COURT OF APPEALS
DECISION
DATED AND FILED

June 29, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-0106

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

COUNTY OF JEFFERSON,

PLAINTIFF-RESPONDENT,

v.

JOHN H. NEWKIRK, III,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Jefferson County: JOHN ULLSVIK, Judge. *Affirmed.*

¶1 VERGERONT, J.[1] John Newkirk, III appeals the judgment of conviction for operating a motor vehicle while intoxicated (OWI) in violation of

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

WIS. STAT. § 346.63(1).[2] He contends the trial court erred in concluding that the initial stop was constitutionally permissible and in concluding that the implied consent statute, WIS. STAT. § 343.305(4), as communicated to him on the informing the accused form, is not unconstitutionally misleading. We reject both contentions and affirm.

BACKGROUND

¶2 Newkirk moved to suppress evidence on the ground that Newkirk was detained without reasonable suspicion. Michael Meyers, deputy sheriff of Jefferson County, was the only witness at the hearing on this motion. Meyers testified as follows. He was on duty in a marked police squad car at approximately 3:15 a.m. on February 6, 1999, when the Dispatch Center informed him over his radio that it had received a report of a possible drunk driver at the Kwik Trip parking lot in Lake Mills. Dispatch gave him the vehicle description—a blue pickup truck—and the license plate number. Dispatch noted the caller's name and telephone number, but did not give Meyers that information at the time; Meyers did not learn the identity of the caller until after Newkirk was arrested.

¶3 While Meyers was driving to the Kwik Trip he received a radio transmission from State Trooper Pete Moe stating that he saw the vehicle described by dispatch in the parking lot. Moe stated that when he drove by, the headlights were on, and then they went off; he then took a position to watch the vehicle. As Meyers approached the parking lot he saw a blue pickup truck make a U-turn in the lot, and as it did so, the back end "broke free and slid a little bit,"

[2] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

"fishtailed." Meyers said of the fishtailing that "at that particular moment [the vehicle] was out of control," but acknowledged that it appeared the operator then laid off the accelerator so that the vehicle "came back around perfectly fine." As Meyers was driving into the parking lot he saw the truck make another U-turn and pull up right next to the gas pumps. After Meyers' squad car was in the parking lot, but before Meyers stopped his car, he saw a man who later identified himself as Newkirk get out of the pickup truck.

¶4 Meyers pulled in behind the truck and got out of his car. At no time did he activate either his emergency lights or siren. Meyers walked toward Newkirk, who was near a garbage can next to the gas pumps. It did not look to Meyers as though Newkirk was pulling up to pump gas because he was further away from the pumps than people normally are when they pull up to pump gas; it looked to Meyers as though Newkirk pulled up to put something in the garbage can, which was "pretty much even with his door." Newkirk had his back to Meyers, and Meyers did not believe Newkirk saw him when he first started to approach him. When Meyers was about two to three feet from Newkirk, Newkirk turned around and said, before Meyers said anything to him, "You didn't stop me for that turn I did." Meyers assumed Newkirk was talking about the U-turn he had made when the back end broke free and skidded. Meyers believed he did not answer Newkirk.

¶5 At this time Meyers was about two feet away from Newkirk. Meyers smelled a strong odor of intoxicants on Newkirk's breath, and observed his eyes were very bloodshot, and his speech pattern was slurred. These observations indicated to Meyers that Newkirk was probably intoxicated, based on his experience as a law enforcement officer. Meyers asked Newkirk for his driver's license and he watched as Newkirk struggled to get it out of his wallet.

Then, seeming frustrated, Newkirk handed his wallet to Meyers. Meyers asked Newkirk to just hand over the license, and after another struggle of approximately thirty seconds, Newkirk removed his license from his wallet. He handed his license to Meyers. Meyers asked Newkirk whether he had been drinking. Newkirk said he had, and he answered other questions on the amount, time and location of his drinking. With Newkirk's agreement, Meyers administered field sobriety tests and a preliminary breath test, which showed a result of .12. Meyers then arrested Newkirk and took him to the hospital for a blood draw, giving him the Informing the Accused form before requesting that he submit to a drawing of his blood.

¶6 On cross-examination, when asked whether he was stopping Newkirk for the fishtailing, Meyers answered, "I didn't stop him at all." When asked whether he would have "made contact" with the driver based on the fishtailing without the information he received over the radio, Meyers answered, "probably not."

¶7 The trial court concluded that based on the information from dispatch, Meyers had reasonable suspicion when he located the vehicle to approach the driver. However, the court also stated that if that information alone did not constitute reasonable suspicion, in combination with the observation of the truck sliding when making the U-turn in the parking lot, it did constitute reasonable suspicion to stop the driver for a reasonable period of time and demand his driver's license and name and an explanation for his conduct. The observations of the strong odor of alcohol, bloodshot eyes, slurred speech and difficulty in removing his driver's license then justified further detaining and questioning.

¶8 The trial court also considered Newkirk's challenge to the Informing the Accused form, which contained the same language as that in WIS. STAT. § 343.305(4). Newkirk contended the language of the statute is misleading in its description of the consequences of refusing to submit to a test of a sample of breath, blood or urine and, therefore, it violates his right to due process. The trial court disagreed, concluding that Newkirk had not overcome the presumption of the statute's constitutionality.

DISCUSSION

Lawfulness of initial stop

¶9 To execute a valid investigatory stop consistent with the Fourth Amendment prohibition against unreasonable searches and seizures, 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. *See* ***State v. Richardson***, 156 Wis. 2d 128, 139, 456 N.W.2d 830 (1990). An investigatory stop is permissible when the person's conduct may constitute only a civil forfeiture. *See* ***State v. Krier***, 165 Wis. 2d 673, 678, 478 N.W.2d 63 (Ct. App. 1991). Upon stopping the individual, the officer may make reasonable inquiries to dispel or confirm the suspicions that justified the stop. *See* ***Terry v. Ohio***, 392 U.S. 1, 22 (1968).

¶10 In assessing whether reasonable suspicion exists for a particular stop, we consider all the specific and articulable facts, taken together with the rational inferences from those facts. *See* ***State v. Dunn***, 158 Wis. 2d 138, 146, 462 N.W.2d 538 (Ct. App. 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. Jackson***, 147 Wis. 2d 824, 834, 434 N.W.2d 386 (1989).

When, as in this case, the facts are undisputed, the question whether those facts meet the constitutional standard is a question of law, which we review de novo. *See* ***State v. Babbitt***, 188 Wis. 2d 349, 356, 525 N.W.2d 102 (Ct. App. 1994).

¶11 Newkirk contends that a seizure occurred when Meyers pulled up his car behind Newkirk's truck, got out and approached Newkirk. According to Newkirk, at that time Meyers did not have reasonable suspicion to believe Newkirk was operating a motor vehicle while intoxicated. The State disputes a seizure occurred at that time, but we will assume without deciding that it did. We conclude Meyers had reasonable suspicion at that time, based on the information he received from dispatch, his subsequent observation of the described vehicle being in the described location, and his observation of the U-turn with the back end of the car "fishtailing."

¶12 The parties dispute whether the information provided by the caller may form part of the basis for reasonable suspicion. We conclude that it may. Newkirk relies on ***State v. Williams***, 225 Wis. 2d 159, 168, 591 N.W.2d 823 (1999), *judgment vacated*, 120 S. Ct. 1552 (Apr. 3, 2000), but that case concerned an anonymous tip.[3] The caller in this case was not anonymous. Newkirk points out

[3] The court in ***State v. Williams***, 225 Wis. 2d 159, 168, 591 N.W.2d 823 (1999), held that an anonymous tip supplied by a citizen informant, lacking in prediction but describing a crime in progress, may be accorded some weight in an officer's consideration of reasonable suspicion, even though it does not predict future activity. In ***Williams*** the caller to 911 reported that some people in a vehicle which he described, was parked next to his apartment building and were selling drugs. ***Id.*** at 163-64. The court concluded that even though the caller did not give his name, the officers who arrived at the scene after receiving a radio dispatch based on the call, had reasonable suspicion to conduct an investigatory stop of the occupants of the vehicle. *See* ***id.*** at 183.

The United States Supreme Court vacated the judgment in ***Williams*** and remanded to the Wisconsin Supreme Court for further consideration in light of ***Florida v. J.L.***, 120 S. Ct. 1375 (2000). *See* ***Williams v. Wisconsin***, 120 S. Ct. 1552 (April 3, 2000).

that Meyers did not know the caller's name until after the arrest and contends that the identity of the person therefore is not a factor in whether Meyers had reasonable suspicion. However, when we assess whether an officer, who is given information through police channels, has reasonable suspicion to make a stop, we make that assessment based on all the collective information in the police department. *See* ***State v. Mabra***, 61 Wis. 2d 613, 625-26, 213 N.W.2d 545 (1974). Dispatch need not have given the name and telephone number of the caller to Meyers before he made the stop, or even told Meyers that dispatch had that information, in order for the court to consider the fact that dispatch had the caller's name and telephone number as an indication of reliability. The proper test is therefore that set forth in ***State v. Paszek***, 50 Wis. 2d 619, 631, 184 N.W.2d 836 (1971): the reliability of a citizen informant is evaluated from the nature of the report, the opportunity to hear and see the matters reported, and the extent to which it can be verified by independent police investigation.

¶13 In this case, the vehicle description and location was as the caller described, and Meyers arrived at the Kwik Trip very soon after the call, with another officer observing the vehicle in the interim and reporting it to Meyers. Meyers also observed an additional fact that was consistent with the call: the fishtailing of the back end of the vehicle during a U-turn, which signified to Meyers the driver was not in control at that time. Although the driver regained control, although Meyers acknowledged he probably would not have considered the fishtailing in itself sufficient to stop the driver, and although the fishtailing could have an innocent explanation, it is nevertheless activity consistent with operating a vehicle while intoxicated. We conclude that the call describing the operator of the vehicle as a "possible drunk driver" in combination with the

observation of the vehicle fishtailing constituted a reasonable suspicion that the operator of the vehicle was under the influence of an intoxicant.

¶14 We therefore conclude that Meyers had the requisite reasonable suspicion to stop Newkirk—in this case, pull his car up behind Newkirk's truck, get out, and approach Newkirk to speak with him. Once Newkirk spoke to Meyers, before Meyers even spoke to Newkirk, Meyers observed the strong odor of intoxicants, slurred speech and bloodshot eyes. Those additional observations increased the likelihood that Newkirk was driving while under the influence of an intoxicant, and provided ample basis for Meyers to ask Newkirk to provide his driver's license and to question him about his drinking.[4]

Constitutionality of WIS. STAT. § 343.305(4)

¶15 Since the Informing the Accused form given Newkirk contains the statutory language, his challenge is to the statute itself. WISCONSIN STAT. § 343.305(4) provides:

> (4) INFORMATION. At the time that a chemical test specimen is requested under sub. (3) (a) or (am), the law enforcement officer shall read the following to the person from whom the test specimen is requested:
>
> "You have either been arrested for an offense that involves driving or operating a motor vehicle while under the influence of alcohol or drugs, or both, or you are suspected of driving or being on duty time with respect to a

[4] Newkirk also contends that ***West Virginia v. Stuart***, 452 S.E.2d 886 (W. Va. 1994), supports his position, but we disagree. There the court ruled that the officer's observation of the vehicle did not by itself constitute reasonable suspicion, but did in conjunction with an anonymous call reported over dispatch that the driver of a vehicle matching that vehicle's description was intoxicated. *See* ***id.*** at 892. That is consistent with our ruling in this case. The officer's testimony in ***Stuart*** that he would have stopped the vehicle without the tip is obviously not significant to the court's reasoning, as Newkirk contends it is, since the court concluded such a position was constitutionally deficient. ***Id.*** at 888-89.

> commercial motor vehicle after consuming an intoxicating beverage.
>
> This law enforcement agency now wants to test one or more samples of your breath, blood or urine to determine the concentration of alcohol or drugs in your system. **If any test shows more alcohol in your system than the law permits while driving, your operating privilege will be suspended. If you refuse to take any test that this agency requests, your operating privilege will be revoked and you will be subject to other penalties.** The test results or the fact that you refused testing can be used against you in court.
>
> If you take all the requested tests, you may choose to take further tests. You may take the alternative test that this law enforcement agency provides free of charge. You also may have a test conducted by a qualified person of your choice at your expense. You, however, will have to make your own arrangements for that test.
>
> If you have a commercial driver license or were operating a commercial motor vehicle, other consequences may result from positive test results or from refusing testing, such as being placed out of service or disqualified." (Emphasis added.)

The form contained the four above paragraphs that are enclosed by quotation marks, preceded by this introduction: "Under Wisconsin's Implied Consent Law, I am required to read this notice to you."

¶16 Newkirk's argument focuses on the two highlighted sentences and their relation to each other. He contends that, although each sentence is accurate on its own, together they suggest that there is no penalty other than suspension of operating privileges if one takes the test and has an impermissible level of alcohol, whereas there are penalties in addition to that if one refuses. According to Newkirk the statute thus gives a "subtle but distinct push" in favor of submitting to a test because it downplays the consequences of a test that shows an impermissible level of alcohol. This is a violation of his right to due process, Newkirk contends,

relying on ***Raley v. Ohio***, 360 U.S. 423, 438 (1959), because a state may not "actively mislead" an accused regarding his or her rights.

¶17 In ***Raley***, an Ohio state commission informed the defendants that they had a right to rely on the privilege against self-incrimination contained in the Ohio Constitution, but after they did so, the Ohio Supreme Court held they were presumed to know that a state statute deprived them of the protection of that privilege, and they had therefore committed an offense in not answering. ***Id.*** at 425. The United States Supreme Court stated that sustaining the conviction "would be to sanction the most indefensible entrapment by the State—convicting a citizen for exercising a privilege which the State clearly has told him was available to him." ***Id.*** at 438. It concluded that there was "active misleading" by the State and the due process clause did not permit "convictions to be obtained under such circumstances." ***Id.*** at 438-39.

¶18 As the trial court correctly stated, we presume statutes are constitutional and the challenger has the burden of overcoming that presumption. *See* ***State v. Borrell***, 167 Wis. 2d 749, 762, 482 N.W.2d 883 (1992). Whether the statute is constitutional presents a question of law, which we review de novo. *See* ***id.*** We conclude the trial court was correct in deciding that Newkirk did not overcome the presumption of the statute's constitutionality.

¶19 We do not agree with Newkirk that the statute "actively misleads" a driver concerning the consequences of taking a test. We begin by putting the highlighted sentences in their context. The form tells Newkirk he is being informed of Wisconsin's implied consent law and reminds him that he has been arrested for an offense that involves operating a motor vehicle while under the influence of alcohol or drugs or both. It also tells him that the test result or the

fact that he refused to take the test can be used against him in court. It is not reasonable to construe the form as assuring the accused that the only consequence for submitting to a test and having an impermissible level of alcohol is a suspension of one's license: the person to whom the form is read has just been arrested for OWI and is told that the test results or the refusal can be used in court.

¶20 The form and the statute refer to "other penalties" for a refusal because under the informed consent statute there are potential penalties for refusing the test in addition to license revocation. *See, e.g.,* WIS. STAT. § 343.305(10m) (vehicle forfeiture). On the other hand, under the implied consent statute, if the test is taken there are no penalties other than suspension if the level of alcohol is impermissible. The statute and the form are therefore accurate in conveying the consequences under the implied consent law for both taking and refusing the test, and that is all they purport to do.

By the Court.—Judgment affirmed.

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