COURT OF APPEALS
DECISION
DATED AND RELEASED

May 15, 1997

NOTICE

No. 97-0162-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

BRADLEY R. CUMMINGS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sauk County: PATRICK J. TAGGART, Judge. *Affirmed.*

EICH, C.J.[1] Bradley Cummings appeals from a judgment convicting him of operating a motor vehicle while intoxicated (second offense). He argues that (1) the arresting officer had no grounds to stop him and, once stopped, to ask

[1] This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

him to perform field sobriety tests; and (2) the tests were neither relevant to nor probative of conduct related to the offense of driving while intoxicated.

The facts are not in dispute. While conversing with another officer in a service station parking lot around midnight, Sergeant Steve Runice of the Spring Green Police Department saw a man—who he later identified as Cummings—coming out of the station, describing him later as follows:

> [He was] staggering about, weaving, trying to stand still and light a cigarette. It was a little windy that night. So, he was having some difficulty getting his lighter to work, difficulty getting the cigarette lit, and he was weaving there ….
>
> [He] turned and staggered back into the station, and a minute or so later he came back out, and again staggering, and again tried to light a cigarette.

Runice approached Cummings, asking if he could assist him in any way, and when asked, Cummings acknowledged that he had been drinking. Runice then asked whether he needed a ride, and Cummings declined, stating that he "had a ride coming," although he could not identify the person who had brought him there and presumably was returning for him. While talking to Cummings, Runice, an experienced officer, noted that his speech was slurred and his eyes were bloodshot. Runice told Cummings he should not be driving "in his present condition."

Runice drove to the other side of the street and parked. He saw Cummings, who apparently had again gone into the station, come out again, look his way, and walk around the side of station, near a parking area where Runice had earlier observed two cars parked. Runice returned to the station and talked to the attendant for a few minutes. When he came out, he saw a green automobile—which he identified as one of the two cars he had observed in the parking lot

before he first encountered Cummings—driving out from behind the station onto U.S. Highway 14. He followed the car down the road and when it stopped at an intersection—while the light was green and no other vehicles were near the intersection—Runice activated his lights and pulled the car over. When he approached the car, Cummings was in the driver's seat and Runice noticed a smell of intoxicants coming from within the car. After Cummings, acknowledging that he had "a couple of beers," began experiencing difficulty locating his driver's license, Runice asked whether he would submit to some field sobriety tests. He agreed but, in addition to having trouble maintaining his balance when he exited his car, Cummings could not perform any of the tests—which included lifting one foot off the ground, touching his nose with his finger, and counting backwards—nearly falling down several times while attempting to do so. At some point, Runice felt it was unsafe to continue the tests at the side of the highway and placed Cummings under arrest for operating while intoxicated.

Cummings moved to suppress evidence of the sobriety tests and his arrest, arguing that Runice lacked reasonable suspicion to stop him, to administer the tests, and ultimately to arrest him. After the trial court denied the motion, Cummings entered a plea of no contest to the charge and filed this appeal.

Cummings argues first that Runice lacked authority to stop and detain him for conduct which was, in his view, wholly innocent. He refers us to cases holding that such conduct may not form the basis for a stop, quoting at length from ***State v. Waldner***, 206 Wis.2d 51, 60-61, 556 N.W.2d 681, 686 (1996), where the supreme court observed:

> There is nothing unusual nor unlawful in a car driving down the street at 12:30 a.m. …. Nor is there anything unlawful about an individual … driving slowly, then suddenly accelerating. Unusual perhaps, suspicious maybe,

> but not unlawful. Likewise, it is not unlawful for this same car to stop at an intersection before making a left turn when there is no oncoming traffic …. Unusual? Certainly. Suspicious? Maybe. But unlawful? No. Nor is there anything unlawful about this driver stopping the car at this time of night and dumping a mixture of liquid and ice out of a plastic cup into the roadway ….

In reversing this court the ***Waldner*** court held that, while "[a]ny one of these facts, standing alone, might not add up to a reasonable suspicion [to stop and detain a person] …. they do coalesce to add up to a reasonable suspicion." ***Id***. at 61, 556 N.W.2d at 686. Cummings argues that the facts of this case are much more benign—that there was "nothing remarkable," much less illegal or suspicious, about the manner in which he drove away from the service station and that he "did not pull over and dump anything out of the vehicle, as was the case in ***Waldner***." That may be. But, as indicated above, Runice saw Cummings staggering around the service station lot, fumbling with his cigarette and lighter—albeit in a windy area—noted that his speech was slurred and his eyes bloodshot and confirmed that he had been drinking. Then, observing Cummings go behind the station where the two cars were parked, he saw one of those two cars drive onto the highway and come to a stop at a *green* light (with no other traffic near the intersection).

The "fundamental focus" of a "stop" case is reasonableness, and determining what constitutes reasonableness in a given case "is a common sense test."

> What is reasonable under the circumstances? What would a reasonable police officer reasonably suspect in light of his or her training and experience? What should a reasonable police officer do?
>
> [P]olice officers are not required to rule out the possibility of innocent behavior before initiating a brief stop. In this regard we [have] pointed out that the suspects in ***Terry***

> might have been casing the store for a robbery, or they might have been window-shopping or impatiently waiting for a friend in the store…. [S]uspicious conduct by its very nature is ambiguous, and the principal function of the investigative stop is to quickly resolve that ambiguity. Therefore, if 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.

State v. Anderson, 155 Wis.2d 77, 83-84, 454 N.W.2d 763, 766 (1990) (quotations and quoted sources omitted).

In this case Runice had much more than a "hunch" or a "gut" suspicion. As an officer with experience in such matters, he could reasonably suspect that the departing car was being operated by the man with slurred speech and bloodshot eyes who he knew had been drinking and had given him misinformation. Runice had observed Cummings staggering and fumbling in the parking lot and had warned him not to drive. In short, he had reasonable grounds to stop Cummings to inquire further.[2]

Cummings next contends that Runice improperly "expanded the scope of the stop when he asked [him] to perform field sobriety tests." His argument is, in essence, that the mere odor of intoxicants does not justify any reasonable belief that the subject is "under the influence, i.e., that [his] inability to

[2] There is also more here than in ***Reid v. Georgia***, 448 U.S. 438 (1980), the other case Cummings argues. In ***Reid***, narcotics officers at the Atlanta airport saw two persons come from a commercial flight from Florida in the early morning hours (when police surveillance of passengers was at its lowest intensity). The men were carrying similar bags and one occasionally looked back at the other as they proceeded past the baggage claim area. ***Id***. at 439. The second man caught up with the first and they were stopped as they left the terminal. The Supreme Court held that the officers lacked reasonable suspicion to stop the men because, on the facts, they could have had no more than a "hunch" of improper conduct. ***Id***. at 441. Again, Sergeant Runice had much more evidence before him when he stopped Cummings than the narcotics officers had when they stopped Reid. The case does not materially advance Cummings's position.

drive is impaired as a consequence of consuming alcohol." He states this is the equivalent of holding that conduct that is legal in itself is, without more, adequate to support a stop—in violation of the cases holding that a stop may not be predicated on a hunch alone.

In ***County of Dane v. Campshure,*** 204 Wis.2d 27, 30-31, 552 N.W.2d 876, 877 (Ct. App. 1996), the defendant made a similar argument: that the scope of an investigatory stop "was exceeded by the officer's request that [the defendant] perform field sobriety tests." We rejected the argument, holding that the request to perform the tests was not "compulsion for Fifth Amendment purposes," and cannot "transform[] a lawful investigatory stop into an arrest." ***Id***. at 35-36, 552 N.W.2d at 879.

Beyond that, the other information available to Runice at the time he made the request—not only the odor of intoxicants, but the staggering, the slurred speech, the wallet- and cigarette-lighter-fumbling, the admission of drinking, the stopping at a green light for no apparent reason—constitutes, in our opinion, a reasonable evidentiary basis for the request.

Finally, Cummings argues we must conclude that the field-test request was beyond the scope of the initial stop—or an improper extension of the stop—because the State failed to show that the tests Runice administered had any "probative effect on determining whether [his] ability to drive is impaired by alcohol consumption." He says:

> [I]t was the obligation of the State, in order to prove that the detention ... remained within [a permissible scope] to do more than merely show a basis, or hunch, to suspect [him] of operating while intoxicated. It was the obligation of the State to establish that the actions which [Runice] took during the detention were, in fact, reasonably calculated to

> confirm or dispel that suspicion…. This obliged the State to show that the tests … were pertinent to that function.

We understand the argument to be that it was incumbent on the State to offer testimony somehow relating the tests to impaired driving ability in order for the results to have any relevance. We begin by noting that courts have considered evidence of performance on field sobriety and physical and mental dexterity tests as relevant in tens of thousands of driving-while-intoxicated cases in Wisconsin—perhaps hundreds of thousands.

Additionally, Sergeant Runice made the following observations about Cummings's performance—or, more properly, nonperformance—of the tests: he nearly fell down twice when attempting to lift one foot six inches off the ground and had to grab the side of the car to keep from falling; he had difficulty following the simple instructions accompanying each test (such as Runice asking him to wait to begin the tests until he finished giving the instructions); he was unable to count backwards from thirty-four, stopping completely at twenty-four; he could not touch his finger to the tip of his nose; and he had difficulty simply standing on the asphalt shoulder of the road. Indeed, his actions were such that Runice felt it was not safe to conduct further roadside tests and arrested Cummings and escorted him into the squad car.

We think these tests—and Cummings's inability to perform them—are plainly relevant to whether his ability to steer a 3000- or 4000-pound vehicle, capable of attaining high speeds, down a well-traveled U.S. highway could be considered impaired by his reasonably apparent intoxication and physical impairment as evidenced by the tests.

By the Court.—Judgment affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.

.