impair the motorist's ability to drive. ***State v. Richardson***, 156 Wis. 2d 128, 139, 456 N.W.2d 830 (1990). Although acts and circumstances by themselves may constitute lawful behavior that falls short of "reasonable suspicion," taken together, the totality of those circumstances may constitute reasonable suspicion. ***Popke***, 317 Wis. 2d 118, ¶25. In fact, the "building blocks of fact" may accumulate to such a degree that "the sum of the whole is greater than the sum of its individual parts." ***State v. Waldner***, 206 Wis. 2d 51, 58, 556 N.W.2d 681 (1996).

¶18 Contrary to Glover's assertion, the slight odor of intoxicants coming from the vehicle was not the only factor that contributed to the officer's suspicion that Glover might be impaired in his ability to drive. Glover admitted to drinking and had left a bar. The time of night, 1:19 a.m., around "bar time," is also a factor that contributes to the reasonable suspicion that Glover was operating his vehicle while under the influence of alcohol. *See* ***State v. Lange***, 2009 WI 49, ¶¶20, 32, 317 Wis. 2d 383, 766 N.W.2d 551 (time of night of traffic stop is relevant factor in consideration for "probable cause" to arrest for an OWI, a standard more stringent than "reasonable suspicion" for field sobriety tests).

¶19 For these reasons, the circuit court's finding that the officer possessed the requisite reasonable suspicion to administer field sobriety tests is affirmed.

"Probable Cause to Believe" for PBT

¶20 Finally, Glover argues that the officer did not have "probable cause to believe" that Glover was operating a vehicle while impaired to lawfully administer a PBT under WIS. STAT. § 343.303.[2] Glover bases his argument on the lack of egregious driving, ambiguous performance on field sobriety tests, and lack of other indicia of intoxication so compelling as to negate the need for those tests, such as red or glassy eyes, slurred speech, or confusion.

¶21 In ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 603 N.W.2d 541 (1999), our supreme court described the requisite levels of reasonable suspicion and probable cause throughout an OWI investigation. After making a lawful investigatory stop, if the officer has cause to suspect that the driver is driving while impaired, but does not have sufficient basis to establish probable cause to arrest for an OWI violation, the officer is permitted to request that the driver perform field sobriety tests. ***Id.*** at 310. If the field sobriety tests do not produce enough evidence to establish probable cause for arrest under WIS. STAT.

[2] WISCONSIN STAT. § 343.303 provides in part:

> If a law enforcement officer has *probable cause to believe* that the person is violating or has violated s. 346.63(1) or (2m) … the officer, prior to an arrest, may request the person to provide a sample of his or her breath for a preliminary breath screening test using a device approved by the department for this purpose.

(Emphasis added).

§ 343.303, an officer is permitted to utilize a PBT to aid in determination of probable cause to arrest. ***Id***. at 310-11. The phrase "probable cause to believe" in WIS. STAT. § 343.303 refers "to a quantum of proof that is greater than the reasonable suspicion necessary to justify an investigative stop … but less than the level of proof required to establish probable cause for arrest." ***Id.*** at 317.

¶22 The facts in ***Renz*** are roughly similar to the facts in this case. The driver in ***Renz*** exhibited several indicators of intoxication: his car smelled of intoxicants (albeit in ***Renz*** the odor was strong, whereas here only slight), he admitted to drinking three beers earlier that evening, he was stopped at 2:00 a.m., as here close to "bar time," and he exhibited six out of six clues of intoxication on the HGN test. ***Id***. at 296-98. Our supreme court concluded that despite the fact that the driver substantially completed four other field sobriety tests, these indicators satisfactorily constituted "probable cause to believe" that the driver had been operating under the influence of alcohol, and thus the officer was permitted to request that the driver submit to a PBT. ***Id***. at 317. While not an exact match, the facts in this case approximate those in ***Renz***, and therefore the circuit court was correct in concluding that the officer possessed the requisite "probable cause to believe" justifying a request that Glover submit to a PBT.

CONCLUSION

¶23 In sum, the officer acted reasonably in expanding the scope of the initial detention by asking Glover whether he had been drinking alcohol, had a reasonable suspicion that Glover was driving while intoxicated necessary to conduct field sobriety tests, and acquired "probable cause to believe" that administering a PBT was justified. Therefore, Glover's detention began and

remained lawful through the events challenged in this appeal, and accordingly the circuit court is affirmed.

By the Court.—Judgment affirmed.

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