COURT OF APPEALS
DECISION
DATED AND FILED

May 6, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2659

Cir. Ct. Nos. 02-TR-345
02-TR-346

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

COUNTY OF RUSK,

PLAINTIFF-RESPONDENT,

V.

KEITH R. AUSSEM,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Rusk County: FREDERICK A. HENDERSON, Judge. *Affirmed.*

¶1 CANE, C.J.[1] Keith Aussem appeals a judgment of conviction for operating a motor vehicle while intoxicated. He argues the circuit court erred when it denied his suppression motion after determining the law enforcement

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

officer had reasonable suspicion to stop him and that probable cause existed to administer the preliminary breath test. He also argues the court should be reversed because it applied the wrong standard regarding the level of proof necessary for the officer to administer the PBT. We reject all of these arguments and affirm the judgment.

BACKGROUND

¶2 Around 2:45 a.m. on March 30, 2002, Rusk County sheriff's deputy Jeff Wallace observed a brown truck and a white sedan turn into a tavern parking lot of a tavern on State Highway 27.[2] The truck's driver missed the turn and had to back onto the highway to enter the parking lot. After a few minutes, the vehicles left the parking lot and traveled south on Highway 27. Wallace followed them. The vehicles then turned east on County Highway I. As the vehicles approached and passed Merry Lane, the truck stopped and began backing, forcing the sedan to swerve out of the way. The truck turned down Merry Lane. At no time did Wallace observe the truck speeding or veering out of its lane of traffic.

¶3 Wallace stopped the truck and identified its driver as Aussem. Noticing an odor of intoxicants on Aussem's breath, Wallace asked if he had been drinking. After Aussem said he had just come from a tavern, Wallace decided to administer field sobriety tests. He asked Aussem to recite the alphabet from A to M. Aussem did, but continued to X. Next, Wallace administered the finger-to-nose test after explaining and demonstrating the test to Aussem. Aussem touched

[2] Wallace was the only person to testify at the suppression hearing and Aussem does not challenge the testimony's veracity. Therefore, Wallace's testimony provides the basis for the facts.

the bridge of his nose with one hand and his upper lip with the other. Finally, Wallace had Aussem perform a heel-to-toe walk, again demonstrating it, but failing to identify a line for Aussem to walk. Although Aussem performed the test, he had trouble maintaining his balance and took an extra step in one direction. Wallace decided to administer a PBT. Aussem registered .15%,[3] and Wallace arrested him.

¶4 Aussem moved to suppress the evidence resulting from the stop, arguing there was no basis for the stop and arrest. At the hearing, the court determined first that Wallace had a reasonable suspicion to stop Aussem because of suspicious behavior and because of his unsafe backing while turning onto Merry Lane. The court next determined that based on Aussem's failure to properly complete the field sobriety tests, Wallace had "enough reasonable suspicion that he was perhaps driving while under the influence to give him this PBT." Finally, the court concluded that based on the PBT results and the other evidence, Wallace had probable cause to arrest Aussem. The court convicted Aussem of operating while intoxicated. He now appeals.

DISCUSSION

¶5 Aussem first argues the trial court erred when it concluded that Wallace had reasonable suspicion to stop him. In executing a valid investigative stop consistent with the Fourth Amendment prohibition against unreasonable searches and seizures, a law enforcement officer needs to reasonably suspect, in light of his or her experience, that some kind of criminal activity has taken or is

[3] Wallace testified at the suppression hearing that he thought Aussem had registered .10% or a .11%; however, .15% is listed on Aussem's citation.

taking place. ***State v. Richardson***, 156 Wis. 2d 128, 139, 456 N.W.2d 830 (1990). Reasonable suspicion must be based on specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. ***Id.*** A traffic stop is generally permissible if the officer has reasonable grounds to suspect a traffic violation had been committed. ***State v. Gaulrapp***, 207 Wis. 2d 600, 605, 558 N.W.2d 696 (Ct. App. 1996). Whether undisputed facts establish reasonable suspicion justifying police to perform an investigative stop presents a question of constitutional fact subject to de novo review. *See* ***State v. Williams***, 2001 WI 21, ¶18, 241 Wis. 2d 631, 623 N.W.2d 106.

¶6 Aussem argues Wallace's only basis for arrest was his backing up on Highway I, which did not establish reasonable suspicion. We disagree. Wallace stopped Aussem not merely because he backed up, but because in doing so, he forced the white sedan to swerve out of the way. This establishes much more than a reasonable suspicion that the operator of the truck had unsafely backed his or her vehicle, a violation of WIS. STAT. § 346.87. Wallace had a proper basis to stop Aussem.

¶7 Next, Aussem contends the trial court erred when it concluded Wallace had reasonable suspicion to administer the PBT. Aussem argues the trial court applied an incorrect reasonable suspicion standard instead of the correct probable cause standard and that probable cause did not exist for Wallace to administer the test. First, we conclude the trial court's application of the wrong standard does not warrant reversal. Whether probable cause exists under the facts is a question of law we review de novo. *See* ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 316, 603 N.W.2d 541 (1999). Further, the facts, as established by Wallace's testimony at the suppression hearing, are unchallenged. The scope of our review of the trial court's legal conclusion would be the same regardless

whether it applied the correct standard and, therefore, we determine its application of the reasonable suspicion standard does not, in itself, require reversal.

¶8 A law enforcement officer may give a PBT to a driver if the officer has probable cause to believe the driver is operating while under the influence of an intoxicant. WIS. STAT. § 343.303. This "probable cause to believe" is a quantum of proof that is greater than the reasonable suspicion necessary to justify an investigatory stop, but less than the level of proof needed to establish probable cause for an arrest. ***Renz***, 231 Wis. 2d at 317. While probable cause is a varying standard depending on the different burdens of proof that apply at a particular stage of the proceeding, *see* ***id.*** at 308, the core concept of probable cause remains constant. Probable cause "is a test based on probabilities; and, as a result, the facts ... 'need only be sufficient to lead a reasonable officer to believe that guilt is more than a possibility.'" ***Dane County v. Sharpee***, 154 Wis. 2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990) (citation omitted). As a result, the probabilities addressed by probable cause are not technical. ***Id.*** Instead, they rest on the practical considerations of everyday life upon which reasonable and prudent persons, not legal technicians, act. ***Id.*** The bottom line is that probable cause represents a commonsense test. ***Id.***

¶9 Aussem argues that he did not exhibit sufficient indicia of intoxication that would establish probable cause for Wallace to administer a PBT. We disagree. In support of his claim, Aussem points to his relative success in completing the field sobriety tests. He does not, however, address his relative failures in these tests. While it is true Aussem successfully recited the alphabet, he continued well beyond the point Wallace requested. His attempts at touching the tip of his nose were unsuccessful. Finally, although he managed to walk a straight line, he appeared unsteady and took an extra step while doing it. We conclude

these facts, along with the fact that Aussem smelled of intoxicants, his admission he was at a tavern, and his unusual driving established probable cause for Wallace to administer the PBT.

¶10 The circumstances of Aussem's stop are similar to those in ***Renz***. There, Renz was able to substantially complete all the field tests. ***Renz***, 231 Wis. 2d at 317. However during a one-legged stand, he had to restart his thirty-second count; during a heel-to-toe test, he appeared unsteady and left spaces between his feet; and was unable to touch the tip of his nose with one hand during the finger-to-nose test. ***Id.*** at 316-17. His speech was not slurred and his car smelled of intoxicants. ***Id.*** The supreme court concluded this was "exactly the sort of situation in which a PBT proves extremely useful in determining whether there is probable cause for an OWI arrest." ***Id.*** Similarly, here Aussem substantially completed the field tests, but did present some indicia of intoxication, which along with his admission he had been at a tavern and his smelling of intoxicants, established probable cause.

¶11 Finally, in several portions of his brief, Aussem suggests that Wallace failed to follow appropriate field test procedure by choosing to only have Aussem recite the alphabet from A to M and failing to designate a straight line on the heel-to-toe test. He also attacks Wallace's lack of formal training in administering the tests. Aussem offers no authority to suggest what legal significance these facts might have, and we therefore need not address them. *See* ***Barakat v. DHSS***, 191 Wis. 2d 769, 786, 530 N.W.2d 392 (Ct. App. 1995).

By the Court.—Judgment affirmed.

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