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DISTRICT II

October 23, 2024

To:

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Circuit Court Judge
Electronic Notice

Connie Mueller
Clerk of Circuit Court
Ozaukee County Justice Center
Electronic Notice

Nicholas DeSantis
Electronic Notice

Basil M. Loeb
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You are hereby notified that the Court has entered the following opinion and order:

2023AP1878-CR State of Wisconsin v. Anthony Tyler Fenton (L.C. #2022CF287)

Before Gundrum, P.J., Grogan and Lazar, JJ.

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).

Anthony Tyler Fenton appeals from a judgment entered after he pled guilty to operating a motor vehicle while under the influence (OWI) as his fourth offense, contrary to WIS. STAT. § 346.63(1)(a) (2021-22).[1] Fenton argues that the circuit court erred when it denied his suppression motion. He claims the police officer lacked reasonable suspicion to conduct the

[1] Fenton was also charged with operating a motor vehicle with a prohibited alcohol concentration, fourth offense, contrary to WIS. STAT. §§ 346.63(1)(b), 939.50(3)(h). This charge, however, was dismissed as a part of the plea bargain.

All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

traffic stop. Based upon our review of the briefs and Record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm.

In August 2022, while on patrol duty and in full uniform, Police Officer Noah Narlock stopped at a gas station convenience store to buy a bottle of water and gum. When he entered the store, he noticed a man later identified as Fenton walk away after he saw Narlock. Fenton also avoided making eye contact, and it appeared that Fenton was making every effort to keep his distance from Narlock. At one point, when Narlock came nearest to Fenton, he noticed a strong smell of alcohol coming from Fenton. When Narlock exited the store, he observed a car he believed to be Fenton's because it was the only customer car that was parked in the lot both when Narlock entered and exited the store. Narlock ran the license plate of that car, and he learned that it was registered to Fenton, who had three prior OWIs and was thus subject to the .02 prohibited alcohol concentration (PAC) standard.

Narlock drove out of the parking lot and waited nearby for Fenton to leave. Fenton waited about twenty-five to thirty minutes before leaving the store. The officer followed Fenton and conducted a traffic stop, and Fenton refused to consent to a breath or blood test. Narlock obtained a warrant for a blood draw, which showed a blood alcohol concentration of .176.

The State charged Fenton with one count of OWI and one count of operating with a prohibited alcohol concentration, both as fourth offenses, and Fenton thereafter filed a motion seeking to suppress the results of the blood test on the grounds that the officer lacked reasonable suspicion to conduct the stop. The circuit court found that Narlock had reasonable suspicion to believe Fenton was driving with a prohibited alcohol concentration and denied the motion. Specifically, the court observed that the store's surveillance video showed that Fenton saw

Narlock and then moved away from him and that at one point, Narlock came within five feet of Fenton. The court found that Fenton was "emitting this odor of alcohol" and that the odor, combined with Narlock's knowledge that Fenton had three prior OWIs and was subject to a .02 PAC standard, was sufficient to create enough reasonable suspicion to conduct the stop to "check things out." After the court denied the suppression motion, Fenton accepted a plea bargain and pled guilty to OWI fourth offense. Judgment was entered. Fenton appeals.

The issue on appeal is whether the circuit court erred in denying Fenton's suppression motion. "[A]n order granting or denying a motion to suppress evidence" presents "a question of constitutional fact, which requires a two-step analysis" on appellate review. ***State v. Asboth***, 2017 WI 76, ¶10, 376 Wis. 2d 644, 898 N.W.2d 541. "First, we review the circuit court's findings of historical fact under a deferential standard, upholding them unless they are clearly erroneous. Second, we independently apply constitutional principles to those facts." ***State v. Robinson***, 2010 WI 80, ¶22, 327 Wis. 2d 302, 786 N.W.2d 463 (citations omitted).

"Whether there is probable cause or 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. "[W]e review de novo the ultimate question [of] whether the facts as found by the trial court meet the constitutional standard." ***State v. Hindsley***, 2000 WI App 130, ¶22, 237 Wis. 2d 358, 614 N.W.2d 48.

"A determination of reasonable suspicion is made based on the totality of the circumstances." ***State v. Anderson***, 2019 WI 97, ¶33, 389 Wis. 2d 106, 935 N.W.2d 285. "Reasonable suspicion requires that a police officer possess specific and articulable facts that warrant a reasonable belief that criminal activity is afoot." ***State v. Young***, 2006 WI 98, ¶21, 294

Wis. 2d 1, 717 N.W.2d 729. "'[I]f any reasonable inference of wrongful 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.'" ***Id.*** (citation omitted). "[W]hat 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. Young***, 212 Wis. 2d 417, 424, 569 N.W.2d 84 (Ct. App. 1997). Reasonable suspicion requires "more than an officer's 'inchoate and unparticularized suspicion or hunch.'" ***State v. Post***, 2007 WI 60, ¶10, 301 Wis. 2d 1, 733 N.W.2d 634 (citation omitted).

We conclude the circuit court's factual findings are not clearly erroneous, and under the totality of the circumstances, the officer had specific and articulable facts to form the requisite reasonable suspicion to conduct the traffic stop.

First, Narlock testified that he smelled a notable odor of alcohol coming from Fenton when he was about five feet away and that he smelled it only when he was near Fenton. The court found that the odor was coming from Fenton, and the Record supports that finding. Fenton speculates the odor could have come from a broken liquor bottle or cleaning supplies, but presents no evidence to support his theory. When an officer smells alcohol only when passing by a particular person, it is reasonable to believe the odor is coming from that person. This is particularly so when there is no evidence or testimony to contradict what the officer believed to be the source of the odor.[2] Second, Narlock observed Fenton engage in the suspicious activity of

[2] The store video, which was admitted into evidence, does not support Fenton's contention that there was a broken bottle of alcohol or cleaning supplies in the area where the officer smelled the odor.

trying to move away from the officer—in other words, trying to avoid him—and the store video confirms that when Fenton saw Narlock, Fenton moved away. Narlock also testified that Fenton was avoiding eye contact with him. These facts evidence consciousness of guilt. Third, Narlock learned that the owner of the car he believed belonged to Fenton had three prior OWIs and was subject to the .02 PAC standard.

Fenton contends there were other cars in the lot and thus it was unreasonable for Narlock to connect that car to Fenton. He also argues that the officer could not have possibly known whether Fenton had loaned his car to someone who was not subject to the .02 PAC standard. We reject both arguments.

As to the first, it is clear from the Record that the reason Narlock tied the car to Fenton was because it was the only customer car parked in the lot both when Narlock entered the store *and* when he exited the store. It was reasonable for Narlock to suspect that this particular car was Fenton's because the other customer cars that were present either left before Narlock exited the store or arrived after Narlock entered the store.

As to the second, it is possible, of course, that Fenton loaned his car to someone not subject to the .02 PAC standard and that the person Narlock observed in the store was not actually the car's owner. However, it was not unreasonable for the officer to believe that the owner of the car was driving it and to then connect that car to the individual who was emitting a strong odor of alcohol. As the circuit court said, it was reasonable for the officer to want to "check … out" an individual who emitted a strong odor of alcohol, who was evading the officer, and who was driving a car owned by someone subject to the .02 PAC standard.

Generally, an "officer knows it would take very little alcohol for the driver to exceed that [.02] limit[.]" *See* ***State v. Goss***, 2011 WI 104, ¶28, 338 Wis. 2d 72, 806 N.W.2d 918. Here, the strong odor of alcohol coming from Fenton and Fenton's efforts to avoid having contact with the officer, combined with the fact that Fenton was subject to a .02 PAC standard, gave Narlock reasonable suspicion to conduct the traffic stop. Thus, the circuit court did not err in denying Fenton's suppression motion.[3]

IT IS ORDERED that the judgment of the circuit court is summarily affirmed pursuant to 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

[3] Fenton relies on an unpublished opinion, ***State v. Dotson***, No. 2019AP1082-CR, unpublished slip op. (WI App Nov. 24, 2020), wherein this court held that the odor of alcohol did not give an officer reasonable suspicion to conduct field sobriety tests during a traffic stop for an unregistered license plate. We, of course, are not bound by unpublished opinions. *See* WIS. STAT. RULE 809.23(3)(b). Regardless, ***Dotson*** is distinguishable because it did not involve a driver who was subject to the .02 PAC standard, but instead a driver who was subject to the .08 standard. ***Dotson***, No. 2019AP1082-CR, ¶15. Further, the officer in ***Dotson*** "could not recall if the odor was mild or strong." ***Id.***, ¶16.

Fenton also claims the approximately thirty-minute delay between the time the officer was in the store and the time he conducted the stop somehow eliminated the reasonable suspicion. Fenton cites no authority to support this proposition, and we know of no law indicating a suspect's delay in exiting the store would eliminate reasonable suspicion. In fact, the suspect's long delay in exiting a store where customers typically spend no more than a few minutes further suggests consciousness of guilt given that Fenton stayed twenty-five minutes *after* the officer left, most likely to avoid the officer.