COURT OF APPEALS
DECISION
DATED AND FILED

August 6, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP220 **Cir. Ct. Nos. 2008TR5347**
2008TR5348

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TODD A. CARPENTER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Columbia County: ALAN J. WHITE, Judge. *Affirmed*.

¶1 VERGERONT, J.[1] Carpenter appeals a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant, first offense,

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(g) and (3) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

contrary to WIS. STAT. § 346.63(1)(a), and operating a motor vehicle with a prohibited alcohol concentration of .10 or more, first offense, contrary to WIS. STAT. § 346.63(1)(b). He contends the arresting officer did not have reasonable suspicion to prolong a stop that originated after he drove off without paying for gas. He also contends the officer did not have reasonable suspicion that he was driving while under the influence of an intoxicant and thus the field sobriety tests the officer administered were unlawful. He therefore argues that the circuit court should have granted his motion to suppress evidence. We conclude the circuit court properly denied the motion. Accordingly, we affirm the judgment of conviction.

BACKGROUND

¶2 The only witness at the evidentiary hearing on Carpenter's motion to suppress evidence was the arresting officer, Timothy Larson, a trooper with the Wisconsin State Patrol for the past eight years. He testified as follows. At approximately 1:47 a.m., Sunday, August 24, 2008, he received a call advising him that a white Cadillac Escalade had just driven off from the Petro Travel Plaza in Caledonia without paying for over ninety-five dollars worth of gas. When Trooper Larson located the vehicle, it was driving in the direction of the Petro Travel Plaza. He followed the vehicle for about a half mile until it pulled into a parking stall next to the building at the Plaza. Trooper Larson parked his squad car directly behind the vehicle, in effect blocking its exit.

¶3 When the driver of the Escalade, later identified as Carpenter, got out of his vehicle, Trooper Larson asked him about not paying for the gas. Carpenter explained that when he stopped to get gas, he went inside and bought some food but forgot to pay for the gas. He said that when he realized his mistake,

he returned to the Petro station to pay his bill. As Trooper Larson was talking with Carpenter, who was standing about a foot away, he detected a slight odor of intoxicants on Carpenter's breath.

¶4 Carpenter went in to pay for the gas, accompanied by Trooper Larson. When they were back outside, Trooper Larson asked Carpenter how much he had to drink that evening and Carpenter admitted to having some drinks two hours earlier. At that point Trooper Larson proceeded to administer field sobriety tests and subsequently arrested Carpenter.

¶5 The circuit court denied the motion to suppress. The court concluded that the totality of the circumstances, including Carpenter's admitted forgetfulness in paying for the gas, the slight odor of intoxicants, the lateness of the hour on a Saturday night/Sunday morning, and Carpenter's admission to drinking alcohol combined to provide the requisite reasonable suspicion to further investigate by administering field sobriety tests.

DISCUSSION

¶6 On appeal, Carpenter argues that the circuit court erred because: (1) Trooper Larson exceeded the lawful scope of the encounter beyond that which was necessary to resolve the original complaint, and (2) Trooper Larson did not have the requisite reasonable suspicion to administer field sobriety tests.

¶7 The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures, and an investigative stop is a seizure under the Fourth Amendment. ***State v. Post***, 2007 WI 60, ¶10, 301 Wis. 2d 1, 733 N.W.2d 634. To be lawful, an investigatory detention must be supported by the law enforcement officer's reasonable suspicion, grounded in specific articulable

facts and reasonable inferences from those facts, that a person is or was violating the law. ***State v. Colstad***, 2003 WI App 25, ¶8, 260 Wis. 2d 406, 659 N.W.2d 394. 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? ***Id.***

¶8 In reviewing the circuit court's determination, we accept the circuit court's findings of historical fact unless they are clearly erroneous, and we review de novo the application of those facts to the constitutional standard. ***State v. Young***, 2006 WI 98, ¶17, 294 Wis. 2d 1, 717 N.W.2d 729. In this case Trooper Larson was the only witness and the circuit court accepted his testimony as credible. We therefore apply the constitutional standard to the events and observations described by Trooper Larson.

¶9 Carpenter's first argues that Trooper Larson did not have reasonable suspicion to prolong the encounter with him after he paid for the gas. We assume for purposes of discussion that Carpenter was "seized" within the meaning of the Fourth Amendment when the officer parked his squad car directly behind Carpenter's vehicle. Carpenter implicitly concedes that this, as well as the officer's initial contact with him, was lawful for purposes of investigating the nonpayment of gas. However, Carpenter argues, after he paid for the gas, he should have been allowed to leave because the reason for the stop had been resolved. According to Carpenter, Trooper Larson's next question about how much Carpenter had to drink unreasonably prolonged the stop. We disagree. The Wisconsin Supreme Court has held that the time it takes to ask a question does not unreasonably prolong an initially lawful stop. ***State v. Griffith***, 2000 WI 72, ¶¶56-63, 236 Wis. 2d 48, 613 N.W.2d 72.

¶10 Carpenter also argues the officer did not have reasonable suspicion that he was driving under the influence of an intoxicant when the officer administered the field sobriety tests.[2] Although admittedly this is a close case, we conclude he did. We reach this conclusion based on the totality of circumstances, which include the following.

¶11 The officer smelled a slight odor of intoxicants and Carpenter admitted he had "some drinks" two hours ago. In addition, Carpenter had just filled his vehicle with nearly ninety-five dollars worth of gasoline, gone inside to buy food, and paid only for the food. While this could be due to ordinary forgetfulness, it could also be due to inattentiveness caused by the alcohol he had consumed. Trooper Larson was not required to draw the innocent inference from this fact. ***State v. Anderson***, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990) (a police officer is "not required to rule out the possibility of innocent behavior before initiating a brief stop").

¶12 Likewise, Trooper Larson was not required to interpret Carpenter's statement that he had "some drinks" two hours earlier to mean that Carpenter had had only a little to drink. Rather, he could reasonably draw the inference that Carpenter was using a vague term, "some," because he was aware he had had too much to drink.

¶13 The time of night is also a factor that contributes to reasonable suspicion that Carpenter was operating his vehicle while under the influence of

[2] While the parties debate whether field sobriety tests are a search under the Fourth Amendment, they agree that in Wisconsin the reasonable suspicion standard is applied to the tests. We therefore apply this standard and do not decide whether the tests are a search.

alcohol. *See* ***State v. Lange***, 2009 WI 49, ¶32, ___ Wis. 2d ___, 766 N.W.2d 551. Common knowledge tells us that people tend to drink on weekends. *See* ***id.*** The incident here occurred late on a Saturday night—that is, early Sunday morning at or around "bar time" on August 24, 2008.

¶14 While any one of these facts, standing alone, might well be insufficient to constitute reasonable suspicion, "such facts accumulate, and as they accumulate, reasonable inferences about the cumulative effect can be drawn." ***Post***, 301 Wis. 2d 1, ¶37.

CONCLUSION

¶15 We agree with the circuit court that there were specific and articulable facts that, taken together with the reasonable inferences from those facts, provided a basis to reasonably suspect that Carpenter had enough to drink to impair his ability to drive. The administration of the field sobriety tests was therefore lawful and the circuit court properly denied Carpenter's motion to suppress evidence. 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.