COURT OF APPEALS
DECISION
DATED AND FILED

March 31, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-1343-CR **Cir. Ct. No. 03CT000161**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LOUISE M. FIRKUS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Portage County: JOHN V. FINN, Judge. *Affirmed.*

¶1 DYKMAN, J.[1] Louise Firkus appeals from a judgment of conviction for operating while intoxicated (OWI)—third offense. Firkus pleaded no contest after the circuit court denied her motion to suppress evidence gathered

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

during a traffic stop. Firkus contends that the arresting officer lacked reasonable suspicion to justify the stop. Because we conclude that the facts found by the circuit court satisfy the reasonable suspicion standard, we affirm Fircus's conviction.

Background

¶2 Unless otherwise noted, the following facts are drawn from the hearing on Firkus' motion to suppress the evidence gathered during her traffic stop.

¶3 On March 21, 2004, Deputy Sheriff Michael Morgan was driving his squad car south on County Trunk Highway Q in Portage County. Morgan testified that, as he approached the intersection with County Trunk Highway B, he observed two cars approaching from the east. On direct examination, Morgan testified that he was at the stop sign on Highway Q when he saw the lead vehicle, a Mercury, move to the left of center with respect to the following vehicle, an Impala. He testified that the leftward movement occurred as the cars moved past him. When pressed on cross-examination, Morgan testified that he saw the leftward movement as he was approaching the stop sign, within a few car lengths of stopping. He also testified then that the leftward movement occurred when the two cars were "within a few hundred feet" to the west of his vehicle.

¶4 Morgan testified that he made a right turn and began to pursue the cars. He noted that the tire tracks on the wet pavement confirmed his belief that one of the cars had deviated to the left. At this point, he had not activated his emergency lights or siren. Morgan testified that he caught up with the vehicles and observed that the trailing Impala appeared to be driving appropriately. When he entered a passing zone, he passed the Impala and repositioned his squad car

directly behind the Mercury. Morgan observed that the Mercury was weaving within its lane and that its right wheels crossed over the fog line. The Mercury slowed to twenty-five miles per hour and signaled a right turn. It did not turn onto the first road it came to, instead continuing, still driving erratically, until it reached the next road, where it made a very wide right turn. At this point, Morgan activated his emergency lights. The Mercury did not pull over, but continued traveling at approximately twenty miles per hour, and Morgan activated his siren and used his squad car's public address system to order the driver to stop. After approximately three quarters of a mile and one more turn, the Mercury pulled into a residential driveway. The criminal complaint indicates that Morgan approached the car and had a conversation with the driver, Louise Firkus. Morgan noted a strong smell of intoxicants, as well as glassy eyes and slurred speech. After administering field sobriety tests, Morgan placed Firkus under arrest for OWI.

¶5 The suppression hearing included testimony by Kathleen Somers, the driver of the Impala. Somers was Firkus' neighbor, and also the bartender at the restaurant that Firkus was traveling home from when Morgan stopped her. The two had left the restaurant together. Somers testified that at no time did she observe Firkus' car weaving or moving inappropriately.

¶6 Firkus also testified at the suppression hearing. She said that, after passing Somers, Morgan moved his car to within a car length of her own. Not recognizing Morgan's car as a police vehicle, and believing him to be a driver in a hurry to get home, she signaled for a right turn and slowed down in the hope that Morgan would pass her. She testified that she failed to pull over because she could not see Morgan's emergency lights, due to the brightness of his headlights and the closeness of his car to hers. She also testified that she did not hear the

siren because her windows were rolled up and she was focused on the closeness of Morgan's car behind her.

¶7 After hearing the testimony of Morgan, Firkus, and Somers, the court made a ruling from the bench. Relevant portions of the ruling follow:

> In determining whether or not there is reasonable suspicion, I've got to construe the facts in the light most favorable to the officer.
>
> ....
>
> In this case we basically have got credibility issues ….
>
> ....
>
> I find it quite incredible that an officer would go a quarter of a mile down a road, pick two vehicles ... pick one rather than the other, and pull that vehicle over just on the chance that it might be a drunken driver and be correct is incredible to me ....
>
> ....
>
> I don't think the credibility issue is so strong in one direction that I ought to discount the officer's observations and say that he didn't have a basis to stop the vehicle and the motion is denied.

¶8 Upon the rejection of her motion, Firkus pleaded no contest and was convicted. She appeals.

Discussion

¶9 The Fourth Amendment protects "[t]he right of the people ... against unreasonable searches and seizures." U.S. CONST. amend. IV. Courts enforce this rule by excluding evidence derived from searches or seizures found to be unreasonable. ***Mapp v. Ohio***, 367 U.S. 643, 655, 81 S. Ct. 1684 (1961). To be permissible under the Fourth Amendment, a traffic stop must generally be justified

by an officer's reasonable suspicion that a violation has been or will be committed. ***State v. Gaulrapp***, 207 Wis. 2d 600, 606, 558 N.W.2d 696 (Ct. App. 1996).

¶10 A trial court's decision on the reasonableness of a search or seizure presents a question of "constitutional fact." ***State v. Phillips***, 218 Wis. 2d 180, 191, 577 N.W.2d 794 (1998). We review such decisions using a two-step inquiry. ***Id.*** We defer to the trial court's factual determinations unless they are clearly erroneous. WIS. STAT. § 805.17(2). Whether those facts are sufficient to create reasonable suspicion is a question of law that we review de novo. ***Phillips***, 218 Wis. 2d at 191.

¶11 Firkus contends that the circuit court's findings of fact are clearly erroneous and must be disregarded. We disagree. The clearly erroneous standard gives great deference to the findings of the trial court. We must accept the circuit court's findings of fact unless there is no credible evidence to support them; this is true even where there is evidence that could lead to the opposite conclusion. ***Jacobson v. American Tool Companies***, 222 Wis. 2d 384, 390, 588 N.W.2d 67 (Ct. App. 1998).

¶12 Having reviewed the transcript, we conclude that the court considered the testimony of the witnesses, made credibility determinations, and evaluated the likelihood of the different scenarios presented. In the circuit court's assessment, the version of events presented by Morgan was more likely than the version presented by Firkus and Somers.[2]

[2] Though neither party raises the issue, the first sentence of the trial court's ruling gives us pause. As this case involves conflicting accounts presented by multiple witnesses, fact finding necessarily requires credibility determinations. These determinations are for the trial court, and that court should not "construe the facts in the light most favorable to the officer" unless it (continued)

¶13 Firkus points to the arguable inconsistencies in Morgan's account, and contends that Somers is a disinterested witness whose testimony should be given greater weight. Firkus urges us to evaluate the credibility of the stories differently than the circuit court did, but we are not free to do so. The trial court, when acting as the factfinder, is the ultimate arbiter of the credibility of a witness, and its finding in that respect will not be questioned unless based upon caprice, an erroneous exercise of discretion, or an error of law. ***Dejmal v. Merta***, 95 Wis. 2d 141, 152, 289 N.W.2d 813 (1980). "Discrepancies in the testimony of a witness do not necessarily render it so incredible that it is unworthy of belief .... Testimony may be so ... contradictory as to impair credibility as to parts of the testimony without being so incredible that all of it must be rejected ...." ***State ex rel. Brajdic v. Seber***, 53 Wis. 2d 446, 450, 193 N.W.2d 43 (1972).

¶14 We must therefore apply the constitutional standard to the facts as found. The court found that Morgan observed Firkus' vehicle swerve in and out of its lane, signal for and then fail to make a right turn, make a wide turn onto a second highway, and fail to pull over despite Morgan's use of his siren and

---

determines that the officer's version is more credible. *See* ***Rivera v. Eisenberg***, 95 Wis. 2d 384, 388, 290 N.W.2d 539 (Ct. App. 1980).

After considering the entire ruling, however, we are convinced that the court was describing not its fact-finding process, but its application of the reasonableness standard to the facts as found. This reasonableness standard is an objective one, based upon reasonable inferences that the investigating officer *could have made* from the observed facts. If an officer observes facts that *could* lead to reasonable suspicion, a seizure is lawful; this is true even if the officer could have drawn other inferences from the facts consistent with innocent behavior. ***State v. Waldner***, 206 Wis. 2d 51, 59, 556 N.W.2d 681 (1996). A court reviewing the officer's actions therefore does not attempt to determine the *most* reasonable inference from a set of facts, but asks whether inferences supporting suspicion could reasonably be made. ***Id.*** at 60. This inquiry essentially considers the facts as found in the light most productive of reasonable suspicion. We conclude that it is this process, rather than the finding of the facts, that the circuit court described in its first sentence. Our conclusion is supported by the fact that the court went on to evaluate the credibility of the different accounts presented.

emergency lights.[3] These observations were more than sufficient to create a reasonable suspicion that an offense was being committed. The fact that Firkus provided explanations other than intoxication for her unusual driving does not affect this conclusion; officers are not required to rule out the possibility of innocent behavior before initiating a brief stop. ***Waldner***, 206 Wis. 2d at 59.

By the Court.—Judgment Affirmed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.

[3] Defendant's brief seems to suggest that the detention of Firkus began earlier, when Morgan first turned his car and began to pursue her for further observation. This is incorrect; at that point, Morgan was in no way restraining Firkus' freedom of movement. ***Terry v. Ohio***, 392 U.S. 1, 19 n.16, 88 S. Ct. 1868 (1966) ("Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred."). In fact, under ***In re Kelsey C.R.***, 2001 WI 54, ¶33, 243 Wis. 2d 422, 626 N.W.2d 777, detention does not begin until a suspect complies with a police officer's order to stop. Thus, in this case, any observations made by Morgan prior to Firkus' pulling over may be considered to determine whether reasonable suspicion existed.