COURT OF APPEALS
DECISION
DATED AND FILED

December 27, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP993-CR **Cir. Ct. No. 2006CT165**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PATRICK J. WIEGEL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Grant County: ROBERT P. VAN DE HEY, Judge. *Affirmed.*

¶1 VERGERONT, J.[1] Patrick Wiegel appeals a judgment of conviction for operating a motor vehicle under the influence of an intoxicant, second offense, contrary to WIS. STAT. § 346.63(1)(a). He contends the circuit

[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.

court erred in denying his motion to suppress evidence because, he asserts, the arresting officer did not have reasonable suspicion to stop his vehicle, did not have reasonable suspicion to prolong the stop to give him field sobriety tests, and did not have probable cause to arrest him. We disagree on each point, conclude the circuit court correctly denied the motion, and affirm the judgment of conviction.

BACKGROUND

¶2 City of Platteville Police Officer Jay Pucek testified at the suppression hearing as follows. He was on duty at 1:16 a.m. when he observed a vehicle crossing over the clearly marked centerline of the street and operating with the tires on the driver's side over the centerline for approximately a block. He stopped the vehicle. Wiegel was the driver. In talking to Wiegel, the officer noticed that his eyes were "red or blood shot and watery," his breath smelled of alcohol, and the smell of alcohol was coming from the inside of his vehicle. In response to the officer's question, Wiegel said he had come from a bar and had had a few drinks. The officer then had Wiegel perform field sobriety tests and at the conclusion of these he arrested Wiegel for operating while under the influence of an intoxicant.

¶3 Wiegel also testified. He testified that he was driving his pickup truck after leaving the bar when he saw some people standing next to parked cars in the street and he did not know if they were going to cross the street, so he crossed the centerline to give them room. He gave detailed testimony on the field sobriety tests, disputing that his performance showed any impairment.

¶4 The officer testified that he did not recall seeing any pedestrians and could not say whether there were pedestrians there; he would not stop someone for going left of the centerline to avoid a pedestrian if he knew that was the reason.

¶5 The circuit court concluded that the officer had reasonable suspicion to stop Wiegel's vehicle because of his driving over the centerline and there was probable cause to arrest because of that, the odor of intoxicants, the bloodshot eyes, and the performance on the field sobriety tests. The court therefore denied Wiegel's motion to suppress evidence.

DISCUSSION

¶6 On appeal, Wiegel argues that the circuit erred because (1) the officer's mistaken belief that Wiegel had committed a traffic violation did not give rise to reasonable suspicion to justify the stop; (2) the officer exceeded the lawful scope of the stop by investigating whether Wiegel was driving while under the influence; and (3) his performance on the field sobriety tests did not establish probable cause to arrest.

¶7 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. ***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. ***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. ***Terry v. Ohio***, 392 U.S. 1, 22 (1968).

¶8 In assessing whether there exists reasonable suspicion for a particular stop, we must consider all the specific and articulable facts, taken together with the rational inferences from those facts. ***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).

¶9 Under the Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution, an arrest is illegal unless it is supported by probable cause. ***State v. Koch***, 175 Wis. 2d 684, 700, 499 N.W.2d 152 (1993). "Probable cause exists where the totality of the circumstances within the arresting officer's knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant probably committed a crime." ***Id.*** at 701.

¶10 Probable cause is neither a technical nor a legalistic concept; rather, it is a "flexible, common-sense measure of the plausibility of particular conclusions about human behavior." ***State v. Petrone***, 161 Wis. 2d 530, 547-48, 468 N.W.2d 676 (1991). The conclusions need not be unequivocally correct or even more likely correct than not. ***Texas v. Brown***, 460 U.S. 730, 742 (1983). It is enough if they are sufficiently probable that reasonable people—not legal technicians—would be justified in acting on them in the practical affairs of everyday life. *See* ***State v. Wisumierski***, 106 Wis. 2d 722, 739, 317 N.W.2d 484 (1982).

¶11 We accept the circuit court's findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2). However, whether the facts as found by the circuit court or the undisputed facts fulfill the constitutional standard is a question

of law, which we review de novo. ***State v. Guzman***, 166 Wis. 2d 577, 586, 480 N.W.2d 446 (1992).

¶12 We consider first whether there was reasonable suspicion to stop Wiegel's vehicle, and we conclude there was. Wiegel argues that there was no traffic violation because there is an applicable exception to the requirement that one drive on the right half of the roadway—when passing pedestrians in the right half of the roadway.[2] However, we assess reasonable suspicion based on the facts known to the officer and the reasonable inferences from those facts; and an officer is not required to draw an inference of innocent conduct if there is a reasonable inference of wrongful conduct. ***State v. Griffin***, 183 Wis. 2d 327, 332-33, 515 N.W.2d 535 (Ct. App. 1994). The circuit court here accepted the officer's testimony that he did not see the pedestrians. Therefore, based on what the officer observed—that Wiegel's vehicle drove over the centerline for approximately a block for no apparent legitimate reason—the officer could draw the reasonable inference that Wiegel was impermissibly driving over the centerline.

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[2] WISCONSIN STAT. § 346.05(1)(b) and (d) provide:

> **Vehicles to be driven on right side of roadway; exceptions**. (1) Upon all roadways of sufficient width the operator of a vehicle shall drive on the right half of the roadway and in the right-hand lane of a 3-lane highway, except:
>
> ….
>
> (b) When overtaking and passing under circumstances in which the rules relating to overtaking and passing permit or require driving on the left half of the roadway; or
>
> ….
>
> (d) When overtaking and passing pedestrians, animals or obstructions on the right half of the roadway; or

¶13 We next consider Wiegel's argument that, even if the officer had reasonable suspicion to make the initial stop because of his observation of the driving over the centerline, the scope of the stop was limited to investigating that traffic violation. According to Wiegel, his bloodshot and watery eyes and the smell of alcohol did not provide reasonable suspicion to investigate whether he was driving while under the influence of an intoxicant, because the officer could not reasonably infer from those signs that his ability to drive was impaired as a consequence of consuming intoxicants.[3] *See* WIS JI—CRIMINAL 2663.

¶14 Even if we accept Wiegel's premise that the officer could not reasonably infer from his bloodshot and watery eyes and the odor of alcohol that Wiegel had consumed enough alcohol to impair his ability to drive, there is another implicit premise to Wiegel's argument that is not supported by the record. There is nothing in the record to suggest that, when the officer stopped Wiegel, Wiegel told him that he had driven over the centerline to avoid pedestrians.[4] The officer testified to his conversation with Wiegel and did not mention that Wiegel told him this.

¶15 Perhaps more significantly, Wiegel testified to his conversation with the officer and did not mention that he told this to the officer. Wiegel testified that he had seen the officers when he came out of the bar, he believed they saw him, and he expected them to stop him. When the officer came up to his vehicle after

[3] Based on our reading of the record, we do not see that Wiegel made this argument in the circuit court. However, the State does not argue that Wiegel waived the right to make this argument on appeal. We therefore address it.

[4] We do not intend to suggest that, if Wiegel had told this to the officer, the officer would be obligated to believe him. That is an issue we need not address.

he stopped, before the officer said anything, Wiegel asked why he had pulled him over and the officer said he had observed him operating left of the centerline back on Main Street. "[A]fter [the officer] said that," Wiegel testified, "I looked at him and I said, yeah, right." Wiegel explained that he said "yeah, right" because he knew when he saw this officer and another outside the bar "that was the point at which they decided that I was going to be picked up that night and they would find a reason to do so." Wiegel recounted that the officer asked him where he was coming from, and, when he said "down at the bars," the officer asked him if he had anything to drink and he answered "a few beers." Then the officer asked him to step out of the truck and to perform field sobriety tests, which Wiegel did.

¶16 Because there is no indication in the record that Wiegel told the officer he drove over the centerline in order to avoid a pedestrian, the officer could reasonably infer, for the reasons we have explained in paragraph 12, that Wiegel did not have a legitimate justification for doing so but did so because he was not in control of his driving. That reasonable inference, together with Wiegel's bloodshot and watery eyes, the odor of alcohol, and his admission that he had been "down at the bars" and "had a few beers" is sufficient to create a reasonable suspicion that Wiegel was driving while under the influence of an intoxicant. Therefore the officer could lawfully extend the stop to investigate this potential offense further. *See* ***State v. Betow***, 226 Wis. 2d 90, 94, 593 N.W.2d 499 (Ct. App. 1999) (if during a valid traffic stop the officer becomes aware of additional factors that constitute reasonable suspicion that the person has committed or is committing an offense distinct from that prompting the stop, the stop may be extended for a new investigation).

¶17 Finally, we consider Wiegel's argument that there was not probable cause to believe he was driving while under the influence of an intoxicant because

the field sobriety tests did not show that he was impaired. The officer testified that Wiegel did not "pass" the horizontal gaze nystagmus (HGN), the walk-and-turn test, the one-legged stand, and the finger dexterity, but did pass the alphabet test and a test involving tilting one's head back, closing one's eyes, and counting out thirty seconds to oneself before saying "stop." For each of the tests the officer testified he did not pass, Wiegel provided an explanation of his performance other than impairment.

¶18 We have already concluded that the officer could reasonably infer from Wiegel's crossing the centerline that Wiegel was not in control of his driving. While Wiegel testified that it was a breezy night and that is why he did not successfully complete the one-legged stand, he did not testify that he told the officer that the breeze was a problem and the officer did not recall whether it was a windy night. While Wiegel testified that the officer did not adequately explain the walk-and-turn test, the officer testified that he gave the explanation he always gives and in his opinion it is clear. We conclude that, from Wiegel's performance on these two tests coupled with the driving over the centerline, Wiegel's bloodshot and watery eyes, and the odor of alcohol, the officer could reasonably believe that Wiegel had probably consumed enough alcohol to impair his ability to drive safely.

CONCLUSION

¶19 The circuit court correctly denied Wiegel's motion to suppress evidence because the stop and extension of the stop were both supported by reasonable suspicion and the arrest was supported by probable cause. Accordingly, we affirm the judgment of conviction.

By the Court.—Judgment affirmed.

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