COURT OF APPEALS
DECISION
DATED AND FILED

October 25, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal Nos. 2011AP1928
2012AP73-CR

Cir. Ct. Nos. 2011TR76
2011CT17

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

NO. 2011AP1928

IN THE MATTER OF THE REFUSAL OF ANDREW C. WHEATON:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANDREW C. WHEATON,

DEFENDANT-APPELLANT.

NO. 2012AP73-CR

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANDREW C. WHEATON,

DEFENDANT-APPELLANT.

APPEALS from a judgment and an order of the circuit court for Monroe County: J. DAVID RICE, Judge. *Judgment and order affirmed.*

¶1 BLANCHARD, J.[1] Andrew C. Wheaton appeals (1) a final judgment of conviction for operating while intoxicated (OWI)-3rd offense and (2) an order of revocation for unreasonable refusal to provide a sample of his breath, blood, or urine. The OWI and the refusal arise out of the same set of interactions between Wheaton and a Wisconsin State Patrol trooper after a warrantless traffic stop near Tomah.

¶2 Wheaton argues on appeal that the circuit court erred in concluding that: (1) there was reasonable suspicion to justify the traffic stop;[2] and (2) there was probable cause to believe that Wheaton was operating while intoxicated at the time the trooper requested a preliminary breath test (PBT). However, regarding the second purported issue, what was preserved for appeal is an argument that the trooper lacked probable cause to arrest Wheaton for OWI, and therefore that is the

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

[2] To the extent Wheaton argues that probable cause for, instead of reasonable suspicion of, a traffic violation is required for a traffic stop, the law is to the contrary. *See* ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 310, 603 N.W.2d 541 (1999) ("officer may make an investigative stop if the officer … reasonably suspects that a person is violating the non-criminal traffic laws").

issue this court addresses.[3] For the reasons provided below, this court concludes that the trooper had reasonable suspicion to justify the stop and also had probable cause to arrest Wheaton for OWI. Accordingly, this court affirms.

BACKGROUND

¶3 In January 2011, Wheaton was charged with OWI-3rd and operating with a prohibited alcohol concentration-3rd in connection with events that occurred on December 31, 2010. In the same month, the State filed a notice of intent to revoke Wheaton's operating privilege, based on his alleged refusal to submit to tests in the same incident. Wheaton responded to the State's notice with a demand for a refusal hearing.

¶4 In August 2011, the circuit court held a joint evidentiary hearing on the refusal and a suppression motion in the OWI case. The trooper was the only witness who testified at the hearing. He testified in relevant substance as follows.

¶5 On the night of Wheaton's arrest for the OWI charge, at approximately 3:05 a.m., which was a little more than one hour after bar time, the trooper was on patrol, heading northbound on a section of U.S. Highway 12 that is

[3] At the outset of the suppression hearing, Wheaton's attorney told the circuit court that the second challenge (after the challenge to the stop) was whether there was "probable cause … to arrest." After evidence was closed at the hearing, the attorney reiterated to the court that the second question raised by the defense involved "the arrest and whether or not there's probable cause." The attorney's references regarding the PBT were ambiguous, stating in part, "*I'm not sure* that the PBT should have been requested." (Emphasis added.) Without objection from the defense, the court focused the relevant portion of its findings and conclusions on whether there was probable cause to arrest, and did not address the question of whether the trooper had the requisite probable cause to request a PBT under WIS. STAT. § 343.303. For these reasons, this court concludes that Wheaton has not preserved the PBT issue. *See* ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727 (issues not preserved in the circuit court, even alleged constitutional errors, generally are not considered on appeal).

a four-lane divided highway. The trooper noticed a car ahead, traveling in the same direction at a speed "slower than the posted speed limit" of thirty miles per hour. The trooper did not characterize the car's speed further; for example, the trooper gave no estimate in miles per hour. It is not disputed that the motorist was Wheaton.

¶6 The trooper was in the left lane and Wheaton in the right lane. "A little further down the road," after the trooper first noticed Wheaton's car, and while Wheaton's car was about 100 feet in front of the trooper's vehicle, the trooper noticed Wheaton's car make a right-hand turn onto a side street without using a turn signal. The trooper recalled no other vehicles being in the area at that time. The trooper decided to stop Wheaton for failing to signal the turn.[4]

¶7 The trooper followed Wheaton and activated the emergency lights of his police vehicle. At the moment when the trooper activated the emergency lights, Wheaton's car was "in the motion to turn left," soon after his initial right turn off the highway. Wheaton's car then proceeded into an alleyway before turning into a driveway. Only a few seconds elapsed between the time the trooper activated his emergency lights and the time Wheaton stopped in the driveway. The record does not appear to reflect facts about whether the trooper noticed Wheaton using a turn signal in making any turns after the initial right turn off the highway.

[4] Failing to signal a turn is addressed in WIS. STAT. § 346.34(1)(b). In relevant part this statute provides, "In the event any other traffic may be affected by the movement, no person may turn any vehicle without giving an appropriate signal in the manner provided in s. 346.35."

¶8 The trooper approached Wheaton's car and explained the reason for the stop. Wheaton responded that the turn signals on his car flashed "slower [than normal] because [his car] had a bad alternator."[5] As the trooper spoke with Wheaton, the trooper noticed an odor of intoxicants coming from Wheaton as he spoke. In addition, the trooper noticed that Wheaton's eyes appeared both glassy and bloodshot. Further, Wheaton "star[ed] off into the distance."

¶9 The trooper obtained a photo identification card from Wheaton and returned to his vehicle to obtain database information on Wheaton. The trooper also spoke with an officer from the Tomah Police Department, who had arrived on scene. The officer informed the trooper that he had seen Wheaton in a Tomah bar that evening.

¶10 The trooper asked Wheaton if he would perform standard field sobriety tests, which Wheaton agreed to do. At this point, the trooper asked Wheaton if he had been drinking, and Wheaton responded that he had had a couple drinks.

¶11 The first of three tests the trooper administered was the horizontal gaze nystagmus (HGN). During this test, the trooper noticed, in both of

[5] Although not relevant to the reasonable suspicion analysis, because it was information that became known to the trooper only after the stop, the trooper later reviewed a video recording from his police vehicle that had captured images of the rear of Wheaton's car during the stop. The video showed Wheaton using a turn signal when turning off the highway, but also showed the turn signal blinking significantly more slowly than normal. At the joint refusal and suppression hearing, the trooper estimated, based on his review of the video recording, that the turn signal flashed "roughly about three and a half to four seconds between each blink," which the trooper concluded would have made it "hard" for an observer of the car "to understand that [Wheaton] was making a right-hand turn with that directional signal." The trooper clarified that he did not notice the delayed blinking "in realtime," but only after viewing the recorded images sometime after Wheaton's arrest.

Wheaton's eyes, a lack of smooth pursuit, "jerkiness at maximum deviation, and then nystagmus prior to onset at 45 degrees," for a total of six out of six potential clues of intoxication. During the walk and turn test, there was one visible clue out of a potential twelve, which occurred when Wheaton "stopped and asked if I wanted him to continue." In the one-leg stand test, no clues were observed.

¶12 When the Tomah officer presented Wheaton with a PBT, Wheaton protested that the police were not "allowing him the proper time to give the test[, because] based on the time that he took his last drink ... there would still be residual alcohol in his mouth and that would affect the test." The trooper interpreted Wheaton's position to be that he would refuse to take the PBT. The trooper placed Wheaton under arrest and transported him to an area hospital for a legal blood draw, the details of which are not relevant to issues preserved and raised on appeal.

¶13 After the trooper testified and the parties gave their arguments, the court observed that the facts that Wheaton was driving "noticeably slower than the 30-mile-an-hour speed limit" and that it was just after 3:00 a.m. reasonably attracted the trooper's initial attention, but that in and of themselves these facts "would not obviously be reasonable suspicion to stop."

¶14 This court pauses to note that a reasonable interpretation of this statement is that the court concluded from the testimony that the trooper did not observe Wheaton drive at a dramatically slow or creeping rate of speed. The speed was noticeably slower than thirty miles per hour but not extremely slow, so as to, for example, startle another motorist who, while driving at or slightly above the speed limit, might suddenly come upon Wheaton's car.

¶15 On the question of whether the trooper reasonably believed that Wheaton had violated WIS. STAT. § 346.34(1)(b), the court concluded that, despite the lack of proof of any traffic in the area other than Wheaton's car and the trooper's vehicle, the trooper's vehicle constituted "any other traffic" that "may" have been "affected by" Wheaton's right hand turn. *See* § 346.34(1)(b). Therefore, the court concluded, the trooper had reason to believe that Wheaton was violating § 346.34(1)(b) at the time of the stop.

¶16 As an apparent alternative ground for the stop, the court concluded that "the officer had reason to believe that the defendant was operating with a defective turn signal" and that the trooper had "reasonable suspicion to stop the defendant to inquire as to whether there was a problem with his turn signal." This part of the court's decision was apparently based on the video the officer reviewed after the stop and on Wheaton's explanation to the trooper during their initial discussion that his defective alternator was making his turn signal blink slowly.

¶17 Regarding Wheaton's driving conduct immediately after the trooper activated his emergency lights, the court found that the trooper could have drawn one of two conclusions from the fact that Wheaton did not immediately pull over in response to the emergency lights. One was that Wheaton did not notice the emergency lights. The other was that Wheaton "chose to ignore" the emergency lights, "and was trying to get home." The court appeared to conclude that either of these possibilities could contribute to a reasonable suspicion that Wheaton was driving while impaired.

¶18 Finally, the court concluded that the trooper had probable cause to arrest Wheaton for OWI.

DISCUSSION

I. Reasonable Suspicion to Stop

¶19 "Whether there is … reasonable suspicion to stop a vehicle is a question of constitutional fact." ***State v. Popke***, 2009 WI 37, ¶10, 317 Wis. 2d 118, 765 N.W.2d 569 (citations omitted). This "consists of the circuit court's findings of historical fact, which we review under the 'clearly erroneous standard,' and the application of these historical facts to constitutional principles, which we review de novo." ***Id.***

¶20 "[R]easonable suspicion must be based on 'specific and articulable facts[,] which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion.'" ***State v. Richardson***, 156 Wis. 2d 128, 139, 456 N.W.2d 830 (1990) (citation omitted). Reasonableness is measured against an objective standard, taking into consideration the totality of the circumstances. *See* ***id.***

¶21 Under federal and Wisconsin cases interpreting the Fourth Amendment of the United States Constitution and article I, sec. 11 of the Wisconsin Constitution, and under ***Terry v. Ohio***, 392 U.S. 1, 21 (1968), "The State bears the burden of proving that a temporary detention was reasonable. Such a detention requires a reasonable suspicion, grounded in 'specific and articulable facts,' and reasonable inferences from those facts, that an individual was engaging in illegal activity." ***State v. Pickens***, 2010 WI App 5, ¶14, 323 Wis. 2d 226, 779 N.W.2d 1 (citations omitted).

¶22 This court concludes that it need not address the question of whether the State carried its burden of proving that the trooper had reasonable suspicion to believe that Wheaton violated WIS. STAT. § 346.34(1)(b) when he executed the

right-hand turn off the highway. This is because this court concludes that, regardless of whether the trooper could reasonably have concluded that Wheaton violated § 346.34(1)(b), the State carried its burden of proving that the trooper had reasonable suspicion of impaired driving justifying the stop.

¶23 The State points to the following as factors that produced an objectively reasonable suspicion of impaired driving at the time of the stop: (1) Wheaton was driving at 3:05 a.m., approximately one hour after "bar time"; (2) Wheaton was driving noticeably below the speed limit when the trooper first saw his car; (3) the trooper's reasonable belief that Wheaton failed to signal a turn; (4) Wheaton failed to respond immediately to the trooper's emergency lights; and (5) "observations of unusual driving were made within a short span of time."[6]

¶24 While the issue of reasonable suspicion of impaired driving in this case presents a close call, for the following reasons this court is persuaded that the State has pointed to sufficient factors to show, in their totality, a reasonable suspicion of impaired driving.

[6] The State does not clearly rely on the fourth of these five factors in the reasonable suspicion section of its brief. However, the State relies on that factor in the probable cause section of its brief, and this court sees no good reason to ignore the factor for purposes of the reasonable suspicion analysis. Wheaton had a reasonable opportunity to respond to the State's reliance on this factor in his reply brief.

Separately, the State understandably does not rely on the circuit court's conclusions that (1) "the officer had reason to believe that the defendant was operating with a defective turn signal," and (2) the trooper had "reasonable suspicion to stop the defendant to inquire as to whether there was a problem with his turn signal." This court finds nothing in the record to support a conclusion that the trooper had reason to suspect, *at the time of the stop*, that there was a mechanical or electrical problem with Wheaton's car, causing Wheaton's turn signal to be defective. The trooper unambiguously testified that he thought he observed Wheaton fail to use his turn signal, and did not testify to any facts suggesting that, at the time of the stop, there was any aspect of Wheaton's car that appeared to be in disrepair or defective in any respect. It was only after the stop that Wheaton's defective turn signal came to the trooper's attention.

¶25 As to the first factor, there is no dispute that the time of night may be a factor contributing to reasonable suspicion of impaired driving, although it is not sufficient by itself. *See* ***State v. Waldner***, 206 Wis. 2d 51, 60-61, 556 N.W.2d 681 (1996) (nothing illegal in itself about driving at late hour; however, other factors in combination with late-hour driving may "coalesce to add up to a reasonable suspicion"). Even if it is debatable whether unusual driving behavior occurring approximately one hour after bar time is as incriminating as unusual driving behavior at a time closer to bar time, there can be no debate that the 3:00 a.m. time here is a relevant factor contributing to reasonable suspicion. *See* ***State v. Post***, 2007 WI 60, ¶36, 301 Wis. 2d 1, 733 N.W.2d 634 ("poor driving" as early as 9:30 p.m., while not as suspicious as poor driving "at or around 'bar time'" "lend[s] some further credence to … suspicion that [driver] was driving while intoxicated").

¶26 Regarding the second factor, as suggested above, Wheaton's noticeably-slower-than-the-speed-limit driving is a specific and articulable factor supporting reasonable suspicion. Like other factors in this case, it may be a weak indicator of impairment if considered alone, but it adds to the totality of circumstances suggesting impairment. The circuit court apparently credited the training and experience of the trooper, who testified that he had three years of experience on the job including a twenty-one-week certification training course, in the context of whether Wheaton's slow speed for the location and time of night was objectively worthy of note. Based on the trooper's testimony, the circuit court found that Wheaton was traveling "noticeably" slower than the speed limit. We therefore reject Wheaton's argument that "Wheaton could have been traveling 29 mph in a 30 mph zone." That would not be a rate of speed that a reasonable officer would consider "noticeably" slower than the speed limit.

¶27 As to the third factor, regardless of whether the officer had reason to believe that there was a violation of WIS. STAT. § 346.34(1)(b), this court agrees with the State's argument that Wheaton's apparent failure to signal may be considered one specific and articulable factor contributing to reasonable suspicion of impaired driving. Again, by itself, this factor might be a weak indicator of impairment, but it adds to the totality of circumstances in this case.

¶28 Regarding the fourth factor, this court agrees with the State that the circuit court's finding that Wheaton's failure to pull over immediately in response to the trooper's emergency lights represents a specific and articulable factor. As stated above, the court found that a reasonable officer could have concluded that Wheaton failed to immediately notice the emergency lights or decided, at least briefly, to ignore them. To these two possibilities, one could reasonably add a third variation: that Wheaton noticed the emergency lights but had a diminished ability to respond to them. Whichever it was, this factor has at least some significance.

¶29 Wheaton argues as to the fourth factor that, "Pulling over within a few seconds is faster than most drivers [pull over] and shows lack of impairment, rather than impairment." This argument acknowledges the legitimacy of the premise that delay in responding to emergency lights can be an articulable factor supporting reasonable suspicion of impairment, but suggests that the court improperly ignored the undisputed fact that only a few seconds elapsed between activation of the emergency lights and Wheaton's stop. However, the record reflects that the court found, at least implicitly, that the delay in Wheaton's response time mattered, despite the short interval, in light of all the evidence. That evidence included the absence of other traffic in the area, the location of the stop,

the relatively close positions of the vehicles, and a time of night that should have made the trooper's emergency lights immediately obvious. Wheaton fails to persuade this court of any clear error in fact finding on this point.

¶30 Finally, this court concludes that the State's fifth asserted factor may add slightly to the analysis. All of the following occurred in a narrow time frame: Wheaton's "noticeably" low speed, his failure to signal, and his inability to recognize or respond to, or hesitation in responding to, the emergency lights immediately. The trooper and circuit court were free to consider this short time frame to be an additional factor insofar as it made less likely the possibility that each of Wheaton's driving behaviors had an innocent explanation.

¶31 In sum, the State points to articulable factors that are sufficient, if perhaps just barely, to rise to the level of an objectively reasonable suspicion of impaired driving.

II. Probable Cause to Arrest

¶32 As our supreme court has explained:

> Probable cause to arrest for operating while under the influence of an intoxicant refers to that quantum of evidence within the arresting officer's knowledge at the time of the arrest that would lead a reasonable law enforcement officer to believe that the defendant was operating a motor vehicle while under the influence of an intoxicant. The burden is on the state to show that the officer had probable cause to arrest.
>
> The question of probable cause must be assessed on a case-by-case basis, looking at the totality of the circumstances. Probable cause is a "flexible, common-sense measure of the plausibility of particular conclusions about human behavior." When the facts are not disputed, whether probable cause to arrest exists in a given case is a question of law that this court determines independently of

> the circuit court and court of appeals but benefiting from their analyses. In determining whether there is probable cause, the court applies an objective standard, considering the information available to the officer and the officer's training and experience.

State v. Lange, 2009 WI 49, ¶¶19-20, 317 Wis. 2d 383, 766 N.W.2d 551 (footnotes, containing citations, omitted).

¶33 This court concludes that facts that include the following, when considered in their totality, amply support the court's conclusion that the trooper had probable cause to arrest Wheaton for OWI: the hour of the night; the noticeably slow driving speed; the court's finding that Wheaton did not immediately respond to the emergency lights; the smell of alcohol coming from Wheaton; Wheaton's glassy and bloodshot eyes; his admission of drinking alcohol; his staring into the distance; his failure of the HGN test; his refusal of the PBT; and his explanation for his refusal of the PBT, an apparent admission that he had continued drinking even after bar time, before which he had been seen in a Tomah bar.[7] From all these facts, under a "flexible, common-sense measure of the plausibility of particular conclusions about human behavior," "a reasonable law enforcement officer" would have probable cause to arrest Wheaton for operating a motor vehicle while under the influence of intoxicants.[8]

[7] The circuit court noted that the fact that "bar time" had occurred over one hour earlier, together with the fact that Wheaton told the trooper that he had been drinking so recently that the PBT would not produce a reliable reading, "could certainly have added to the facts" supporting probable cause to arrest Wheaton. The implication was that Wheaton had been drinking both before and after bar time, since the trooper knew from the officer that Wheaton had been in a Tomah bar earlier that night.

[8] In addressing probable cause to arrest, this court does not rely on Wheaton's apparent failure to signal. The record is ambiguous as to whether, by the time of arrest, the trooper could have continued to reasonably believe that Wheaton failed to signal.

¶34 This court now addresses, and rejects, arguments made by Wheaton on this issue.

¶35 Wheaton raises various objections to the HGN test results, but he developed no similar argument in the circuit court. In any case, the circuit court found no defect in the HGN test.

¶36 Wheaton lists certain factors that do not, in themselves, point toward intoxication (e.g., that Wheaton passed the one-leg stand test), and argues based on his selective list of factors that "[t]hese factors were not sufficient." This argument fails to meaningfully address the factors pointing to intoxication, painting a partial picture that is not consistent with the totality-of-the-circumstances analysis.

¶37 Wheaton seems to argue it would be legal error to consider his refusal to submit to the PBT in connection with the probable cause determination, because he did not give a "true refusal" to the PBT. However, in support of that argument, he merely repeats the position he gave the trooper at the time, namely, that he was concerned about alcohol residue in his mouth. Wheaton fails to develop a legal argument in support of this position.

CONCLUSION

¶38 For these reasons, this court affirms the judgment of conviction and the order of revocation.

By the Court.—Judgment and order affirmed.

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