COURT OF APPEALS
DECISION
DATED AND FILED

July 5, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP874-CR **Cir. Ct. No. 2005CT58**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

CHAD F. CEBULA,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Marquette County: RICHARD O. WRIGHT, Judge. *Affirmed*.

¶1 HIGGINBOTHAM, J.[1] The State appeals an order suppressing evidence. Chad Cebula was charged with operating a motor vehicle while under

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

the influence of an intoxicant (OWI), second offense, and operating a motor vehicle with prohibited alcohol concentration, second offense, contrary to WIS. STAT. §§ 346.63(1)(a), 346.63(1)(b) and 346.65(2)(b), and operating a motor vehicle after revocation contrary to WIS. STAT. § 343.44(1)(b) and 343.44(2)(b). Cebula moved to suppress evidence related to these charges based on allegations that the officers lacked reasonable suspicion to believe he was driving. The trial court granted the motion. The State appeals the trial court's order granting the motion. We affirm.

BACKGROUND

¶2 The following facts are taken from the hearing on Cebula's motion to suppress evidence. On May 13, 2005, Village of Westfield Deputy Jeffrey J. Tomlin was serving civil process on Wendy Warren.[2] When the deputy contacted Warren and her husband, they informed him that a person had been driving recklessly on Cardinal Drive in the Village of Westfield by speeding, spinning his tires and driving in a reckless manner. Warren and her husband described the vehicle as a red, silver and white 1989 truck. After leaving their residence, Tomlin drove through the immediate neighborhood and noticed a vehicle that matched the description sitting in the back lot of the Mill Pond Apartments. Tomlin drove his vehicle up to where the identified vehicle was sitting. The truck was parked without the motor running. Tomlin approached the vehicle and recognized the driver as Cebula. He also recognized Cebula's girlfriend as the person standing next to the truck. Tomlin discussed Warren's complaint with

[2] Wendy Warren is also identified in the record as Wendy Kilbey. We refer to her as "Warren."

Cebula. Tomlin testified that Cebula told him that he was "over there; it did happen."

¶3 Tomlin smelled an intoxicant and saw that Cebula had a drink in his possession. Tomlin asked Village of Westfield Police Officer John Bitsky to investigate a possible OWI violation. After Bitsky arrived at the scene, he approached Cebula and observed that Cebula's eyes were "red, bloodshot, [and] glossy;" Bitsky also testified that he detected the smell of intoxicants. He further testified that Cebula admitted that he had been drinking a "Kessler and Coke," and handed Bitsky a coffee mug containing the mixed drink. Bitsky smelled the mug, determined that it had a strong odor of alcohol, and poured it out. Bitsky then performed a series of field sobriety tests. Cebula was then charged with OWI, second offense, operating a motor vehicle with prohibited alcohol concentration, second offense, and operating a motor vehicle after revocation.

¶4 Cebula moved to suppress the physical evidence obtained from his car, all chemical test results taken from him on May 13, 2005, and his statements made to Tomlin and Bitsky. Following an evidentiary hearing the trial court granted Cebula's motion. The State appeals.

DISCUSSION

¶5 In reviewing an order suppressing evidence, we will uphold a circuit court's findings of fact unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2); ***State v. Harris***, 206 Wis. 2d 243, 249-50, 557 N.W.2d 245 (1996). However, whether the trial court's factual findings support the conclusion that a reasonable suspicion was established presents a question of law, which this court reviews de novo. ***State v. Waldner***, 206 Wis. 2d 51, 54, 556 N.W.2d 681 (1996).

¶6 The issue in this case is whether there was reasonable suspicion to believe that Cebula was operating a motor vehicle while under the influence of an intoxicant.[3] We consider the totality of the circumstances in determining whether reasonable suspicion exists. ***State v. Williams***, 2001 WI 21, ¶22, 241 Wis. 2d 631, 623 N.W.2d 106. The State argues there were sufficient reasonable, articulable facts from which a reasonable officer could believe that Cebula was operating the truck at the time the reckless driving occurred. Cebula argues that there was no evidence that he was the reckless driver. We conclude that, based on the evidence presented at the suppression hearing and the court's factual findings, there was insufficient evidence for a reasonable officer to form a reasonable suspicion that Cebula was driving the truck when the reckless driving occurred. Because there was no evidence that Cebula was operating a motor vehicle, we further conclude that there was no reasonable suspicion to believe that Cebula was operating a motor vehicle while under the influence of an intoxicant.

¶7 The State's case hinges entirely on Tomlin's testimony that Cebula said he was the reckless driver. The record contains no evidence other than this testimony that Cebula drove the truck. The problem for the State, however, is that the court rejected this testimony as being incredible. The State inexplicably

[3] The State's first issue is whether Cebula was detained within the meaning of ***Terry v. Ohio***, 392 U.S. 1 (1968). The State argues Cebula was not detained until Bitsky performed field sobriety tests on Cebula. Cebula does not address this issue. We understand the circuit court to have concluded that Cebula was detained when Bitsky began asking questions of Cebula while Cebula was still in the truck. For purposes of discussion, we assume that Cebula was detained when Bitsky began conducting the field sobriety tests. This assumption, however, does not alter our conclusion that there was no reasonable suspicion to detain Cebula for operating a motor vehicle while under the influence of an intoxicant, because the circuit court's factual finding that Cebula was not driving the truck has not been properly challenged on appeal.

ignores this finding while it advances its argument that Cebula drove the truck at the time the reckless driving occurred.

¶8 To compound the problem, the State does not argue on appeal that this finding was clearly erroneous. When the trial court is acting as the finder of fact, the trial court is the final arbiter of a witness's credibility. ***Cogswell v. Robertshaw Controls Co.***, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979). We are without authority as an appellate court to review a trial court's credibility determinations in such cases. ***Id.*** at 250. Thus, we accept the trial court's factual finding that there was no evidence that Cebula was the person who drove the truck recklessly.

¶9 It is true that there is other evidence from which an officer could reasonably infer that Cebula may have driven the truck recklessly.[4] However, this evidence is scant. The State relies on statements made by Warren and her husband[5] that they observed a male driving a 1989 truck with red and white stripes recklessly on the street running in front of their house. The State also points to the deputy's discovery of Cebula in a vehicle fitting that description shortly after talking with the Warrens. But this evidence is not enough.

[4] Some testimony was taken regarding whether the truck keys were in the ignition when the deputy approached Cebula. However, the State did not raise this as an issue before the trial court and does not rely on this testimony in arguing that there was reasonable suspicion that Cebula drove the truck. Thus, we do not consider this evidence in determining whether there was reasonable suspicion that Cebula recklessly drove the truck while under the influence of an intoxicant.

[5] Cebula attempts to mount a challenge to the reliability of Warren's statements to the deputy. Because we decide this appeal in his favor, we need not address this challenge.

¶10 Setting aside the deputy's testimony regarding what Cebula said about driving the truck or being in the vicinity where the alleged reckless driving occurred, the record supports the circuit court's conclusion that there is insufficient evidence that Cebula was the operator of the recklessly driven truck. Viewing the record to support the court's findings of historical fact, as we must, it can be reasonably inferred that Cebula, who was not the owner of the truck, was simply sitting in the truck talking with his girlfriend when the deputy approached him. Apparently, the circuit court viewed the evidence this way. We cannot say that this inference is unreasonable in light of the court's credibility findings.

¶11 Accordingly, we conclude the deputy lacked reasonable suspicion to believe that Cebula was the person who recklessly drove the truck. Consequently, we conclude that there was no reasonable suspicion to detain Cebula to perform field sobriety tests to determine whether there was probable cause to arrest Cebula for operating a motor vehicle while under the influence of an intoxicant. We affirm the circuit court's order granting Cebula's motion to suppress evidence.

By the Court.—Order affirmed.

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