COURT OF APPEALS
DECISION
DATED AND FILED

July 14, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP336-CR **Cir. Ct. No. 2009CT149**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRITTANY A. MEYE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: RICHARD CONGDON, Judge. *Reversed and cause remanded with directions.*

¶1 BROWN, C.J.[1] It is against the law of Wisconsin to operate a motor vehicle while intoxicated. But, although unwise, it is not against the law to

[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 unless otherwise noted.

drink and then drive. Here, the sole evidence supporting the officer's suspicion that Brittany A. Meye had been driving while intoxicated before pulling into a gas station was that he smelled alcohol coming from either Meye or her passenger as they walked past him after stopping the vehicle. We conclude that this falls short of reasonable suspicion that Meye was intoxicated. We reverse.

BACKGROUND

¶2 On Thursday, January 22, 2009, at approximately 3:23 a.m., a Pewaukee police officer observed Meye and her passenger drive into the parking lot of a Kwik Trip gas station. Meye and her passenger parked at pump six and then entered the store. The officer testified that when Meye and her passenger were within a couple feet of him, he detected a strong odor of intoxicants. The officer could not determine whether the odor was coming from Meye or her passenger. After the two left the store, the officer observed Meye get into the driver's side of the car. The officer then approached the driver's side door and made contact with Meye. She was later arrested and charged with an OWI, second offense.

¶3 The officer testified that his only reason for detaining Meye was the odor of intoxicants. He also stated that prior to making contact with Meye he observed nothing unusual in her gait or the manner in which she walked to the car. Nor did he observe any traffic violations or mechanical defects with the car which would justify stopping the defendant.

DISCUSSION

¶4 When reviewing a motion to suppress evidence, the court will uphold the circuit court's factual findings unless those findings are clearly

erroneous. ***State v. Patton***, 2006 WI App 235, ¶7, 297 Wis. 2d 415, 724 N.W.2d 347. This court reviews de novo whether the facts lead to reasonable suspicion. ***State v. Young***, 2006 WI 98, ¶17, 294 Wis. 2d 1, 717 N.W.2d 729.

¶5 The law on reasonable suspicion is well established. An officer must have an objective reasonable inference of wrongful conduct to support reasonable suspicion. *See* ***State v. Anderson***, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990). Reasonable suspicion sufficient to make an investigatory stop is based on a common sense test: "what would a reasonable police officer reasonably suspect in light of his or her training and experience." ***State v. Young***, 212 Wis. 2d 417, 424, 569 N.W.2d 84 (Ct. App. 1997). Further, an officer must have specific and articulable facts which, combined with rational inferences from those facts, reasonably warrant the officer's intrusion. ***Terry v. Ohio***, 392 U.S. 1, 21 (1968).

¶6 Meye argues that the odor of intoxicants alone is insufficient to raise reasonable suspicion to make an investigatory stop. We agree. We will not cite, chapter and verse, all the many cases in this state where either we or our supreme court found facts sufficient for an investigatory stop. Suffice it to say that these decisions, both published and unpublished, include an officer or a citizen having observed traffic violations, erratic driving, mechanical defects with the vehicle, unexplained accidents or multiple indicia of physical impairment. Not one of these cases has held that reasonable suspicion to seize a person on suspicion of drunk driving arises simply from smelling alcohol on a person who has alighted from a vehicle after it has stopped—and nothing else. As we already stated, the officer in this case observed no traffic violations, no erratic driving, saw no mechanical defects or had any other information from which to justify the seizure.

¶7 The State claims that the odor of intoxicants and the observation that Meye got into the driver's side of the car was enough to reasonably infer that criminal activity was afoot. The State contends that, from these two facts alone, an officer may reasonably infer that criminal activity is afoot and make an investigatory stop based on observation of legal activity. In support, the State cites ***State v. Waldner***, 206 Wis. 2d 51, 556 N.W.2d 681 (1996).

¶8 ***Waldner*** provides no help whatsoever. There, an officer observed unusual but legal driving behavior, enough so that the officer decided to follow the vehicle. ***Id.*** at 53. The officer subsequently observed the vehicle stop and park in a legal parking space and the driver poured out a drink that looked like a "mixture of liquid and ice." ***Id.*** While the erratic driving was not illegal per se, the manner of driving plus the officer's observance of the driver pouring out a drink together led to the reasonable inference that Waldner was committing a crime and therefore gave rise to reasonable suspicion to justify the investigatory stop. ***Id***. at 58. Here, we point out for the third time that the officer never saw Meye's driving behavior, so he would not know if she was perhaps driving while impaired. In sum, there was not that combination of specific and articulable facts present, unlike in ***Waldner***, which would give rise to reasonable suspicion.

¶9 The weakness of this seizure is exacerbated by the fact that the officer was not sure from which person the odor of alcohol was coming from or if it was coming from both persons. Case law requires that those indicators of drunk driving used by law enforcement must be linked to the operator of the vehicle. *See* ***State v. Secrist,*** 224 Wis. 2d 201, 212, 589 N.W.2d 387 (1999). Meye correctly cites ***Secrist*** for the proposition that the suspicious behavior must be "linked to a

specific person." ***Id.***[2] When the odor cannot be linked to one person in particular, it is not within the officer's knowledge that the evidence is connected to the *defendant*. Because the officer did not have reasonable suspicion to stop Meye, we reverse and remand for further proceedings not inconsistent with this opinion.

By the Court.—Judgment reversed and cause remanded with directions.

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

[2] It *is* against the law to possess marijuana. Thus, had the officer smelled marijuana, this would be a different case altogether. *See* ***State v. Secrist***, 224 Wis. 2d 201, 218-19, 589 N.W.2d 387 (1999) (holding that when Secrist, driving alone, approached an officer to ask for directions and the officer smelled the odor of marijuana on him, this alone was enough to create reasonable suspicion that Secrist had committed a crime).