OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV

September 26, 2024

To:

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Circuit Court Judge
Electronic Notice

Amanda Nelson
Clerk of Circuit Court
Rock County Courthouse
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Mary E. Bricco
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You are hereby notified that the Court has entered the following opinion and order:

2024AP63-CR State of Wisconsin v. Kristin E. Siverhus (L.C. # 2018CT159)

Before Nashold, J.[1]

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. Rule 809.23(3).

Kristin Siverhus appeals a judgment convicting her of operating a motor vehicle while intoxicated (OWI), third offense. Specifically, Siverhus challenges the circuit court order denying her suppression motion. On this court's own motion, this appeal is disposed of summarily pursuant to WIS. STAT. RULE 809.21(1). I affirm.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2021-22). All references to the Wisconsin Statutes are to the 2021-22 version.

Siverhus was convicted, pursuant to a plea agreement, of third-offense OWI following the denial of her motion to suppress evidence. The following facts are derived from the testimony of the arresting officer, who was the sole witness at the suppression hearing.

The arresting officer and a second officer were dispatched at approximately 8:17 p.m. to an address regarding a report from the property owner that there were trespassers on his property, that an altercation had ensued, and that the property owner had used a baseball bat to smash the window of the alleged trespassers' vehicle. On the way to the property, the arresting officer observed a vehicle matching the description of the alleged trespassers' vehicle and he initiated a traffic stop.

The arresting officer approached the driver, Siverhus, while the second officer approached the vehicle's passenger. The arresting officer identified himself and asked Siverhus to step out of the vehicle. In talking to Siverhus, the arresting officer noticed that Siverhus "was having a really hard time talking that night. Her voice was very quiet and kind of raspy" and "she couldn't speak very well." According to the officer, "most of what [Siverhus] was saying was hard to understand" and her speech was "very impaired." While speaking with Siverhus, the officer did not notice any odor of intoxicants coming from her and did not notice any "obvious signs" of impairment.

Although the arresting officer was able to get only "little parts and pieces" from Siverhus about what had occurred at the property, the passenger told the second officer that he and Siverhus had permission to be on the property and "that it was a big misunderstanding." The passenger said that he and Siverhus had reached an agreement with the property owner that the property owner would pay for the repair to the vehicle's window. The officers asked Siverhus

and the passenger to return to the property with the officers so that the officers could verify their explanation with the property owner. Siverhus returned to her vehicle and drove with the passenger approximately one half to three quarters of a mile back to the property, behind the officers' squad car. The officer did not observe Siverhus engage in any bad driving on the way to the property.

Upon arriving at the property, the two officers went to talk to the property owner, while a third officer who had arrived at the property stayed with Siverhus and the passenger. The property owner confirmed that there had been a misunderstanding, that he was unaware that his wife had given Siverhus permission to be on the property, and that he had agreed to pay for the window that he smashed with a baseball bat.

The officers then began walking back toward Siverhus's vehicle, when the third officer approached them and said that while he was speaking with Siverhus and the passenger inside the vehicle, he noticed the odor of intoxicants coming from inside the vehicle and that "the driver of the vehicle was possibly impaired." Although the arresting officer had not previously noticed the odor of alcohol on Siverhus when talking to her outside of the vehicle, he testified that based on his professional experience, it is easier to smell intoxicants on a person when that person is inside the vehicle, as opposed to when the person is standing outside the vehicle. This is because the inside of a vehicle is more contained and because officers are usually in closer proximity when talking to a person inside the vehicle than when talking to a person outside the vehicle where "you keep a little distance for safety reasons."

The arresting officer approached Siverhus in her vehicle, and confirmed that the property owner had corroborated her story. He then asked Siverhus if she had been drinking and she

responded that she had one "shot" several hours prior to driving. The officer then had Siverhus exit the vehicle and perform field sobriety tests. The officer testified that based on his experience as a law enforcement officer, it is common for people being investigated for OWI to "underestimate how much they have had to drink" and that they often "end up telling you later that they've had more to drink than they initially told you." The arresting officer estimated that approximately five minutes had passed from the conclusion of his conversation with the property owner to either his conversation with the third officer or his request that Siverhus perform field sobriety tests.[2]

According to the criminal complaint, following the field sobriety tests and a preliminary breath test, Siverhus was arrested and cited for OWI. She subsequently submitted to a blood test, which revealed a blood alcohol concentration of .13.

Siverhus moved to suppress evidence obtained after the officers confirmed that Siverhus had not been trespassing. She argued that the grounds for the original stop ended when the officers received corroboration from the property owner that Siverhus had permission be on the property. She also argued that the arresting officer unconstitutionally extended the initial stop by

[2] The arresting officer's testimony was ambiguous as to when the five-minute period ended. The officer testified as follows:

> Q. And how long between the point when that determination was made was she asked to do the field sobriety tests?
>
> A. I don't know an exact time. But I'm guessing from the time we spoke to the land owner and spoke to [the third officer,] who indicated there was possible impairment, five minutes maybe.

The circuit court mentioned the five-minute period but did not specifically make a finding as to when that period ended.

asking her whether she had anything to drink because, according to Siverhus, the commencement of the arresting officer's OWI investigation was based solely on the statement from the third officer that he noticed an odor of intoxicants coming from the vehicle. Siverhus further argued that, even after the arresting officer learned that Siverhus had one drink hours before driving, the officer lacked reasonable suspicion to request field sobriety tests.

The circuit court denied Siverhus's motion to suppress. The court determined that the arresting officer reasonably asked Siverhus whether she had been drinking based not only on the odor of intoxicants but also on Siverhus's "speech impairment" or "difficulty with speech" that made her "very hard to understand." The court also determined that once Siverhus answered that she had one drink, which the court suggested the officer was not required to believe,[3] there was "sufficient additional evidence for the officer to continue his investigation" by requesting field sobriety tests.

Siverhus renews her arguments on appeal. As in the circuit court, on appeal, Siverhus does not challenge the initial stop of her vehicle, nor does she challenge the officer's actions related to the trespass investigation. Rather, she challenges what she alleges was an unlawful extension of the initial detention in order to investigate a separate OWI offense.

"When reviewing a motion to suppress, this court employs a two-step analysis." ***State v. Anker***, 2014 WI App 2017, ¶10, 357 Wis. 2d 565, 855 N.W.2d 483. The circuit court's findings

[3] Specifically, the circuit court stated, "And as the officer testified and we see in virtually every OWI case in the State of Wisconsin, she indicated that she had one drink. I think the average in the State of Wisconsin for most OWI offenses is that they [said they] had two drinks. And as we all know, most OWI convictions don't come because of two drinks."

of fact are reviewed under the clearly erroneous standard, but the court's application of constitutional principles to those facts are reviewed de novo. ***Id.***

Police may not extend a traffic stop to conduct an investigation of criminal activity "absent the reasonable suspicion ordinarily demanded to justify detaining an individual." ***Rodriguez v. United States***, 575 U.S. 348, 355 (2015); *see also* ***State v. Hogan***, 2015 WI 76, ¶35, 364 Wis. 2d 167, 868 N.W.2d 124 ("An expansion in the scope of the inquiry, when accompanied by an extension of time longer than would have been needed for the original stop, must be supported by reasonable suspicion.").

"Reasonable suspicion exists if, under the totality of the circumstances, 'the facts of the case would warrant a reasonable police officer, in light of his or her training and experience, to suspect that the individual has committed, was committing, or is about to commit a crime.'" ***State v. Rose***, 2018 WI App 5, ¶14, 379 Wis. 2d 664, 907 N.W.2d 463 (2017) (quoted source omitted). "Reasonable suspicion must be based on more than an officer's inchoate and unparticularized suspicion or hunch." ***Id.*** (internal quotation marks and quoted source omitted). "An officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion of the [detention]." ***Id.*** (internal quotation marks and quoted source omitted). The State bears the burden of establishing that a detention is reasonable. ***State v. Walli***, 2011 WI App 86, ¶7, 334 Wis. 2d 402, 799 N.W.2d 898.

Siverhus first argues that when the arresting officer questioned her about drinking, he unlawfully extended the original stop to investigate an OWI without reasonable suspicion. This argument appears to be comprised of two subparts, the first of which was not argued below and

could be deemed forfeited. *See* ***Schill v. Wisconsin Rapids Sch. Dist.***, 2010 WI 86, ¶45 & n.21, 327 Wis. 2d 572, 786 N.W.2d 177 (explaining that issues not raised in the circuit court are forfeited, and supporting the proposition that appellate courts generally do not address forfeited issues). However, I nevertheless briefly address this first subpart.

Siverhus contends that the mission of the trespass investigation ended once the arresting officer received confirmation from the property owner that no trespass had occurred. She also states that approximately five minutes elapsed between this confirmation and either the arresting officer's return to Siverhus's vehicle or his receipt of the information from the third officer regarding that officer's observations.[4] Siverhus argues:

> [T]he State was unable to establish whether [the third officer] made his observations before [the arresting officer] ended the original stop, or after, during those five minutes it took for [the arresting officer] to return.
>
> In other words, [the arresting officer] could not provide any testimony as to whether [the third officer's] observations occurred simultaneous to the mission-related tasks performed by [the arresting officer]. Without this confirmation, the State failed to meet its burden of proof.

Thus, Siverhus appears to argue that in order for the arresting officer's alcohol-related question to pass constitutional muster, the third officer needed to have made his alcohol-related observations before the five-minute period began because the "mission" related to the trespass investigation ended upon completion of the officers' conversation with the property owner. This argument fails for at least the following reason. Implicit in this argument is the assumption that

[4] Siverhus is unclear in her briefing as to when she believes the five-minute period ended. At one point she suggests that it ended when the arresting officer spoke with the third officer, but at another point she indicates that it ended when the arresting officer "return[ed]," presumably to Siverhus's vehicle.

the arresting officer's short walk back toward Siverhus's vehicle after confirming Siverhus's account with the property owner was not part of the initial "mission" related to the trespass investigation. However, Siverhus does not support this assumption with any relevant authority, nor does she develop an argument as to why this would be true, and I therefore reject this argument on that basis. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (undeveloped legal arguments and "[a]rguments unsupported by references to legal authority will not be considered").

Siverhus also contends that the arresting officer's alcohol-related question was unlawful because he lacked reasonable suspicion of an OWI-related offense. Assuming without deciding that reasonable suspicion for the officer's question was required, that standard is satisfied here. Siverhus argues that the alcohol-related question was based solely on the arresting officer's "second-hand testimony" from the third officer that he smelled alcohol in the vehicle while talking to Siverhus and the passenger.[5] Relying on ***County of Sauk v. Leon***, No. 2010AP1593, unpublished slip op. (WI App Nov. 24, 2010), Siverhus argues that the mere odor of alcohol alone, even when it is attributable to the driver, is insufficient to establish reasonable suspicion.

[5] To the extent that Siverhus means to suggest that hearsay may not be considered, I note that there was no objection to the arresting officer's testimony as to what the third officer told him; therefore, any challenge to that testimony is forfeited. *See* ***State v. Mercado***, 2021 WI 2, ¶35, 395 Wis. 2d 296, 953 N.W.2d 337 ("Forfeiture occurs when a party fails to raise an objection."); *see also* WIS. STAT. § 901.03(1). Moreover, other than the rules protecting privileged communications, the rules of evidence do not apply at suppression hearings. *See* WIS. STAT. RULE 901.04(1) ("Preliminary questions concerning ... the admissibility of evidence shall be determined by the judge .... In making the determination the judge is bound by the rules of evidence only with respect to privileges and as provided in [WIS. STAT. §] 901.05."); *see also* ***State v. Jiles***, 2003 WI 66, ¶48, 262 Wis. 2d 457, 663 N.W.2d 798 ("[T]he rules of evidence do not apply at suppression hearings.").

However, as the record makes clear, reasonable suspicion to question Siverhus about alcohol consumption was not based on the odor of alcohol alone. The third officer had informed the arresting officer not only that he noticed the odor of alcohol in the vehicle but also that the driver might be impaired. More importantly, as the circuit court determined, Siverhus was "clearly having a difficult time speaking," was "very hard to understand," and manifested a "speech impairment." Based on all of these factors, the court properly concluded that there was reasonable suspicion to ask Siverhus if she had been drinking.

Siverhus's second primary argument is that, even if the arresting officer's alcohol-related question did not unconstitutionally extend the original stop, administering field sobriety tests did so because the officer lacked reasonable suspicion to request or administer them. As set forth above, I have assumed for purposes of this decision that the officer's alcohol-related question was required to be supported by reasonable suspicion and I have concluded that this standard was satisfied. Notably, Siverhus does not argue or present any authority suggesting that the reasonable suspicion standard required for administering field sobriety tests is greater than that which would be required to question a driver about the consumption of alcohol. In ***Leon***, this court concluded that before detaining a driver to conduct field sobriety tests, an officer must have reasonable suspicion that the driver "'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.'" ***Id.***, ¶15 (quoting WIS JI—CRIMINAL 2663). Here, at the time the arresting officer requested the field sobriety tests, he was aware that Siverhus's speech was impaired and that she was very difficult to understand, that another officer had noticed the odor of alcohol in her vehicle and believed that Siverhus may be impaired, and that Siverhus had

admitted to having consumed a "shot" a few hours before driving. Although this is a close case, I conclude that these circumstances satisfy the reasonable suspicion standard.

Accordingly,

IT IS ORDERED that the circuit court's judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals