COURT OF APPEALS
DECISION
DATED AND FILED

May 10, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP1652-CR

Cir. Ct. No. 2005CT247

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RODNEY E. MCCABE,

DEFENDANT-APPELLANT.

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

¶1 LUNDSTEN, P.J.[1] Rodney McCabe appeals a circuit court judgment convicting him of operating a motor vehicle with a prohibited alcohol

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

concentration of 0.296%, as a fourth offense, in violation of WIS. STAT. §§ 346.63(1)(b) and 346.65(2)(g)3. (2003-04). McCabe challenges the circuit court's decision denying his suppression motion. He argues that the officer who stopped his vehicle lacked reasonable suspicion for the stop. We affirm.

Background

¶2 At the hearing on McCabe's suppression motion, the arresting officer testified. In addition, the court heard a tape recording of the police dispatch call that alerted the officer to the possibility that McCabe was operating a vehicle while intoxicated. After receiving this information from dispatch but before stopping McCabe's vehicle, the officer observed McCabe's vehicle ranging "up and down" in speed from 15 to 25 miles per hour in a posted 25-mile-per-hour zone, deviating within its lane of travel, and nearly striking a curb. This occurred over the course of approximately 11 blocks, and included some turns or curves.

¶3 On the recording of the dispatch call, an off-duty dispatcher is heard reporting to the on-duty dispatcher that the male driver and female passenger of McCabe's vehicle were "both highly intoxicated." The on-duty dispatcher is then heard relaying this information to the officer. Later in the recording, according to McCabe, the off-duty dispatcher is heard remarking to the on-duty dispatcher something to the effect of: "I know she was drunk, and if he was half as drunk as she was." Although some of the recording at this point is unintelligible, the State does not dispute McCabe's characterization of the remark.

¶4 The circuit court initially granted McCabe's motion, but later reversed itself upon the State's motion for reconsideration. After listening to the dispatch call recording again, the court acknowledged that it did not originally

hear the statement on the recording that *both* the driver and the passenger were highly intoxicated.

Discussion

¶5 McCabe argues that the recording makes clear that the off-duty dispatcher was merely speculating as to whether McCabe was intoxicated based on his passenger's intoxication. McCabe asserts that the information heard on the tape does not support the stop of his vehicle because it simply reflected the off-duty dispatcher's "hunch" that McCabe was intoxicated.

¶6 McCabe also argues that we may not consider the officer's firsthand observations of McCabe's erratic driving. He makes two sub-arguments in support of this argument. Before we address those sub-arguments, however, we observe that McCabe does *not* argue that the information the officer received from dispatch, when combined with the officer's observations, was insufficient for the officer to form a reasonable suspicion of illegal activity. We take this as a concession by McCabe that, if we include the officer's observations in our analysis, the officer had reasonable suspicion. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (arguments ignored may be deemed conceded).

¶7 Before we address the merits, we pause to comment on our December 21, 2006 order, in which we made the following statements: "The circuit court's change of mind on reconsideration appears to have been founded entirely on the content of the recording …." and "[I]f McCabe convinces us that the [circuit] court erred in its analysis of the tape, that would be a sufficient argument to cause reversal of the suppression decision." In retrospect, the latter statement was ill considered. That statement appears to be based on our

acceptance of McCabe's assertion to us that the recording issue was the sole issue on appeal. Further, our order was issued before briefing and the record in this case were complete, and was in response to the State's motion seeking summary affirmance on the ground that McCabe failed to provide a complete transcript of the original suppression hearing. With the benefit of full briefing and the complete record, it is now obvious that the issues on appeal were never limited to whether the contents of the recording alone provided sufficient information to support the stop.

¶8 McCabe might complain that our order misled him and affected his arguments on appeal. We are not sympathetic. First, the content of our order reflected McCabe's representation to us of the issue before us. Second, and more importantly, regardless of McCabe's argument strategy on appeal, we would affirm the circuit court. Although we need not address the question due to McCabe's implicit concession, when the information on the tape recording is combined with the officer's observations, the reasonable suspicion standard is easily met. The observed driving behavior, combined with information that McCabe was, at a minimum, with a visibly intoxicated person, provided reasonable suspicion supporting the stop.[2] Accordingly, we turn our attention to McCabe's argument that we may not consider the officer's firsthand observations.

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[2] We find the lack of argument in McCabe's brief on this topic telling. If McCabe was misled into thinking that there was agreement that the sole issue on appeal was whether the tape, by itself, provided reasonable suspicion, the State's brief both disabused him of that notion and provided an opportunity in his reply brief to argue, in the alternative, that the tape, combined with the officer's firsthand observations, did not supply reasonable suspicion. We conclude, at a minimum, that McCabe's failure to make the argument in his reply brief was an implicit concession.

¶9 McCabe's first sub-argument is that we cannot consider the officer's firsthand observations because the circuit court failed to make a finding of "bad driving" and because the court "made a credibility determination adverse to the officer's claim that he observed poor driving." This argument is without merit. The circuit court's decision on reconsideration indicates that the court considered and accepted the officer's testimony describing the officer's observations of McCabe's vehicle. The court said: "I'm satisfied that with the information that the—both parties were intoxicated *as well as what followed*, that that does create the basis for reasonable suspicion of an intoxicated driver and the stop is therefore appropriate." (Emphasis added.) We are satisfied that, contrary to what McCabe argues, the circuit court's decision shows that it credited the officer's account of what he observed.[3]

¶10 McCabe's second sub-argument is that we should not consider the officer's firsthand observations because the State waived reliance on those observations. In support of this waiver argument, McCabe asserts that, during the hearing on the State's motion for reconsideration, the State failed to raise an argument based on the officer's firsthand observations.

[3] The State cites to the officer's testimony that he received information from dispatch that the vehicle's occupants had been "staggering." If the officer did receive such information, it is not apparent from the tape recording of the dispatch call. Neither party addresses possible reasons for this potential discrepancy, that is, neither party addresses whether the officer received additional information not on the tape, whether the officer's recollection of the dispatch call may have been faulty, or whether there is some other explanation for any discrepancy. It does not appear that the circuit court relied on this aspect of the officer's testimony. The court simply concluded: "I'm satisfied that with the information that the—both parties were intoxicated as well as what followed, that that does create the basis for reasonable suspicion of an intoxicated driver and the stop is therefore appropriate." We will assume, in McCabe's favor, that the officer's recollection was faulty on this point and, like the circuit court, will place no reliance on that aspect of the officer's testimony.

¶11 It may be true that the State did not raise such an argument as part of its motion for reconsideration. But this is not surprising because the purpose of the reconsideration motion and hearing was to revisit the contents of the tape recording, which the State asserted had been distorted during playback and misunderstood by the circuit court at the original suppression hearing. At the original suppression hearing, it was clear that the State was relying on the officer's observations. The State elicited the officer's testimony about his observations and alluded to that testimony during argument. We see nothing in the record suggesting that the State subsequently retreated from its position. And, as already discussed, the circuit court in its reconsideration decision considered and accepted the officer's observations. McCabe cites no authority, and we know of none, that would require us to find waiver by the State under these circumstances.

¶12 For the reasons stated above, we affirm the circuit court's judgment.

By the Court.—Judgment affirmed.

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