COURT OF APPEALS
DECISION
DATED AND FILED

December 6, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP669

Cir. Ct. Nos. 2005TR10620
2005TR10621

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

COUNTY OF WINNEBAGO,

PLAINTIFF-RESPONDENT,

V.

EDWARD G. MEIER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: SCOTT C. WOLDT, Judge. *Affirmed*.

¶1 SNYDER, P.J.[1] Edward G. Meier appeals from a judgment of conviction for operating a vehicle while intoxicated and with a prohibited

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

alcohol concentration. He contends that the circuit court's findings of fact were erroneous, that there was no reasonable suspicion for the investigatory stop of his vehicle, and that his trial counsel was ineffective. Because we reject all of Meier's claims of error, we affirm the judgment of the circuit court.

¶2 We begin by noting that Meier has not provided a statement of the facts as required by WIS. STAT. RULE 809.19(1)(d). Rather, he provides an analysis of "Exhibit A" from his motion hearing interspersed with his claims of error at trial. The incident report from his arrest is provided as part of Meier's appendix but is not part of the court record provided. Consequently, we gather the relevant facts as best we can from the motion hearing transcript.

¶3 At approximately 2:45 a.m. on October 23, 2005, Winnebago County Sheriff's Deputy Gordon LeDioyt was doing paperwork when he heard a call from dispatch. Dispatch indicated that a witness had called to report a possible drunk driver. The witness said the driver was driving erratically, described the vehicle as a silver Toyota SUV, and provided the license plate number.

¶4 LeDioyt responded and caught up to the vehicle on County Highway A. The witness confirmed that LeDioyt had the right vehicle when the patrol car passed the witness to follow the suspect car. LeDioyt explained that the witness was "following [the vehicle] almost the entire time except for one point that they actually got ahead of it and pulled over to get it back in front of them, and then I passed them and got between them and the suspect vehicle.

¶5 While behind the vehicle, LeDioyt observed it cross the center line twice and go over to the fog line once. He also observed the vehicle's speed increasing and decreasing from approximately forty-five miles per hour to thirty

miles per hour and fluctuating back up and down again. LeDioyt then stopped the vehicle and identified the driver as Meier. As a result of the traffic stop, LeDioyt cited Meier for operating a motor vehicle while intoxicated and with a prohibited alcohol concentration, both first offenses.

¶6 Meier pled not guilty and moved to suppress the evidence obtained after the traffic stop. At the conclusion of the hearing, the circuit court denied Meier's motion. Meier then stipulated to the State's evidence that he was driving with a blood alcohol concentration of .14. The court entered a judgment of conviction on the OWI charge. Meier appeals on grounds the circuit court erred when it denied his suppression motion.

¶7 Whether evidence should be suppressed is a question of constitutional fact. ***State v. Samuel***, 2002 WI 34, ¶15, 252 Wis. 2d 26, 643 N.W.2d 423. In reviewing questions of constitutional fact, we will uphold a circuit court's factual findings unless they are clearly erroneous, but we will independently decide whether those facts meet the constitutional standard. ***Id.***

¶8 Meier first challenges the circuit court's findings of fact. He questions LeDioyt's credibility and accuses LeDioyt of falsifying the incident report. Meier argues that Exhibit A, a diagram of the scene along with handwritten notes, "delineates the lies and intentional fabrications of the … witness [and] begins to expose how misinformation is initiated and then mutated just as unethically by an Officer of the Law on his official written report and into the court room." He also emphasizes that during the motion hearing, LeDioyt "change[d] his story" regarding whether Meier hit, touched, or crossed the center line. The transcript indicates that LeDioyt originally testified that Meier hit the

center line and later, after refreshing his recollection with his written report, stated that Meier crossed the line.

¶9 We reject Meier's argument for three reasons. First, the record does not contain LeDioyt's incident report, any written witness statement or witness testimony, or Meier's personal account of the events of October 23, 2005. An appellate court will not consider materials outside the record. ***Jenkins v. Sabourin***, 104 Wis. 2d 309, 313-14, 311 N.W.2d 600 (1981). Here, we have nothing but LeDioyt's hearing testimony and Exhibit A before us.

¶10 Second, a witness may look at a writing to refresh his or her memory and then testify in his or her own words as to the contents of the writing. ***Harper, Drake & Assocs. Inc. v. Jewett & Sherman Co.***, 49 Wis. 2d 330, 342, 182 N.W.2d 551 (1971). Here, LeDioyt reviewed his incident report and then testified in his own words regarding Meier's vehicle crossing the center line. This is an acceptable technique for eliciting testimony from a witness.

¶11 Third, on issues of credibility, we defer to the circuit court's determinations. ***State v. Owens***, 148 Wis. 2d 922, 929-30, 436 N.W.2d 869 (1989). The circuit court found LeDioyt's testimony credible and nothing in the record leads us to conclude otherwise.

¶12 Meier also argues that the facts do not meet the constitutional standard for reasonable suspicion. He asserts that he was driving in a conscientious manner and that the witness, who had called in the report, was tailgating him. Meier contends that it was the witness's unsafe driving that provoked his erratic driving; specifically, his varying speed was an effort to avoid the tailgating vehicle. Thus, the argument goes, his driving that night was

reasonable under the circumstances and LeDioyt had no reasonable suspicion that criminal activity was afoot.

¶13 In ***Terry v. Ohio***, 392 U.S. 1, 21-22 (1968), the United States Supreme Court determined that the detention of a suspect must be based upon a reasonable suspicion of criminal activity. What constitutes a reasonable suspicion is a commonsense test. *See* ***State v. Waldner***, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996). We look to whether a reasonable officer could have a suspicion of illegal activity grounded in specific facts and reasonable inferences in light of the totality of the circumstances. *See* ***id.*** at 56, 58.

¶14 LeDioyt's hearing testimony established that he had eighteen years of experience and had investigated numerous drunk driving incidents in the past. He reported that the incident with Meier occurred at approximately 2:45 a.m., another fact relevant to his suspicions. LeDioyt observed Meier cross the center line, drift to the fog line, and change speed erratically. These facts, even in the absence of the witness report, are sufficient to support a reasonable suspicion that illegal activity was afoot.

¶15 Finally, Meier argues that he received ineffective assistance of counsel because his lawyer did not request a jury trial, failed to subpoena a witness, failed to call Meier as a witness at the motion hearing, and did not pursue certain lines of inquiry. To maintain a claim for ineffective assistance, Meier must show that (1) his attorney's performance was deficient, and that (2) this deficient performance prejudiced his defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Both factors must be present to prevail.

¶16 Here, Meier did not raise the issue of ineffective assistance before the circuit court. There was no evidentiary hearing and there are no affidavits; in

effect, Meier is asking us to make the necessary evidentiary rulings without any supporting record facts. We do not know if Meier's counsel's decision not to request a jury trial was strategic, financial, or arbitrary. We have no record of any conversations or advice counsel provided to Meier or of any directions Meier provided to counsel for handling the case. Nothing in the file describes the eyewitness reward program that Meier claims violated his Sixth Amendment rights. Finally, Meier does not explain how his counsel's failure to subpoena the eyewitness to testify at the hearing affected the outcome. The circuit court ruled that, even in the absence of the witness's report, LeDioyt had reasonable suspicion for the stop.

¶17 Without a record to establish deficient performance, we need not address whether counsel's performance prejudiced Meier's defense. *See* ***State v. Moats***, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990) (there is no need to review proof of one if there is insufficient proof of the other). Accordingly, we reject Meier's assertions because his position is not adequately supported in fact or in law.

¶18 Meier makes several peripheral assertions, all of which are unsupported by any legal argument or authority. For example, he contends that LeDioyt based his traffic stop not on reasonable suspicion but rather on "*hearsay suspicion*"; that LeDioyt's calculation of Meier's driving speed was "unprovable" because LeDioyt had to be speeding to catch up with him; and that Meier's attorney "lack[ed] precision in framing his questions" which allowed LeDioyt to be evasive. We need not address his conclusory statements or his suggestions of dishonesty, malice, and incompetence. To the extent any of Meier's additional assertions have not been addressed by our prior analysis, they are deemed rejected.

¶19 We conclude that the circuit court's findings of fact are supported by the record and that the totality of the circumstances demonstrate reasonable suspicion to support an investigatory traffic stop. We further conclude that in the absence of any supporting evidence, Meier's claim of ineffective assistance of counsel must fail. Therefore, we affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

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