COURT OF APPEALS
DECISION
DATED AND FILED

April 27, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2321-CR **Cir. Ct. No. 2009CT2623**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALLEN L. RESCH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: WILLIAM DOMINA, Judge. *Affirmed*.

¶1 ANDERSON, J.[1] Allen L. Resch appeals from his third offense conviction of operating a motor vehicle while intoxicated in violation of WIS.

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

STAT. §§ 346.63(1)(a) and 346.65(2)(am)3. Specifically, Resch appeals the trial court's order denying his motion to suppress the initial stop and the imposition of field sobriety tests. The issues on appeal are (1) whether the trial court erred when it found the deputy had reasonable suspicion to justify his investigatory stop of Resch and (2) whether the trial court erred when it found the deputy had reasonable suspicion to justify imposing field sobriety tests upon Resch. We affirm, because the arresting deputy's suspicions were grounded in specific, articulable facts, which taken together with rational inferences from those facts, led to a reasonable belief that Resch was engaged in suspicious activity to justify the stop and, subsequently, that he was operating a vehicle while intoxicated to justify the field sobriety tests.

I. *Facts*

¶2 On December 17, 2009, at approximately 2:26 a.m., a Waukesha county sheriff's deputy observed Resch's vehicle parked in a private business parking lot at a stop sign facing a public road. Resch had left his vehicle running and its headlights off. According to the deputy, the vehicle appeared suspicious for a variety of reasons: the time of day, the unusual location of the vehicle (in the exit lane of a business' parking lot), the fact that the vehicle had its headlights off, and the possibility that the occupants of the vehicle were engaged in criminal activity (i.e., burglary). As a result, the deputy approached the vehicle and made contact with Resch, the sole occupant.

¶3 Upon speaking to Resch, the deputy detected a strong odor of intoxicants emanating from the vehicle. At that point, the deputy asked Resch whether he had been drinking that night, to which Resch responded "a little." Resch indicated that he had driven from Brookfield and was following some

friends home but had lost them. Due to the circumstances surrounding the encounter, the deputy believed Resch was operating his vehicle under the influence of intoxicants and had Resch undergo three field sobriety tests and a preliminary breath test (PBT). The deputy noted that he conducted the tests because Resch smelled of intoxicants and was the sole occupant of a running vehicle—which had been left idling at a stop sign of a private lot with its headlights off.

¶4 Subsequently, Resch failed the field sobriety tests and the PBT revealed that he had an impermissible alcohol concentration on his breath. The deputy placed Resch under arrest and issued him a citation for a third offense violation of operating while intoxicated.

¶5 Resch challenged the citation at trial, and on April 14, 2010, he filed a motion to suppress the traffic stop and imposition of field sobriety tests, arguing that the deputy lacked reasonable suspicion to perform the stop and the tests. The trial court denied the motion, concluding that the evidence was "sufficient on totality to allow a reasonable officer to detain for interrogation a vehicle which is parked at a stop sign with its headlights off at 2:30 in the morning running in an area of closed businesses" and that there were "sufficient additional facts following the additional stop to allow the officer to progress to ask for additional demonstrations of capacity through ... field sobriety tests." Resch was ultimately convicted of operating while intoxicated, his third offense, in violation of WIS. STAT. § 346.63(1)(a); however, the conviction was subsequently stayed pending the outcome of this appeal.

¶6 Resch appeals his conviction and the trial court's denial of his motion to suppress the investigatory stop and imposition of the field sobriety tests.

II. *Reasonable Suspicion to Stop*

¶7 "A trial court's determination of whether undisputed facts establish reasonable suspicion justifying police to perform an investigative stop presents a question of constitutional fact." ***State v. Sisk***, 2001 WI App 182, ¶7, 247 Wis. 2d 443, 634 N.W.2d 877. When reviewing questions of constitutional fact, we apply a two-step standard of review. ***State v. Powers***, 2004 WI App 143, ¶6, 275 Wis. 2d 456, 685 N.W.2d 869. First, we will uphold a trial court's findings of historical fact unless they are clearly erroneous. ***Id.*** Second, based on the historical facts, we review de novo whether a reasonable suspicion justified the stop. ***Id.***

¶8 "A traffic stop is a form of seizure triggering Fourth Amendment protections from unreasonable searches and seizures." ***State v. Gammons***, 2001 WI App 36, ¶6, 241 Wis. 2d 296, 625 N.W.2d 623. For a traffic stop to comport with the Fourth Amendment, "[t]he police must have a reasonable suspicion, grounded in specific articulable facts and reasonable inferences from those facts, that an individual is violating the law." ***Id.*** "Determining whether there was reasonable suspicion requires [this court] to consider the totality of the circumstances." ***State v. Allen***, 226 Wis. 2d 66, 74, 593 N.W.2d 504 (Ct. App. 1999).

¶9 The law of reasonable suspicion and investigative stops was summarized in ***State v. Washington***, 2005 WI App 123, ¶16, 284 Wis. 2d 456, 700 N.W.2d 305:

> Thus, the standard for a valid investigatory stop is less than that for an arrest; an investigatory stop requires only "reasonable suspicion." The reasonable suspicion standard requires the officer to have '"a particularized and objective basis' for suspecting the person stopped of criminal

> activity"[;] reasonable suspicion cannot be based merely on an "inchoate and unparticularized suspicion or 'hunch[.]'" When determining if the standard of reasonable suspicion was met, those facts known to the officer at the time of the stop must be taken together with any rational inferences, and considered under the totality of the circumstances. Stated otherwise, to justify an investigatory stop, "[t]he police must have a reasonable suspicion, grounded in specific articulable facts and reasonable inferences from those facts, that an individual is [or was] violating the law." However, an officer is not required to rule out the possibility of innocent behavior before initiating a brief investigatory stop. (Citations omitted.)

¶10 Further, in regards to a defendant's potential for innocent behavior, ***State v. Waldner***, 206 Wis. 2d 51, 60, 556 N.W.2d 681 (1996), instructs:

> [W]hen a police officer observes lawful but suspicious conduct, if a reasonable inference of unlawful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, police officers have the right to temporarily detain the individual for the purpose of inquiry. Police officers are not required to rule out the possibility of innocent behavior before initiating a brief stop. If a reasonable inference of unlawful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, the officers have the right to temporarily detain the individual for the purpose of inquiry. (Citations omitted.)

¶11 Resch argues that the deputy did not have a reasonable suspicion to conduct the investigatory stop. Specifically, Resch contends that neither together nor by itself, did the time of day or the legal act of parking a running vehicle with its headlights off at a stop sign in a private lot indicate that criminal activity may have been afoot.

¶12 Resch's challenge fails because the trial court did not consider any of those factors in isolation. Instead, the trial court considered the totality of the circumstances to conclude that the deputy had a reasonable suspicion to conduct the investigatory stop. Additionally, although Resch's actions leading up to the

investigatory stop could be construed as innocent, the deputy was not required to rule out the possibility of innocent behavior before initiating the stop. *See* ***id.***

¶13 Specifically, as the trial court indicated, the time of day is an important factor in determining whether a law enforcement officer had a reasonable suspicion. *See* ***Allen***, 226 Wis. 2d at 74-75 ("[T]he time of day is another factor in the totality of the circumstances equation."). Here, the fact that it was near 2:30 a.m. when the deputy noticed Resch's vehicle in the parking lot helped create a reasonable suspicion for the deputy to believe there was potential for criminal activity (i.e., burglary).

¶14 In addition to the factors surrounding the investigatory stop, the deputy's experience is also part of a totality of circumstances consideration. *See* ***State v. Lange***, 2009 WI 49, ¶¶30-31, 317 Wis. 2d 383, 766 N.W.2d 551. In the instant case, the deputy considered that in his experience as a sheriff's deputy, it is rare to see a vehicle parked at that particular location of the parking lot, running and with its headlights off, especially at that time of day when the businesses in the area were closed.

¶15 Thus, the totality of the circumstances surrounding the stop—the location, time of day, and state of Resch's vehicle—could reasonably lead an experienced police officer to suspect that criminal activity may be afoot. These are specific and articulable facts to objectively discern a reasonable inference of unlawful conduct to justify the stop. The deputy had a reasonable suspicion to conduct the investigatory stop.

III. *Reasonable Suspicion to Extend a Traffic Stop to Impose a Field Sobriety Test*

¶16 The standard for determining the legality of a field sobriety test is based on the same reasonable suspicion standard as the initial stop. ***State v. Colstad***, 2003 WI App 25, ¶19, 260 Wis. 2d 406, 659 N.W.2d 394 (2003) (citing ***State v. Betow***, 226 Wis. 2d 90, 94-95, 593 N.W.2d. 499 (Ct. App. 1999)). If, during a valid traffic stop, a law enforcement officer "becomes aware of additional suspicious factors which are sufficient to give rise to an articulable suspicion that the person has committed or is committing an offense or offenses" independent from those that prompted the initial stop, "the stop may be extended and a new investigation begun." ***Colstad***, 260 Wis. 2d 406, ¶19. Thus, for the deputy to have had a reasonable suspicion to perform the field sobriety tests on Resch, he must have obtained new, specific, and articulable information following the initial stop, which combined with the reasonable inferences from both the new and preexisting information, led him to believe that Resch was operating a vehicle while under the influence of intoxicants. *See* ***id.***

¶17 Resch argues that the deputy lacked a reasonable suspicion to extend the initial traffic stop for the purposes of imposing field sobriety tests. Resch contends that the deputy never observed Resch driving to indicate he was impaired and impermissibly conducted the field sobriety tests based on insufficient observations, specifically: (1) the odor of intoxicants emanating from Resch's vehicle; (2) Resch's admission that he had been drinking earlier that evening; (3) Resch's statement that he was following his friends but had lost them; and (4) Resch was the sole occupant of a parked, running vehicle, sitting at a stop sign with its headlights off. We disagree that these are insufficient observations.

¶18 Instead we agree with the trial court that the deputy's observations, taken as part of the totality of the circumstances surrounding the deputy's stop and encounter with Resch, gave the deputy reasonable suspicion to conduct the field sobriety tests. Resch first argues that the "'strong odor' of intoxicants, among other factors, does not give rise to a reasonable inference that such an odor results from the consumption of alcohol in an amount sufficient to impair a person's ability to drive."[2] Additionally, Resch argues that the odor of intoxicants alone is insufficient to support a reasonable inference that his ability to drive was impaired as a result of intoxication. In support of his argument, Resch cites to ***State v. Meye***, No. 2010AP336, unpublished slip op. (WI App July 14, 2010). Pursuant to WIS. STAT. RULE 809.23(3)(b), unpublished cases issued after 2009 may be cited as persuasive authority, thus, though not controlling, we will address the legal propositions of ***Meye***.

¶19 In ***Meye***, this court held that the mere odor of intoxicants does not constitute reasonable suspicion that a driver is intoxicated to allow a law enforcement officer to make an investigatory stop. ***Meye***, No. 2010AP336, unpublished slip op. ¶¶1, 6. There, a police officer made an investigatory stop and subsequent OWI arrest after he smelled a strong odor of intoxicants emanating from the defendant or her passenger as they walked past him in a gas station

[2] To support this proposition in their brief, Resch's attorneys cite to an unpublished decision, ***State v. Schutz***, No. 2008AP729, unpublished slip op. (WI App July 31, 2008), a case which is ineligible for consideration as persuasive authority. *See* WIS. STAT. RULE 809.23(3)(b) (created by S. Ct. Order 08-02, 2009 WI 2 (eff. July 1, 2009)) (establishing a prohibition on citing unpublished cases issued prior to July 1, 2009). After the State pointed out the error in its brief, Resch's attorneys acknowledged their disregard of § 809.23(3)(b). Nonetheless, Resch's attorneys have committed a procedural violation. We strongly admonish counsel for their lack of due diligence, an omission this court does not take lightly. When an attorney violates procedural rules in this manner, this court has the authority to impose a fine. *See* ***Roy v. St. Lukes Med. Ctr.***, 2007 WI App 218, ¶12 n.3, 305 Wis. 2d 658, 741 N.W.2d 256.

parking lot. ***Id.***, ¶1. The officer neither saw the defendant's driving behavior nor determined which person the odor of intoxicants was coming from. ***Id.***, ¶¶6, 9. We ultimately rejected the State's argument that the officer had the requisite reasonable suspicion to conduct a stop based merely on the odor of intoxicants emanating from two people and by observing the defendant enter the driver's side of her car. ***Id.***, ¶¶7-9.

¶20 Though we agree with the holding of ***Meye***, its application to Resch's case does not lead this court to conclude that the deputy lacked a reasonable suspicion to administer the field sobriety tests. In ***Meye***, the police officer relied solely on the odor of intoxicants to conduct an investigatory stop. ***Id.***, ¶1. That is not what happened in Resch's case. Here, the odor of intoxicants was only one of several relevant factors in the reasonable suspicion determination. In addition to the odor of intoxicants, the trial court considered the totality of the circumstances surrounding the deputy's imposition of the field sobriety tests.

¶21 Resch next argues that by itself his admission to consuming alcohol is insufficient to support a reasonable inference that his ability to drive was impaired as a result of intoxication and, as a result, the deputy impermissibly conducted the field sobriety tests.[3] However, like its consideration of the odor of intoxicants, the trial court did not consider Resch's admission to consuming alcohol in a vacuum. Instead, the court considered Resch's admission as a factor among the totality of circumstances.

[3] Resch's attorneys again cite the unpublished decision of ***State v. Schutz***, No. 2008AP729, unpublished slip op., to support this proposition in their brief, a case which is ineligible for consideration. *See* WIS. STAT. RULE 809.23(3)(b). We again admonish Resch's counsel for their procedural violation and lack of due diligence.

¶22 As part of the totality of its circumstances consideration, the trial court noted the "nonsensical" character of Resch's statements that he was following friends but had lost them, Resch's failure to provide the deputy with a clear explanation as to exactly why he was in the parking lot, and the fact that Resch was stopped a considerable distance from where he initially indicated he had come from. The trial court also considered the nature in which the deputy had found Resch—sitting alone in a parked vehicle, which was left running and with its headlights off at a stop sign of a gas station parking lot around 2:30 in the morning.[4]

¶23 Based on the trial court's findings of fact and evidence presented at trial, the officer knew several articulable facts about Resch prior to administering the field sobriety tests: he smelled of intoxicants; consumed at least "a little" alcohol; was sitting by himself in a vehicle, which was idling at the stop sign of a private parking lot with its headlights off; had lost the friends whom he allegedly had been following; gave no clear explanation as to what he was doing in the parking lot; and was stopped around 2:30 in the morning. We conclude these facts and the reasonable inferences from them give rise to a reasonable suspicion that Resch had consumed enough alcohol to impair his ability to drive and to justify the deputy's imposition of the field sobriety tests.

[4] Additionally, the time of day (i.e., at or around "bar time") also supports the deputy's imposition of the field sobriety tests. *See* ***State v. Lange***, 2009 WI 49, ¶32, 317 Wis. 2d 383, 766 N.W.2d 551; ***State v. Post***, 2007 WI 60, ¶36, 301 Wis. 2d 1, 733 N.W.2d 634.

IV. *Conclusion*

¶24 We affirm the trial court's denial of Resch's motion to suppress the investigatory stop and field sobriety tests and conclude that, based on the totality of the circumstances, the court correctly concluded that the deputy had a reasonable suspicion to conduct both the investigatory stop and the field sobriety tests.

By the Court.—Judgment affirmed.

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