COURT OF APPEALS
DECISION
DATED AND FILED

June 23, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2416 **Cir. Ct. No. 2010TR3973**

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

IN THE MATTER OF THE REFUSAL OF CHARLES L. WENDT:

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

CHARLES L. WENDT,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Jefferson County: JENNIFER L. WESTON, Judge. *Reversed and cause remanded for further proceedings.*

¶1 LUNDSTEN, J.[1] Charles Wendt was arrested for driving under the influence of alcohol. He refused to submit to an evidentiary chemical test of his blood. In a subsequent refusal hearing, Wendt argued that the arresting officer lacked probable cause to request the blood test, and the circuit court agreed. Accordingly, the court ordered that no action be taken on Wendt's operating privilege. The State appeals. I reverse and remand for further proceedings.

Background

¶2 A City of Watertown police officer was on patrol on a Saturday night in July 2010 with his squad's video camera activated. At approximately 12:46 a.m., while stopped at a stop sign, the officer observed a car cross in front of him. The driver of the car was Charles Wendt. The officer saw Wendt deviate from his lane of traffic and go slightly over the road's center line. The officer proceeded to follow Wendt for six or seven blocks, which included traveling through a construction area. The officer did not observe any other traffic violations. After Wendt passed through the construction area, the officer initiated a stop.

¶3 When the officer approached Wendt and informed him about the lane deviation, Wendt responded that it was due to his opening a bag of peanuts while driving. During this interaction, the officer noticed "a moderate odor of alcohol" coming from Wendt. The officer also noticed that Wendt's eyes were bloodshot and glassy, but that Wendt's manner of speaking was normal. Wendt denied that he had been drinking. The officer proceeded to administer field

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

sobriety tests. After concluding that Wendt failed those tests, the officer arrested Wendt for violating WIS. STAT. § 346.63(1)(a).

¶4 After Wendt's arrest, the officer provided the required informing the accused information and then requested that Wendt submit to an evidentiary chemical test of his blood. Wendt refused and, based on that refusal, was served with a notice of intent to revoke his operating privilege. Wendt requested a refusal hearing. At the hearing, the circuit court concluded that grounds for revocation were lacking and, accordingly, ordered that no action be taken on Wendt's operating privilege. The State appeals.

Discussion

¶5 Pursuant to statute, refusal hearings involve several issues, only one of which matters here: "whether the officer had probable cause to believe that [Wendt] was driving under the influence of alcohol." *See* ***State v. Wille***, 185 Wis. 2d 673, 679, 518 N.W.2d 325 (Ct. App. 1994); WIS. STAT. § 343.305(9)(a)5.a. The circuit court concluded that the officer did not have the required probable cause because either the initial stop of Wendt was unlawful or, alternatively, the extension of that stop was unlawful. Wendt argues that either basis is reason to affirm. For the reasons below, I disagree.

A. Probable Cause For The Initial Stop

¶6 The State argues that there was probable cause for the initial traffic stop. "Whether there is probable cause or reasonable suspicion to stop a vehicle is a question of constitutional fact." ***State v. Popke***, 2009 WI 37, ¶10, 317 Wis. 2d 118, 765 N.W.2d 569. "A finding of constitutional fact consists of the circuit court's findings of historical fact, which we review under the 'clearly erroneous

standard,' and the application of these historical facts to constitutional principles, which we review de novo." ***Id.***

¶7 The State contends that the officer had probable cause to stop Wendt for a violation of WIS. STAT. § 346.05. The circuit court rejected this view based, at least in part, on its apparent belief that Wendt's "very slight [lane] deviation" was insufficient to constitute a traffic violation. I agree with the State.

¶8 WISCONSIN STAT. § 346.05(1) states: "Upon all roadways of sufficient width the operator of a vehicle shall drive on the right half of the roadway and in the right-hand lane of a 3-lane highway ...," unless a listed exception applies. Wendt does not argue that an exception applies. We have previously stated that "even a momentary incursion into the oncoming lane, that does not affect other vehicles or drivers, is sufficient to provide probable cause to believe that a left-of-center violation [under § 346.05] has occurred." ***State v. Puchacz***, 2010 WI App 30, ¶19, 323 Wis. 2d 741, 780 N.W.2d 536; *see also* ***Popke***, 317 Wis. 2d 118, ¶¶17-18 (concluding that there was probable cause to stop a vehicle for a violation of § 346.05 where "[t]he officer watched as the defendant drove left of center," and rejecting the argument that a momentary crossing was insufficient to violate the provision).

¶9 Here, the circuit court plainly found that Wendt's driving resulted in at least a "momentary incursion" into the oncoming lane because it found that there was a slight lane deviation, crediting the officer's testimony that Wendt's car went over the center line. Wendt does not argue that the circuit court's findings were clearly erroneous. Thus, the officer had probable cause to stop Wendt for a violation of WIS. STAT. § 346.05.

¶10 Wendt's arguments to the contrary are unavailing because they rely on mischaracterizations of the circuit court's findings. For example, Wendt argues that, instead of finding a lane deviation, the court actually expressed "skepticism about the officer's ability to observe the alleged deviation." Wendt points to the court's finding that "[the officer was], apparently, able to somehow observe that the car went slightly over the center lane [sic] and deviated from the lane of traffic." On its face, this finding credits the officer's testimony that he saw Wendt's car travel over the center line, and the court's seeming uncertainty about the precise details of that observation does not change this. And, if any doubt remained, the court reiterated this finding when it subsequently stated that "the lane deviation was minor and very short-lived."

¶11 To the extent Wendt argues that it matters that the squad's video recording did not capture the deviation, this ignores what I have just discussed—that the circuit court credited the officer's testimony that there was a deviation. To this end, the officer testified that the deviation occurred when Wendt's car was not directly in front of the squad and, thus, was outside of the squad video's frame.

¶12 Finally, I note a point that Wendt does not raise, but that the circuit court appears to have taken into consideration. That is, after noting the lane deviation, the court questions whether the stop was justified "after following the vehicle for that long," referring to the officer following Wendt for six or seven blocks before pulling Wendt over. In this respect, the court appears to have been addressing a topic not at issue in this appeal: whether, based on Wendt's overall driving, it was reasonable to suspect that he was driving under the influence. If driving under the influence was the justification for the stop, the six or seven blocks of driving might matter. But because the stop was based on Wendt's lane deviation violation, it does not.

¶13 For the reasons discussed, I conclude that the officer had probable cause for the initial stop.

B. Reasonable Suspicion To Extend The Stop

¶14 The State next argues that the circuit court erroneously concluded that the officer lacked reasonable suspicion supporting an extension of the stop to investigate whether Wendt was driving under the influence.[2] I agree.

¶15 The following principles apply:

> In order to justify an investigatory seizure, "[t]he police must have a reasonable suspicion, grounded in specific articulable facts and reasonable inferences from those facts, that an individual is [or was] violating the law." "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." … "A trial court's determination of whether undisputed facts establish reasonable suspicion justifying police to perform an investigative stop presents a question of constitutional fact, subject to *de novo* review."

State v. Colstad, 2003 WI App 25, ¶8, 260 Wis. 2d 406, 659 N.W.2d 394 (citations omitted).

¶16 As pertinent to this issue, the circuit court found the following facts:

- Wendt deviated from his lane, which perhaps was due to Wendt opening a bag of peanuts.

[2] The circuit court framed this as a probable cause analysis. The parties, however, agree that the officer would have only needed reasonable suspicion that Wendt was driving under the influence to extend the stop. *See* ***State v. Betow***, 226 Wis. 2d 90, 94-95, 593 N.W.2d 499 (Ct. App. 1999) (an officer who develops reasonable suspicion of an offense "separate and distinct from the acts that prompted the officer's intervention in the first place" may extend a traffic stop to investigate).

- The remaining six or seven blocks of Wendt's driving was "good driving" and "very safe."
- When the officer approached Wendt in his vehicle, there was an odor of alcohol.
- The officer knew that Wendt worked at a bar.
- Wendt had "glassy and bloodshot eyes."
- Wendt's "speech was normal … as the officer knew it."

¶17 The circuit court essentially concluded that these facts did not give rise to a reasonable suspicion that Wendt was driving under the influence. Tracking the circuit court's reasoning, Wendt highlights that his speech was normal and that he did not have any further driving problems, and Wendt points out that each of the other facts have innocent explanations. For example, Wendt refers to the circuit court's observation that the alcohol odor could have come from his clothing due to his working at a bar, and that the officer was aware that Wendt worked at a bar. Wendt also asserts that causes other than intoxication may lead to glassy and bloodshot eyes.

¶18 Judgment calls as to whether particular facts constitute reasonable suspicion are often difficult, but this is not such a case. True, the facts listed above allow very plausible innocent explanations. But that is frequently true when reasonable suspicion is present. To put this in context, even probable cause does not require that guilt is more likely than not. ***State v. Young***, 2006 WI 98, ¶22, 294 Wis. 2d 1, 717 N.W.2d 729. When it comes to reasonable suspicion, possible innocent explanations are inherent in the concept. Thus, "an officer is not required to rule out the possibility of innocent behavior." ***Colstad***, 260 Wis. 2d 406, ¶8.

¶19 Here, the indications of intoxicated driving were obvious and classic—bloodshot and glassy eyes and the odor of alcohol. Just as plainly, persons with a blood-alcohol content above the legal limit are frequently able to drive with no apparent impairment, at least so long as nothing unexpected happens that reveals their slowed reflexes or impaired judgment.

¶20 Finally, I note that Wendt attempts to draw a parallel between the facts here and a case where reasonable suspicion was lacking, ***State v. Betow***, 226 Wis. 2d 90, 593 N.W.2d 499 (Ct. App. 1999). In ***Betow***, a panel of judges on this court concluded that there was not reasonable suspicion to extend a traffic stop to determine if a defendant possessed controlled substances where the State relied on the facts that the defendant had a "mushroom picture" on his wallet, that the defendant seemed nervous, and that it was late evening. *See* ***id.*** at 95-98. Those are very different facts; they do not shed light on whether there is reasonable suspicion here.

Conclusion

¶21 For the above reasons, the circuit court's order is reversed, and the cause is remanded for further proceedings.

By the Court.—Order reversed and cause remanded for further proceedings.

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