COURT OF APPEALS
DECISION
DATED AND FILED

November 26, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1568-CR **Cir. Ct. No. 2007CM1495**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL J. SAUER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Washington County: DAVID C. RESHESKE, Judge. *Affirmed*.

¶1 ANDERSON, P.J.[1] Daniel J. Sauer claims that the circuit court erred in denying his motion to suppress evidence because the arresting officer

[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.

lacked reasonable suspicion both to initiate a traffic stop and to arrest him. We affirm because, under the totality of the circumstances, a reasonable police officer would believe that Sauer was operating a motor vehicle under the influence of alcohol in violation of WIS. STAT. § 346.63(1)(a).

¶2 The facts are not in dispute. On September 23, 2007, at approximately 11:41 p.m., Alan Ratzel, a Village of Kewaskum police officer, observed a white vehicle veering in its lane on Fond du Lac Avenue. Ratzel has been a police officer for eighteen years and has made approximately fifty OWI arrests. Ratzel observed the white vehicle touch the left-hand side and right-hand side of its lane five times. Ratzel observed the gradual veering for approximately one-half mile.

¶3 After making these observations, Ratzel decided to stop the vehicle. After Ratzel activated his lights, it took the white vehicle one-half mile to pull over. Ratzel then contacted the driver, who indicated he was Sauer. Sauer admitted to having "a few" when asked by Ratzel if he had been drinking. In addition to Sauer's admission to having a few drinks, Ratzel noticed that Sauer's eyes were bloodshot and that there was an odor of intoxicants. Ratzel then asked Sauer to perform field sobriety tests. Ratzel noted that Sauer wavered when removing himself from his vehicle. Ratzel asked Sauer to perform three tests: repeat the alphabet, one-legged stands, and finger-to-nose.

¶4 When repeating the alphabet, Sauer paused after the letter "P" and skipped the letter "W." Sauer's struggles with the alphabet led Ratzel to find that he failed that test. Next, Sauer successfully performed the one-legged stand test. The third test performed by Sauer was the finger-to-nose test. Ratzel observed that Sauer passed the test with his left hand, but that his right hand failed to touch

the tip of his nose, hitting the bridge instead. Based upon these tests, Ratzel requested a preliminary breath test. The result of this test showed an alcohol concentration above the legal limit. Based upon these observations, Ratzel placed Sauer under arrest.

¶5 At trial, Sauer argued that Ratzel did not stop him for committing a traffic violation. Additionally, Sauer argued that Ratzel, who was not certified in administering standard field sobriety tests, failed to administer two of the three standardized field sobriety tests.[2]

¶6 Despite these arguments, the circuit court found that Ratzel had probable cause to stop and arrest Sauer. Ultimately, Sauer was found guilty of operating a motor vehicle while intoxicated, third offense.

¶7 On appeal, Sauer argues that the circuit court erred in finding: (1) that Ratzel had reasonable suspicion to temporarily detain Sauer and (2) that Ratzel had probable cause to believe that the defendant was operating a motor vehicle while intoxicated, in violation of WIS. STAT. § 346.63(1)(a).

¶8 In reviewing a circuit court's denial of a motion to suppress evidence, this court applies a "two-step standard of review to questions of constitutional fact." ***State v. Williams***, 2001 WI 21, ¶18, 241 Wis. 2d 631, 642, 623 N.W.2d 106. Reasonable suspicion for an investigatory stop is a constitutional fact because it relates to the constitutional protections against unreasonable searches and seizures by the Fourth Amendment of the United States

[2] The standardized field sobriety tests, according to the National Highway Safety Traffic Administration book, are the walk-and-turn test, the one-legged stand test, and the horizontal gaze nystagmus test.

Constitution and article I, section 11 of the Wisconsin Constitution. ***Id.*** The court in ***Williams*** established a two-step standard of review with regard to questions of constitutional fact. The first step in the two-step standard of review is to "review the circuit court's findings of historical fact, and uphold them unless they are clearly erroneous." ***Williams***, 241 Wis. 2d 631, ¶18. The second step is to "review the determination of reasonable suspicion de novo." ***Id.***

I. Reasonable Suspicion to Stop Sauer's Vehicle

¶9 A police officer may stop a vehicle when he or she reasonably believes the operator is violating any traffic law and, once stopped, the officer may ask the operator questions related to the investigation. ***United States v. Johnson***, 58 F.3d 356, 357 (8th Cir. 1995). Furthermore, an investigatory stop is constitutionally permissible if "the officer has an articulable suspicion that the person has committed or is about to commit a crime." ***State v. Goyer***, 157 Wis. 2d 532, 536, 460 N.W.2d 424 (Ct. App. 1990) (citing ***Terry v. Ohio***, 392 U.S. 1, 21-22 (1968)).

¶10 In ***Terry***, the Supreme Court stated, while recognizing that an investigative stop is a seizure under the Fourth Amendment, "that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." ***Terry***, 392 U.S. at 22. Additionally, ***Terry*** requires a police officer to have reasonable suspicion, based on his or her experience, that criminal activity has or is taking place. ***Id.*** at 21-22.

¶11 The constitutional standard set forth in ***Terry*** is codified in WIS. STAT. § 968.24, which provides that "a law enforcement officer may stop a person in a public place for a reasonable period of time when the officer reasonably

suspects that such a person is committing, is about to commit or has committed a crime." ***Id.***

¶12 ***Terry*** further guides that "in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." ***Terry***, 392 U.S. at 27. Furthermore, the determination of reasonableness is a commonsense test and is based upon the totality of the circumstances. ***State v. Post***, 2007 WI 60 ¶13, 301 Wis. 2d 1, 9, 733 N.W.2d 634.

¶13 In ***Post***, the court declined to set forth a bright-line rule regarding weaving within a single lane of travel. However, the court did note that "a driver's actions need not be erratic, unsafe, or illegal to give rise to reasonable suspicion." ***Id.***, ¶24.

¶14 Based upon the totality of the undisputed facts, we agree with the circuit court that Ratzel had reasonable suspicion to stop Sauer's vehicle. The facts indicate that in eighteen years of experience as a police officer, Ratzel has been involved in over fifty OWI arrests. On the night in question, Ratzel watched Sauer's vehicle veer to the edges of its lane five times within one-half mile. Furthermore, these events occurred at approximately 11:41 p.m. When taking these facts in total, in light of Ratzel's experience and the events that occurred on the night in question, it was not error for the trial court to find that Ratzel's decision to stop Sauer's vehicle was based on a reasonable suspicion and not merely a hunch.

II. Probable Cause to Arrest Sauer for OWI

¶15 When determining probable cause, the court must examine the totality of the facts and circumstances known to the officer at the time of arrest. ***Dane County v. Sharpee***, 154 Wis. 2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990). "Probable cause to arrest exists where the officer, at the time of arrest, has knowledge of facts and circumstances sufficient to warrant a person of reasonable prudence to believe that the arrestee is committing, or has committed, an offense." ***Id.*** The court further stated that this is a "commonsense test," dealing with practical considerations of everyday life. ***Id.***

¶16 After Ratzel decided to stop Sauer's vehicle, he observed numerous additional indicators of intoxication. It took Sauer approximately one-half mile to pull over after Ratzel had turned on his lights. Upon making contact with Sauer, Sauer admitted to having "a few," when questioned on whether he had been drinking. Furthermore, Raztel smelled the odor of intoxicants and noticed that Sauer's eyes were bloodshot. Based on these observations, Ratzel asked Sauer to perform field sobriety tests. Additionally, Ratzel observed that Sauer wavered when removing himself from his vehicle. Ratzel testified that Sauer failed two of the three field sobriety tests he administered. Based upon these observations, Ratzel administered a preliminary breath test, which showed an illegal blood-alcohol concentration of .10 percent.

¶17 Sauer claims that there was a lack of probable cause to arrest because Ratzel was not certified to administer standardized field sobriety tests. However, field sobriety tests are not required to give rise to probable cause. ***State v. Wille***, 185 Wis. 2d 673, 684, 518 N.W.2d 325 (Ct. App. 1994). Rather, what is

necessary to establish probable cause should be examined on a case-by-case basis. ***State v. Kasian***, 207 Wis. 2d 611, 622, 558 N.W.2d 687 (Ct. App. 1996).

¶18 In the present case, as noted above, Ratzel had many indicators other than the failed field sobriety tests that gave rise to probable cause to both request a preliminary breath test and to arrest Sauer for operating a motor vehicle while intoxicated.

¶19 Additionally, Sauer claims Ratzel did not have probable cause to make an arrest because Ratzel failed to perform the National Highway Traffic Administration's standardized field sobriety tests. Sauer furthers this position by asserting that science requires that these tests be performed together and by a certified officer. However, courts have remained "unconvinced that FST [field sobriety test observations] are based on science." ***City of West Bend v. Wilkens***, 2005 WI App 36, ¶20, 278 Wis. 2d 643, 653, 693 N.W.2d 324. Furthermore, as noted above, the performance of field sobriety tests is not required to give rise to probable cause for an arrest. ***Wille***, 185 Wis. 2d at 684.

¶20 For these reasons, it was not error for the trial court to find that Ratzel had probable cause to arrest Sauer for operating a motor vehicle while intoxicated.

¶21 We affirm the circuit court's finding that Ratzel had reasonable suspicion to conduct an investigatory stop of Sauer's vehicle and probable cause to arrest Sauer for operating a motor vehicle while intoxicated.

By the Court.—Judgment affirmed.

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