COURT OF APPEALS
DECISION
DATED AND FILED

October 6, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2957-CR **Cir. Ct. No. 2002CT430**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEVE A. FLEMING,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Sauk County: JAMES EVENSON, Judge. *Affirmed.*

¶1 HIGGINBOTHAM, J.[1] Steve A. Fleming appeals a judgment of conviction for operating a motor vehicle with a prohibited alcohol concentration,

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

third offense, and operating a motor vehicle with a revoked driver's license and an order denying his suppression motions. Fleming argues: (1) the deputy lacked reasonable suspicion to stop and detain him; and (2) the arresting deputy and the deputies at the Sauk County jail disregarded his request for an alternative test at his expense. We conclude the anonymous tip informing the Sauk County sheriff's department of the possibility that Fleming was driving under the influence of alcohol was sufficiently corroborated; therefore, there was reasonable suspicion to stop and detain Fleming. We also conclude the arresting deputy and the deputies at the jail did not prevent Fleming from obtaining an alternative test at his expense. Accordingly, we affirm the circuit court.

FACTS

¶2 Fleming was charged with operating a motor vehicle while intoxicated, third offense, operating a motor vehicle with a prohibited alcohol concentration, third offense, and operating a motor vehicle after revocation, first offense. Fleming moved to suppress the evidence, alleging the traffic stop was unlawful and in violation of the Implied Consent law. After several evidentiary hearings, the trial court denied these motions. Fleming ultimately pled no contest to OWI, third offense, and the OAR charge. The following facts surrounding the traffic stop were taken either from the trial court's findings of fact or the testimony provided at the evidentiary hearings.

¶3 On August 25, 2002, Sauk County deputy sheriff Alex Breunig received information that the Sauk County dispatch had received a report from an anonymous caller of a potentially intoxicated driver. Dispatch reported the caller indicated a vehicle was traveling southbound on U.S. Highway 12 from Bronco Billy's Bar and provided the license plate number of the vehicle in question.

Breunig learned the vehicle was registered to Fleming. Breunig then located the vehicle traveling southbound on U.S. Highway 12 as reported and the license plate matched the plate number provided by the anonymous tipster.

¶4 Breunig followed Fleming's vehicle. Breunig noted that as Fleming's car entered a curve, it drove onto, but did not cross, the centerline for approximately 100-200 feet. As the vehicle entered a second curve, Fleming made "a jerky, erratic turn through the curve." Breunig indicated it appeared Fleming was continuously adjusting the steering wheel throughout the turn. After passing through the intersection of Lehman Road and U.S. Highway 12, the vehicle abruptly braked; then, just south of Lehman Road, the vehicle crossed the fog line by about a foot for a couple hundred feet. Breunig testified it was approximately fifteen minutes after bar time on a weekend less than five miles from a tavern. After the vehicle crossed the fog line, Breunig suspected the driver might be intoxicated.

¶5 Breunig testified Fleming's vehicle drifted from the centerline to the fog line prior to entering a curve at the intersection of U.S. Highway 12 and State Highway 159 and that the jerky movements throughout the second turn were abnormal. However, Breunig observed no violations of the law as he followed Fleming's car and, separately, each abnormality he observed was not necessarily unusual.

¶6 At approximately 2:45 a.m., Breunig attempted to stop the suspect vehicle; it took approximately 2/10 of a mile before the vehicle pulled over to the side of the road. Upon contact, Breunig identified the driver as Fleming and noticed the odor of intoxicants. After a series of field sobriety tests, Breunig arrested Fleming for OWI. When Fleming was arrested and placed in handcuffs,

he informed Breunig he wanted a breath test. Breunig interpreted this request as a request for a roadside preliminary breath test (PBT). Breunig did not offer a PBT.

¶7 Breunig transported Fleming to St. Claire Hospital in Baraboo; Breunig informed Fleming that Sauk County's primary test was a blood test. During the ride to the hospital, Fleming again informed Breunig he wanted a breath test because he had asthma. At the hospital, Breunig issued Fleming a citation for OWI and read him the Informing the Accused form; Fleming also read the form himself. Fleming asked Breunig to re-read the paragraph referencing the alternative test; Breunig read him the paragraph four times. Fleming was then asked to consent to a blood test, which he did. A blood test was performed at approximately 3:19 a.m.

¶8 Fleming then asked for Sauk County's secondary test. Sauk County's secondary test is typically a breath test. Breunig was transporting Fleming to the Sauk County sheriff's department to perform a breath test when he learned there was no qualified officer available to perform the breath test at the sheriff's department. Breunig also contacted the Baraboo police department and the State Patrol and was informed no qualified officer was available. The closest available agency available to perform the breath test was the Wisconsin Dells police department. Although there was time to take Fleming to Wisconsin Dells for a breath test, Breunig did not do so. Breunig was unaware of any other way, other then going to Wisconsin Dells, to make a breath test available to Fleming.

¶9 Breunig then transported Fleming back to St. Claire hospital where he again read Fleming the Informing the Accused form and offered Fleming the opportunity to take a urine test as the secondary test. Fleming refused the urine test and informed Breunig he wanted a person of his choice to perform the test.

Fleming did not specify the test he wished to take; however, he clearly indicated he wanted a person of his own choice to conduct the test and refused to take the urine test.

¶10 At approximately 4:15 a.m. Breunig and Fleming left the hospital a second time. Breunig then transported Fleming to the jail, arriving at approximately 4:20 a.m. Breunig did not recall if he and Fleming had any further discussion about making arrangements for another test.

¶11 Breunig turned Fleming over to jail staff for booking, which normally takes approximately twenty to thirty minutes. During the booking process, Breunig believed Fleming had produced a phony driver's license and attempted to investigate the situation. Fleming's previous booking report indicated a middle initial of "A" and a date of birth of 01/21/51. However, Fleming's driver's license showed "E" as his middle initial and a 01/21/50 date of birth. Fleming indicated his middle name was Alex but his explanation for the "E" on the driver's license was Alex had an "E" in it. In addition, Fleming could not remember what year he was born. Fleming insisted the DOT had made a clerical error in issuing his driver's license.

¶12 Breunig initially thought Fleming had fraudulently obtained a driver's license. Resolving this confusion took approximately fifteen minutes. After clarifying the situation, Breunig left the sheriff's office. Breunig never informed jail staff Fleming had requested an alternative test and never discussed with Fleming arrangements for an alternative test.

¶13 Shortly following Breunig's departure, Fleming again asked jail staff for an alternate test to jail staff. The jail booking staff informed Fleming he would not be allowed to arrange his own test until he completed the booking process and

instructed Fleming to behave and cooperate. Part of the booking procedure included the collection of medical information from Fleming. However, Fleming became verbally abusive and refused to supply the necessary medical information to complete the booking process.

¶14 Jail staff then placed Fleming in a holding cell from which he continued to demand his own test and refused to provide the requested medical information. At one point, Fleming began pounding on the cell, insisting he had a right to an alternate test. Fleming was informed he would be allowed as many phone calls as he wanted once the booking process was complete and he bonded out. Instead, Fleming continued to bang on his cell; he removed his clothing and stuffed it in the toilet, flushing the toilet to flood the jail cell. Jail staff left Fleming in his cell until sometime later in the morning, after 7 a.m.

¶15 As previously noted, Fleming's motions to suppress were denied and on February 17, 2004, Fleming pled no contest to the PAC and OAR charges. Fleming now appeals the court order denying his motions to suppress evidence.

DISCUSSION

Anonymous Tip and the Stop

¶16 Fleming first argues Breunig lacked reasonable suspicion to stop and detain him. He asserts the anonymous tip conveyed to dispatch lacked any indicia of reliability justifying his investigative stop. Fleming further argues the totality of the circumstances observed by Breunig did not establish reasonable suspicion justifying the investigative stop. We disagree.

¶17 Whether reasonable suspicion existed for an investigatory stop is a question of constitutional fact. ***State v. Williams***, 2001 WI 21 ¶18, 241 Wis. 2d

631, 623 N.W.2d 106. We will uphold the trial court's findings of fact unless clearly erroneous, but we review de novo whether those facts meet the constitutional standard. ***Williams***, 241 Wis. 2d 631, ¶18.

¶18 Without probable cause, police may temporarily detain and question a subject if the police have reasonable suspicion to believe the subject is involved in criminal activity. ***Jones v. State***, 70 Wis. 2d 62, 66-67, 233 N.W.2d 441 (1975); WIS. STAT. § 968.24 (2001-02). This reasonable suspicion must be more than an "inchoate and unparticularized suspicion or 'hunch ….'" ***Terry v. Ohio***, 392 U.S. 1, 27 (1968). A law enforcement officer must "reasonably suspect, in light of his or her experience, that some kind of criminal activity has taken or is taking place." ***State v. Richardson***, 156 Wis. 2d 128, 139, 456 N.W.2d 830 (1990). "The question of what 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).

¶19 A court determining the reasonableness of the suspicion must consider the totality of the circumstances, including "both the content of information possessed by police and its degree of reliability." ***Williams***, 241 Wis. 2d 631, ¶22. In determining whether a ***Terry*** stop was lawfully conducted pursuant to an anonymous tip, our supreme court has stated:

> The totality-of-the-circumstances approach views the quantity and the quality of the information as inversely proportional to each other. 'Thus, if a tip has a relatively low degree of reliability, more information will be required to establish the requisite quantum of suspicion than would be required if the tip were more reliable.' Conversely, if the tip contains a number of components indicating its reliability, then the police need not have as much additional information to establish reasonable suspicion.

Williams, 241 Wis. 2d 631, ¶22 (citation omitted). While anonymous tips are generally less reliable than tips from known informants, they can nonetheless form the basis for reasonable suspicion if, suitably corroborated, they exhibit "sufficient indicia of reliability." ***Florida v. J.L.***, 529 U.S. 266, 270 (2000). "In assessing the reliability of a tip, due weight must be given to: (1) the informant's veracity; and (2) the informant's basis of knowledge." ***State v. Rutzinski***, 2001 WI 22, ¶18, 241 Wis. 2d 729, 623 N.W.2d 516. "'[W]hen significant aspects of an anonymous tips are independently corroborated by the police, the inference arises that the anonymous informant is telling the truth about the allegations of criminal activity.'" ***Williams***, 241 Wis. 2d 631, ¶40 (citation omitted).

¶20 We conclude there was reasonable suspicion justifying the investigative stop under ***Terry*** because, although the tip was wholly anonymous, it was otherwise reliable because the police independently corroborated significant aspects of the anonymous tip. *See* ***Williams***, 241 Wis. 2d 631, ¶40. Breunig received an anonymous tip about a potentially intoxicated driver traveling southbound on U.S. Highway 12 from Bronco Billy's Bar approximately fifteen minutes after bar time; the anonymous tip provided the license plate number of the potentially intoxicated driver. The State concedes the anonymous tipster offered no information regarding predictive behavior, or any potentially identifying information as is contemplated by ***Williams*** and thus, absent more, the stop would be unlawful.

¶21 However, the State asserts Breunig made "sufficient observations of Fleming's driving behavior to corroborate the tipster's claim" and thus the tip, coupled with those observations, gave rise to reasonable suspicion. The record bares this out. Breunig testified to the following: (1) Fleming's vehicle weaved back and forth between the centerline and the fog line; (2) at the time of the stop it

was only fifteen minutes after bar time and the car in question was only five miles from a tavern; (3) there were numerous jerky movements as Fleming passed through a turn, which is driving behavior inconsistent with sober drivers; and (4) there was no obvious reason for Fleming's abrupt braking after an intersection. The trial court found Fleming had ridden on the centerline, suddenly braked after passing an intersection, weaved across the white fog line and failed to promptly pull over in response to the emergency police signal. In addition, the trial court found the jerkiness in Fleming's turns, coupled with the previously mentioned traffic irregularities, provided sufficient reasonable suspicion to corroborate the anonymous tip that Fleming was intoxicated.

¶22 Breunig admittedly testified that most of the traffic irregularities separately were not unusual or per se in violation of any traffic laws. However, the Fourth Amendment does not require a police officer lacking the precise level of information necessary for probable cause to arrest to simply shrug his or her shoulders and thus possibly allow a crime to occur or a criminal to escape. ***State v. Waldner***, 206 Wis. 2d 51, 59, 556 N.W.2d 681 (1996). Even where there is no unlawful conduct, a stop may be justified based on observations of lawful conduct so long as the reasonable inferences drawn from the lawful conduct indicate criminal activity may be afoot. ***Id.*** at 57. We conclude the totality of Breunig's observations would lead a reasonable person to suspect Fleming was driving while intoxicated and thus reasonable suspicion existed justifying the stop.

Fleming's Request For An Alternative Test

¶23 Fleming maintains that by failing to comply with his request for an alternative test to determine whether he was driving under the influence of alcohol, including failing to convey that request to the jail booking staff, Breunig

unreasonably frustrated his timely request for an alternative test in violation of WIS. STAT. § 343.305(5). Fleming also asserts by unreasonably prohibiting him from arranging for his own test until he answered their questions about his medical background, the jail staff unreasonably frustrated his request for an alternative chemical test at his own expense. These arguments are without merit.

¶24 WISCONSIN STAT. § 343.305(2) requires law enforcement to provide at its expense at least two of the three approved tests to determine the presence of alcohol or other intoxicants in the breath, blood or urine of an OWI suspect. Specifically, § 343.305(5) imposes three obligations on law enforcement:

> (1) to provide a primary test at no charge to the suspect; (2) to use reasonable diligence in offering and providing a second alternate test of its choice at no charge to the suspect; and (3) to afford the suspect a reasonable opportunity to obtain a third test, at the suspect's expense.

State v. Stary, 187 Wis. 2d 266, 270, 522 N.W.2d 32 (Ct.App. 1994).

¶25 WISCONSIN STAT. § 343.305(5)(a) provides, in relevant part;

> The person who submits to the [primary] test is permitted, upon his or her request, the alternative test provided by the agency under sub. (2) or, at his or her own expense, reasonable opportunity to have any qualified person of his or her own choosing administer a chemical test for the purpose specified under sub. (2)….

Whether a police officer has made a reasonably diligent effort to comply with the statutory obligations is an inquiry that must consider the totality of the circumstances as they exist in each case. ***Stary***, 187 Wis. 2d at 271. If the suspect is denied the statutory right to an additional test, the primary test must be suppressed. ***State v. McCrossen***, 129 Wis. 2d 277, 287, 385 N.W.2d 161 (1986). Whether a suspect's request for an additional test was sufficient is a question of law we review de novo. *See* ***Stary***, 187 Wis. 2d at 269.

¶26 The law enforcement agency must provide a "reasonable opportunity" for the accused to obtain the test of his or her choice within the three-hour time limit of WIS. STAT. §§ 343.305(5)(a) and 885.235(1). ***State v. Vincent***, 171 Wis. 2d 124, 128, 490 N.W.2d 761 (Ct. App. 1992). The agency's responsibility to provide a "reasonable opportunity" is limited to not frustrating the accused's request for his or her own test. ***Id.***

¶27 We conclude Fleming's right to an alternate test under WIS. STAT. § 343.305(5)(a) was not violated. The sequence of events proves critical to our determination that Fleming's right to an alternate test was not violated. Breunig stopped Fleming at approximately 2:45 a.m. As Breunig was placing Fleming into the squad car following his arrest, Fleming told Breunig he wanted a breath test. Breunig took this to mean that Fleming wanted a "roadside test" or a PBT. Breunig did not administer a PBT and transported Fleming to St. Clare Hospital for a blood test. The blood test is the primary test offered by Sauk County. Fleming again requested a breath test as they were traveling to St. Clare Hospital, claiming he had asthma.

¶28 Fleming consented to a blood test at St. Clare Hospital. However, Fleming again requested a breath test as the secondary test; under WIS. STAT. § 343.305(2) a suspected intoxicated driver is permitted a second evidentiary test upon request. Breunig attempted to accommodate Fleming's request by taking him to the Sauk County sheriff's department. While en route to the sheriff's department, however, Breunig discovered that no officer certified in operating the intoximeter was available. Breunig then contacted the Baraboo police department and the State Patrol and was informed that no qualified officer was available to administer the intoximeter for Fleming.

¶29 Breunig testified he had sufficient time to drive to the Wisconsin Dells for a breath test but decided against it. Instead, Breunig drove Fleming back to St. Clare Hospital and offered Fleming a urine test as the secondary test. They arrived at the hospital at approximately 4:15 a.m. Fleming refused to take a urine test. It was at this point Fleming first requested under WIS. STAT. § 343.305(5)(a) an alternative test to be administered by a person of his own choosing and at his own expense. Significantly, Fleming did not indicate the nature of that test (blood, urine or breath), where the test was to be administered, and who was to administer the test. Once Fleming declined to take the urine test and demanded an alternative test, Breunig promptly transported Fleming to the Sauk County jail for booking.

¶30 Fleming argues Breunig unreasonably frustrated Fleming's request for an alternative chemical test at his own expense.[2] Fleming contends "Deputy Breunig understood that Mr. Fleming was asking that a breath test be performed at his expense by a person of his choosing" based on the following facts: (1) Fleming requested a breath test at the scene of the traffic stop; (2) Fleming requested a breath test while en route to St. Clare Hospital; (3) Fleming requested a breath test as the second evidentiary test while at St. Clare Hospital; and (4) Fleming requested a person of his own choosing to administer a test. These facts do not support Fleming's contention.

¶31 Fleming's first request for a breath test did not trigger Breunig's responsibility under WIS. STAT. § 343.305(5)(a) to afford Fleming an alternative test; Fleming simply asked for a breath test, nothing more. Similarly, Fleming's

[2] As we noted, the record establishes that while Fleming requested an alternative test, Fleming did not specify which test was to be administered.

request for a breath test while being transported to St. Clare Hospital the first time did not trigger his right to an alternative test under § 343.305(5)(a) for the same reason. This is also true of Fleming's request for a breath test as the second evidentiary test under § 343.305(2). Indeed, Fleming had no right to choose the form of the secondary test; that choice belongs to the law enforcement officer. *See* ***Stary***, 187 Wis. 2d at 270. Fleming had no right to choose which test he wanted to take. ***Id***. at 269-70. Fleming's right to an alternate test under § 343.305(5)(a) was not triggered until he made a specific request for one after returning to St. Clare Hospital and after he rejected a urine test as the second evidentiary test.

¶32 Fleming contends Breunig frustrated his request for his own test by not going to Wisconsin Dells for a breath test when there was sufficient time to do so and by failing to inform the officers at the jail of Fleming's request for an alternative test. What Fleming ignores is that although Breunig testified he could have transported Fleming to Wisconsin Dells for a breath test within the three-hour period, Breunig was not required to do so. At that time Breunig was attempting to identify an officer certified in administering an intoximeter so as to offer Sauk County's secondary test, a breath test. At that point Fleming had no right to choose his secondary test. ***Id***. Thus, upon discovering that no officer was available to administer the intoximeter, Breunig acted reasonably by returning to St. Clare Hospital to issue a urine test to Fleming. As we noted, it was only after returning to St. Clare Hospital that Fleming specifically requested an alternative test of his choosing under WIS. STAT. § 343.305(5)(a). These facts do not establish that Breunig frustrated Fleming's ability to obtain an additional test at his own expense.

¶33 Breunig's failure to convey to jail staff Fleming's request for an alternate test also did not frustrate his ability to obtain such a test because jail staff

were informed of the request by Fleming himself shortly after his arrival. While it would have been more prudent for Breunig to inform the jail staff of Fleming's request for an alternative test, any possible error by his failure to do so was ameliorated when Fleming told the jail staff himself of his request shortly after arriving at the jail.

¶34 We further conclude the jail staff did not frustrate Fleming's ability to obtain an alternate test. Fleming did that himself. Once Breunig and Fleming arrived at the sheriff's department at approximately 4:20 a.m., Breunig turned Fleming over to jail staff for booking, which normally takes only twenty to thirty minutes. As Fleming points out, he had, at most, fifty-five minutes to obtain an alternate test before the three-hour period expired within which a test is to be taken. However, because of discrepancies found between Fleming's driver's license and his previous booking sheets, Breunig believed Fleming had produced a phony driver's license and attempted to investigate the situation. Fleming's explanations of these discrepancies were unhelpful. Resolving this confusion took approximately fifteen minutes. After clarifying the situation, Breunig then left the sheriff's office.

¶35 Following Breunig's departure, Fleming again requested an alternate test to jail staff. Fleming was specifically instructed he would not be allowed to arrange his own test until he completed the booking process. Despite this admonition, Fleming became verbally abusive and refused to supply the necessary medical information to complete the booking process.

¶36 Jail staff then placed Fleming in a holding cell from which he continued to demand his own test and refused to provide the requested medical information. At one point, Fleming began pounding on the cell, insisting he had a

right to an alternate test. Fleming was informed he would be allowed as many phone calls as he wanted once the booking process was complete and he bonded out. Instead, Fleming continued to bang on his cell, removed his clothing and stuffed it in the toilet, flushing the toilet to flood the jail cell. Jail staff left Fleming in his cell until sometime after 7 a.m.

¶37 Fleming complains the jail staff frustrated his right to obtain an alternate test by requiring him to complete the booking procedures before he could use the telephone to make the necessary arrangements. Fleming cites to no legal authority holding that law enforcement is required to permit a defendant to make the necessary arrangements for an alternate test prior to being booked. *See* ***Vincent***, 171 Wis. 2d at 129 (the agency's responsibilities in making an accused available to obtain his or her own test include the prompt processing of the accused so that he or she has an opportunity to seek and obtain an alternative test within three hours). Here, the jail staff attempted to promptly process Fleming but Fleming chose to interfere with the process by unreasonably refusing to provide necessary medical background information. Fleming continued to be uncooperative by his disruptive conduct in the jail cell. Fleming has only himself to blame for the jail staff's inability to process him in a timely manner.

¶38 Fleming's argument that jail staff frustrated his effort to obtain an alternate test also fails because he does not tell us the arrangements he would have made for the alternate test. Fleming does not say where the test would have been performed nor does he inform us as to his transportation arrangements. Fleming did not arrive at the jail until approximately 4:20 p.m., giving him little time to arrange for an alternate test and to then be transported to the site of the test. In short, we do not know whether Fleming would have met the three-hour deadline for submitting an alternate test even if given the opportunity to do so. We affirm

the order denying Fleming's motion to suppress evidence and his judgment of conviction.

By the Court.—Judgment and order affirmed.

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