COURT OF APPEALS
DECISION
DATED AND FILED

April 25, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1815-CR **Cir. Ct. No. 2015CM2267**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRIAN L. ZIEGLMEIER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Marathon County: THOMAS CANE, Reserve Judge. *Affirmed*.

¶1 HRUZ, J.[1] Brian Zieglmeier appeals a judgment of conviction for third-offense operating a motor vehicle while intoxicated (OWI). He argues the circuit court erred in denying his motion to suppress evidence obtained as the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

result of an extension of a traffic stop.[2] We disagree, concluding law enforcement had reasonable suspicion to extend the traffic stop in order to perform field sobriety tests, such that Zieglmeier's constitutional rights were not violated. Accordingly, we affirm.

BACKGROUND

¶2 At the suppression hearing, officer Maureen Pilsner of the Wausau Police Department testified she observed a vehicle travel past her location at 2:07 p.m. moving at a speed of forty-two miles-per-hour in a twenty-five miles-per-hour speed limit zone. Pilsner testified she immediately activated her emergency lights and followed the vehicle for about two to three blocks before it pulled into a parking lot.

¶3 Pilsner testified she made contact with the driver, Zieglmeier, and requested his driver's license and proof of insurance. At that time, Pilsner smelled the odor of alcohol in the vehicle. Pilsner testified that Zieglmeier was "digging through his car" and glove box looking for the proof of insurance. Zieglmeier then acknowledged he possessed neither a license nor insurance information. Zieglmeier admitted he had "two beers" prior to the stop, and he claimed to be traveling to a tavern that Pilsner stated was "right around the corner" from where the stop occurred. Pilsner acknowledged that Zieglmeier did not seem disoriented when he initially spoke with Pilsner and that she could not recall if Zieglmeier's speech was slurred or if he made eye contact with Pilsner.

[2] The Honorable Gregory Grau entered the order denying the motion to suppress evidence. The Honorable Thomas Cane presided over the plea hearing and entered the judgment of conviction.

¶4 Pilsner returned to her squad car, at which point she discovered there was an outstanding warrant for Zieglmeier's arrest due to his failure to pay court-ordered fees. Pilsner returned to Zieglmeier's vehicle to detain him on the arrest warrant. After Zieglmeier exited the vehicle and was placed in handcuffs, Pilsner testified that she and other officers present "could really smell the alcohol [on Zieglmeier] and decided to do field sobriety tests." Another officer then initiated field sobriety tests, and Zieglmeier was eventually arrested for third-offense OWI.

¶5 A video recording of the stop was also introduced into evidence. Pilsner did not review it prior to or during the hearing. When cross-examined, Pilsner acknowledged that she "frankly do[es] not do many" field sobriety tests and that she had a discussion with another officer at the scene—before returning to arrest Zieglmeier on the warrant—regarding whether a test should be performed. She did not recall if she said either that "I don't think it's enough for a DUI anyway" or that she had smelled only "a little bit" of alcohol on Zieglmeier to the other officer on the video recording.

¶6 The circuit court concluded reasonable suspicion justified conducting field sobriety tests. The court determined that several factors created an inference that Zieglmeier's judgment was impaired by intoxicants. In particular, the court noted: (1) traveling "42 miles an hour in a 25 mile an hour zone on a rather major road" in the afternoon entailed "some degree of danger"; (2) Zieglmeier was speeding, yet he was mere blocks from his destination; and (3) Zieglmeier was driving well over the speed limit while he was under warrant for arrest. The court—based upon its review of the video recording prior to the hearing—also found that Zieglmeier "expressed some confusion" during his discussion with Pilsner concerning the car's insurance situation, which confusion, again, supported a suspicion that his judgment was impaired due to alcohol.

Finally, the court found that Zieglmeier admitted to consuming multiple beers prior to the stop and that, upon being lawfully removed from the vehicle, he exhibited what the court termed "a noticeable odor of an intoxicant." The circuit court denied the motion to suppress.

¶7 Zieglmeier pled no contest to third-offense OWI. He now appeals, and we review the order denying his motion to suppress pursuant to WIS. STAT. § 971.31(10).

DISCUSSION

¶8 A motion to suppress evidence presents a question of constitutional fact to which we apply a two-step standard of review. ***State v. Post***, 2007 WI 60, ¶8, 301 Wis. 2d 1, 733 N.W.2d 634. "We review the circuit court's findings of historical fact under the clearly erroneous standard, and we review independently the application of those facts to constitutional principles." ***Id.***

¶9 Zieglmeier has no quarrel with the initial traffic stop for exceeding the speed limit or with his removal from his vehicle based on the outstanding arrest warrant. Instead, he claims the officers lacked reasonable suspicion to extend the stop so as to perform field sobriety tests.[3] A law enforcement officer may seize an individual when he or she possesses reasonable suspicion under the totality of the facts and circumstances that, "in light of his or her training and

[3] Zieglmeier's argument seems unintuitive in the sense that he claims the *investigatory stop* could not be validly extended, *see* ***State v. Betow***, 226 Wis. 2d 90, 94-95, 593 N.W.2d 499 (Ct. App. 1999), despite that he was already under valid *arrest* under the warrant prior to field sobriety testing here. The State highlights that Pilsner was entitled to remove Zieglmeier from his vehicle and that the length of the stop was irrelevant once he was arrested, but it does not dwell on this issue any further.

experience," a crime or other unlawful offense has been or may be committed. ***Id.***, ¶13. Specific, articulable facts must serve as a basis for reasonable suspicion. ***State v. Waldner***, 206 Wis. 2d 51, 55-56, 556 N.W.2d 681 (1996). An officer may draw a reasonable inference of unlawful activity from underlying facts which by themselves may represent innocent conduct. ***Id.*** The scope of a lawful seizure may be enlarged under these same criteria if a law enforcement officer "becomes aware of additional suspicious factors which are sufficient to give rise to an articulable suspicion that the person has committed or is committing an offense or offenses separate and distinct from the acts that prompted the officer's intervention in the first place." ***State v. Betow***, 226 Wis. 2d 90, 94-95, 593 N.W.2d 499 (Ct. App. 1999); *see also* ***State v. Colstad***, 2003 WI App 25, ¶19, 260 Wis. 2d 406, 659 N.W.2d 394 (appellate courts "must determine whether the officer discovered information subsequent to the initial stop which, when combined with information already acquired, provided reasonable suspicion" of OWI).

¶10 Zieglmeier's argument focuses largely on facts that are not present in this case. He notes his vehicle was not observed swerving on the road, there was no testimony about slurred speech or bloodshot eyes, the time of day was about 2:00 p.m. rather than 2:00 a.m., *see* ***Post***, 301 Wis. 2d 1, ¶36, and he did not stumble as he exited his vehicle. Zieglmeier further disputes the relevance and accuracy of the circuit court's finding that he exhibited "impaired judgment" at the time of the stop. Without any other factors, he argues that an admission to drinking two beers coupled with a "weak" odor of intoxicants does not give rise to a reasonable suspicion that a person is impermissibly intoxicated under WIS. STAT. § 346.63(1)(a). In support of that proposition, Zieglmeier cites WIS JI—CRIMINAL 2663A (2016) and two unpublished cases. *See* ***State v. Gonzalez***,

No. 2013AP2585, unpublished slip op. (WI App May 8, 2014); ***County of Sauk v. Leon***, No. 2010AP1593, unpublished slip op. (WI App Nov. 24, 2010).[4]

¶11 We reject Zieglmeier's arguments and instead conclude, based on the totality of the circumstances known to law enforcement, reasonable suspicion supported their decision to administer field sobriety tests to Zieglmeier. Zieglmeier takes an overly selective view of the circuit court's findings. Unlike ***Gonzalez***, No. 2013AP2585, unpublished slip op., ¶17, and ***Leon***, No. 2010AP1593, unpublished slip op., ¶28, the court here considered more than just an odor of intoxicants and an admission to drinking. Zieglmeier exhibited poor driving conduct by traveling well in excess of the speed limit on what the circuit court described as a "rather major road." The circuit court's conclusions also rested on several other observations indicating that Zieglmeier exhibited "impaired judgment" before and during the stop. When these observations are combined with the noticeable odor of alcohol and admission to drinking, a reasonable officer could reasonably suspect Zieglmeier was impermissibly intoxicated.[5]

[4] *See* WIS. STAT. RULE 809.23(3)(b) (unpublished one-judge opinions issued on or after July 1, 2009, may be cited for persuasive value).

[5] Zieglmeier also erroneously relies on Pilsner's own uncertainty—exhibited in the video recording, and mentioned *prior to* Zieglmeier being removed from his vehicle pursuant to the warrant—concerning whether the odor of intoxicants here was enough to conduct field sobriety tests. As a legal matter, an officer's subjective belief is not determinative under Fourth Amendment analysis. *See* ***State v. Sykes***, 2005 WI 48, ¶33, 279 Wis. 2d 742, 695 N.W.2d 277. As a factual matter, and based in part on Pilsner's own testimony that, once Zieglmeier exited his vehicle, we "could really smell the alcohol," the circuit court found there was "a noticeable odor of an intoxicant" coming from Zieglmeier. Because Zieglmeier was being lawfully removed from his vehicle at the time, there is no issue with law enforcement relying on this second, more marked exposure to Zieglmeier's odor of alcohol.

¶12 We further reject Zieglmeier's claims that his particular signs of "impaired judgment" must be disregarded. He argues "driving in excess of a posted speed limit is almost always an exercise in poor judgment" and not specific enough to support suspicion of intoxication—otherwise law enforcement could compel field sobriety tests of *anyone* stopped for speeding. This argument makes sense if considered in isolation, but Zieglmeier again ignores the totality of the circumstances. The noticeable odor of alcohol and the circuit court's other findings on impaired judgment added more to the calculus than speeding alone to justify an inference of intoxication so as to warrant the field sobriety tests. *See* ***Waldner***, 206 Wis. 2d 51. We agree with the circuit court's conclusion that driving seventeen miles-per-hour over the speed limit when one is nearly at a would-be destination, all the while risking detection under an active arrest warrant by doing so, objectively indicates impaired judgment.

¶13 Zieglmeier also argues the circuit court's finding that he "expressed some confusion" during the stop was clearly erroneous. He relies on Pilsner's testimony that Zieglmeier did not seem "disoriented" or "lost in space" and his own claim that the video recording provides no indication that Pilsner's observations in this regard were incorrect. Based upon our independent review of the recording, we reject this argument. *See* ***State v. Walli***, 2011 WI App 86, ¶17, 334 Wis. 2d 402, 799 N.W.2d 898 (appellate court shall evaluate findings of circuit court under clearly erroneous standard when those findings are based upon review of a video recording and conflicting testimony).

¶14 Zieglmeier's body language on the video cannot be clearly seen, but the audio indicates Zieglmeier was uncertain of the vehicle's insurance status. He ultimately provided Pilsner with an expired proof of insurance card for the vehicle, but he did not realize the card was expired until Pilsner informed him of that fact.

This aspect of the recording supports the circuit court's inference that Zieglmeier did, in fact, "express some confusion" on the issue at the time of the stop. And although the court—as the factfinder—was entitled to weigh the recording against Pilsner's testimony, *see* ***id.***, ¶14, we note the two do not necessarily conflict. Despite Zieglmeier's claims, Pilsner certainly did not testify that Zieglmeier was confident on the status of his vehicle's insurance or that he provided accurate information to her.

¶15 We also disagree with Zieglmeier's claim that his confusion was "too speculative" to support a reasonable suspicion he was intoxicated. We once again "look to the totality of the facts taken together" here. *See* ***Waldner***, 206 Wis. 2d 51. Pilsner asked a rather basic question, one which was not difficult to understand or answer. Zieglmeier's confusion on this issue certainly was relevant to Pilsner's determination—once Pilsner detected that very "noticeable" odor of alcohol—as to whether Zieglmeier might have been lacking in awareness or impaired. Accordingly, we conclude the circuit court properly denied the motion to suppress.

By the Court.—Judgment affirmed.

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