COURT OF APPEALS DECISION DATED AND FILED

July 1, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 2009AP5-CR

Cir. Ct. No. 2008CT1545

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JILL Y. TRELEVEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: LINDA M. VAN DE WATER, Judge. *Affirmed*.

¶1 ANDERSON, P.J.[1] Jill Y. Treleven contends that the arresting officer lacked reasonable suspicion to initiate a traffic stop and did not develop

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

probable cause to support her arrest for operating a motor vehicle while intoxicated (OWI). We agree with the trial court that under the totality of the circumstances, there was reasonable suspicion to support an investigative traffic stop, and the arresting officer had probable cause to arrest Treleven. Therefore, we affirm her conviction for fourth offense OWI.

¶2 In an amended criminal complaint, Treleven was charged with one count of OWI, fourth offense, WIS. STAT. §§ 346.63(1)(a), 346.65(2)(am)4., and 346.65(2)(g)1., and one count of operating a motor vehicle with a prohibited alcohol concentration, fourth offense (PAC), §§ 346.63(1)(b), 346.65(2)(am)4., and 346.65(2)(g)1. She filed a motion to suppress, which was denied after an evidentiary hearing. She entered a no contest plea to the count of OWI and the PAC count was dismissed. She now appeals the denial of her motion to suppress. We will deal first with her contention that there was no reasonable suspicion to conduct an investigative stop, and then we will address her contention that there was no probable cause to support her arrest.

¶3 *Reasonable Suspicion*. At 2:24 a.m. on Saturday, June 21, 2008, City of Waukesha Police Officer Jessica Trucksa observed the tires of Treleven's eastbound vehicle cross the double yellow line of Sunset Drive. Trucksa immediately initiated an investigative stop. At the suppression hearing, she testified that Treleven had violated the traffic regulation prohibiting a driver to operate left of center. She also testified that she did not know the statute number that prohibited operating left of center.

¶4 On appeal, Treleven faults Trucksa for not knowing the statute number, "[h]owever, Officer Trucksa never specifically addressed what Wisconsin State Traffic Law was violated." She also faults the trial court for not providing

the statute number, "[t]he Court never indicated what state statute was violated."[2] Treleven suggests that the applicable traffic regulations are either WIS. STAT. §§ 346.09(1) or 346.13.[3] Substantively, Treleven argues that there is no evidence that her actions interfered with other traffic or that she crossed the center line while attempting to pass another vehicle. She contends that under the totality of the circumstances, Trucksa lacked reasonable suspicion to initiate a traffic stop.

¶5 On review of a trial court's ruling on a motion to suppress evidence, we shall uphold the court's findings of fact unless they are clearly erroneous and independently determine whether the investigative detention was constitutionally reasonable. ***State v. Betow***, 226 Wis. 2d 90, 93, 593 N.W.2d 499 (Ct. App. 1999). "The question of what constitutes reasonable suspicion is a common sense test." ***State v. Colstad***, 2003 WI App 25, ¶8, 260 Wis. 2d 406, 659 N.W.2d 394. The test is an objective one, ***State v. Waldner***, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996), and the suspicion must be grounded in specific articulable facts along with reasonable inferences from those facts. ***Colstad***, 260 Wis. 2d 406, ¶8. When determining whether reasonable suspicion exists, we examine the cumulative effect of the facts in their totality. ***Waldner***, 206 Wis. 2d at 58. "[C]onduct which

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[2] This court knows of no law, and none is cited by Treleven, to support her contention that the officer's reasonable suspicion must be based on the officer's knowing the statute number of the traffic regulation she suspects a driver of violating.

[3] Based upon the evidence in this case, that Treleven's wheels crossed a double yellow line, the pertinent section of WIS. STAT. § 346.09 provides:

> **(3)** The operator of a vehicle shall not drive on the left side of the center of a roadway on any portion thereof which has been designated a no-passing zone, either by signs or by a yellow unbroken line on the pavement on the right-hand side of and adjacent to the center line of the roadway, provided such signs or lines would be clearly visible to an ordinarily observant person.

has innocent explanations may also give rise to a reasonable suspicion of criminal activity, and … in assessing the officer's actions, we should give weight to his or her training and experience, and the knowledge acquired on the job." ***Betow***, 226 Wis. 2d at 98.

¶6 Investigative traffic stops are subject to the constitutional reasonableness requirement. ***State v. Post***, 2007 WI 60, ¶12, 301 Wis. 2d 1, 733 N.W.2d 634. The question we must answer is whether the State has shown that there were "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" the intrusion of the stop. ***Terry v. Ohio***, 392 U.S. 1, 21 (1968). The burden of establishing that an investigative stop is reasonable falls on the State. ***Post***, 301 Wis. 2d 1, ¶12. The determination of reasonableness is a common sense test. ***Id.***, ¶13.

¶7 The crucial question is whether the facts of the case would warrant a reasonable police officer, in light of his or her training and experience, to suspect that the individual has committed, was committing, or is about to commit a crime. ***Id.*** This common sense approach balances the interests of the State in detecting, preventing, and investigating crime and the rights of individuals to be free from unreasonable intrusions. ***Id.*** The reasonableness of a stop is determined based on the totality of the facts and circumstances. ***Id.***

¶8 We point out that, in this case, Treleven did violate a traffic regulation, she operated over a double yellow line in violation of WIS. STAT. § 346.09(3). An officer has a statutory duty to enforce the law where he or she observes a traffic violation. WIS. STAT. § 349.02(1). On our highways there are

no grace periods, like the five-second rule in the kitchen.[4] A driver does not have to cross the double yellow line by a certain number of feet to have violated the traffic regulation because of the carnage that is caused daily by violations of traffic regulations.[5]

¶9 There are a number of building blocks we can also consider in deciding if the totality of the circumstances equation supports a finding of reasonable suspicion. ***State v. Allen***, 226 Wis. 2d 66, 74-75, 593 N.W.2d 504 (Ct. App. 1999). In ***Allen***, we considered an officer's training and experience to be one of the building blocks. ***Id.*** at 74. Here, Trucksa is a patrol officer and testified to having received training at the police academy with a curriculum approved by the National Highway Traffic Safety Administration. Another building block is the time of day, ***id.*** at 74-75; here, it was 2:24 a.m. on a Saturday morning, near bar closing time. We agree with the trial court's conclusion that the officer had reasonable suspicion to execute a traffic stop based on Treleven's erratic driving—operating over the center line—and the supporting building blocks.

¶10 *Probable Cause*. In ***Dane County v. Sharpee***, 154 Wis. 2d 515, 453 N.W.2d 508 (Ct. App. 1990), we set out the test for probable cause.

> Probable cause to arrest exists where the officer, at the time of the arrest, has knowledge of facts and circumstances

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[4] "[I]f you pick up a dropped piece of food before you can count to five, it's O.K. to eat it." Harold McGee, *The Five-Second Rule Explored, or How Dirty Is That Bologna?*, N.Y. TIMES, May 9, 2007, http://www.nytimes.com/2007/05/09/dining/09curi.html?ex=1336363200&en=241e6e22e405bc24&ei=5090&partner=rssuserland&emc=rss (last visited June 10, 2009).

[5] In a concurring opinion in ***Tate v. Short***, 401 U.S. 395, 401 (1971), Mr. Justice Blackmun even noted, "the problems of traffic irresponsibility and the frightful carnage it spews upon our highways."

> sufficient to warrant a person of reasonable prudence to believe that the arrestee is committing, or has committed, an offense. As the very name implies, it is a test based on probabilities; and, as a result, the facts faced by the officer "need only be sufficient to lead a reasonable officer to believe that guilt is more than a possibility." It is also a commonsense test.

Id. at 518 (citations omitted). As we did when discussing reasonable suspicion, we apply this test without deference to the historical facts as found by the court. ***Waldner***, 206 Wis. 2d at 54.

¶11 When Trucksa reached Treleven's car, she noticed that Treleven's eyes were glassy and bloodshot and she could detect the odor of intoxicants coming from Treleven. Treleven admitted that she had had a couple of beers at a friend's house. As Treleven began to exit the car, Trucksa determined that Treleven was physically handicapped and had to use a wheelchair. Because of her physical limitations, Trucksa did not ask her to perform any physical field sobriety tests.

¶12 The officer had Treleven remain in the car, facing the officer with her feet on the pavement, when the officer administered nonphysical field sobriety tests. The first test administered was the horizontal gaze nystagmus test (HGNT). The officer testified that she administered it in accordance with her training and detected all six clues of alcohol impairment. Next, Treleven successfully completed two verbal field sobriety tests. When the officer asked Treleven to take the preliminary breath test (PBT), she replied, "Well, then, you caught me."

¶13 Treleven asserts that the results on the HGNT are suspect because Trucksa did not account for the possible adverse affect of strobing lights. She argues, "[c]learly, when the strobe lights were on throughout this test, the possibility for interference with the results of the horizontal gaze nystagmus was

very likely." There was no evidence that strobe lights can have an adverse effect on the HGNT, and the only testimony from Trucksa was that her squad car's emergency lights were not in Treleven's line of sight when she administered the HGNT. In ***State v. Wille***, 185 Wis. 2d 673, 682, 518 N.W.2d 325 (Ct. App. 1994), we said, "The trial court takes evidence in support of suppression and against it, and chooses between conflicting versions of the facts. It necessarily determines the credibility of the officers and other witnesses." Obviously, the trial court rejected the implication that strobe lights adversely impacted the HGNT.

¶14 Treleven places stock in her passing the two verbal field sobriety tests that were administered. While she acknowledges that field sobriety tests are not always necessary to establish probable cause, she contends that, in those cases discussing the concept, "the driving in question is far worse." This argument ignores a general principal we apply in these cases; a police officer has probable cause to arrest when the totality of the circumstances within that officer's knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant probably drove while intoxicated. ***State v. Koch***, 175 Wis. 2d 684, 701, 499 N.W.2d 152 (1993). This is a practical test, based on "considerations of everyday life on which reasonable and prudent [people], not legal technicians, act." ***State v. Drogsvold***, 104 Wis. 2d 247, 254, 311 N.W.2d 243 (Ct. App. 1981) (citation omitted).

¶15 Before considering the totality of the circumstances, we will address Treleven's argument that her refusal to take the PBT should not be considered consciousness of guilt. She argues that while the refusal to take a mandatory evidentiary test is consciousness of guilt, *see* ***State v. Albright***, 98 Wis. 2d 663, 668-69, 298 N.W.2d 196 (Ct. App. 1980), the PBT is not a mandatory evidentiary test. Therefore, refusal to take it should not be consciousness of guilt. There is no

statutory sanction for refusal to submit to a PBT, but that fact may be considered evidence of consciousness of guilt for purpose of establishing probable cause to arrest. *See* ***State v. Babbitt***, 188 Wis. 2d 349, 359, 525 N.W.2d 102 (Ct. App. 1994) (holding this with respect to a refusal to submit to field sobriety tests).

¶16 We agree with the trial court that under the totality of the circumstances, Trucksa had probable cause to arrest Treleven for drunk driving. The building blocks that make up probable cause include Treleven's violation of a traffic regulation; time of day; glassy, bloodshot eyes; odor of an intoxicant; HGNT provided six clues of impairment; and the refusal to submit to the PBT. We are satisfied that a reasonable and prudent police officer would reach the conclusion that there was probable cause to arrest.

By the Court.—Judgment affirmed.

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