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DISTRICT II

October 4, 2023

To:

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Circuit Court Judge
Electronic Notice

Monica Paz
Clerk of Circuit Court
Waukesha County Courthouse
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You are hereby notified that the Court has entered the following opinion and order:

2022AP464-CR State of Wisconsin v. Randy L. Paul (L.C. #2019CF578)

Before Gundrum, P.J., Neubauer and Lazar, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Randy L. Paul appeals from a judgment convicting him of attempting to flee or elude an officer and operating a motor vehicle with a prohibited alcohol content as a fourth offense. Paul argues that the circuit court erred in denying his motion to suppress evidence because his Fourth Amendment rights were violated when an officer administered standardized field sobriety tests (FSTs) without a search warrant following Paul's arrest for his attempt to flee. He also argues that the court erred by applying the reasonable suspicion standard. *See, e.g.*, ***State v. Colstad***, 2003 WI App 25, 260 Wis. 2d 406, 659 N.W.2d 394. Based upon our review of the briefs and

the Record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).[1] We reject Paul's arguments and affirm.

Paul was arrested for attempting to flee or elude an officer after he led authorities on a twenty-five-mile car chase. Officer Daniel Barber, who initiated the traffic stop, transported Paul to the police station following his arrest. Based on Paul's failure to successfully perform FSTs administered at the police station and a preliminary breath test showing an illegal alcohol concentration level, Paul was also arrested for operating a motor vehicle while intoxicated (OWI).

The State filed a criminal complaint charging Paul with OWI as a fourth offense and attempting to flee or elude an officer. Paul then moved the circuit court to suppress all evidence obtained after Barber administered the FSTs. As pertinent to this appeal, Paul argued that administering the FSTs without a warrant violated his constitutional rights under the Fourth Amendment.

The circuit court held a hearing at which Barber testified. Barber said that on the night of Paul's arrest, a concerned citizen called dispatch to report a vehicle that "was swerving extremely bad" and "was all over the road." The caller provided the dispatcher with the approximate location, color, make, and license plate number of the swerving vehicle. When Barber saw the vehicle, he attempted to initiate a traffic stop, but the driver of the vehicle did not pull over despite Barber following the vehicle with Barber's emergency lights and siren activated. After a twenty-five-mile car chase involving squads from several jurisdictions and the

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

use of "tire deflation devices" known as "stop sticks[,]" the driver finally pulled over. Paul was identified as the driver.

During the chase, Barber learned that Paul had three prior OWI convictions and was subject to a .02 blood alcohol concentration limit. After arresting Paul, Barber "could smell the odor of intoxicants" on Paul's breath. Barber drove him in a squad car back to the police department, where Barber administered the FSTs referenced above. Paul consented to a preliminary breath test, and the result was a .126 alcohol concentration level.

The circuit court denied Paul's motion to suppress. Relying on ***Colstad***, the court found that "[t]he totality of [the] circumstances provide[d] the reasonable suspicion necessary to administer the [FSTs]" and thus concluded that Paul's Fourth Amendment rights had not been violated. *See* ***id.***, 260 Wis. 2d 406, ¶19. Paul entered a no-contest plea to having a prohibited alcohol content, as a fourth offense, and attempting to flee or elude an officer, and he was convicted. Paul appeals.

Paul argues that the circuit court erred in denying his suppression motion. He asserts that the court erroneously applied ***Colstad***'s reasonable suspicion standard because, in that case, FSTs were conducted prior to an arrest for OWI, but post-arrest cases like his require a warrant under the Fourth Amendment. Notably absent from Paul's argument is any suggestion that the court erred in denying his suppression motion, regardless of the quantum of evidence necessary to request FSTs, because Barber lacked reasonable suspicion. Nor does he refute in his reply brief the State's argument that Barber had reasonable suspicion to request FSTs. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 108–09, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded). We therefore do not review the circuit

court's finding that Barber had reasonable suspicion to administer the FSTs. Instead, we address only Paul's arguments that the Fourth Amendment requires an officer in a post-arrest situation to obtain a warrant before administering FSTs rather than permitting the officer to conduct an investigation based on reasonable suspicion in accordance with Wisconsin precedent. *See, e.g.*, ***Colstad***, 260 Wis. 2d 406, ¶¶19-21.

The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons ... against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause ...." U.S. CONST. amend. IV. A "search" under the Fourth Amendment occurs when the police infringe on an expectation of privacy that society considers reasonable. ***United States v. Jacobsen***, 466 U.S. 109, 113 (1984).

In denying Paul's suppression motion, the circuit court relied on the totality of the evidence presented at the hearing and found that Barber had reasonable suspicion to begin a new investigation to administer the FSTs. As such, the court concluded, administering the FSTs did not violate Paul's Fourth Amendment rights. When reviewing the denial of a motion to suppress evidence, we uphold a circuit court's findings of historical fact unless they are clearly erroneous. *See* ***State v. Vorburger***, 2002 WI 105, ¶32, 255 Wis. 2d 537, 648 N.W.2d 829. We review de novo the circuit court's application of constitutional principles to those facts. *See* ***id.***

Paul relies on the reasoning of ***United States v. Dionisio*** to argue that a warrant is required to administer FSTs, but only *after* a person is in custody. *See* ***id.***, 410 U.S. 1 (1973). In ***Dionisio***, the Supreme Court held that the Fourth Amendment is not implicated when a grand jury witness is compelled to provide a recording of his or her voice because the Fourth Amendment's protections only extend to protect people from being compelled to expose to

governmental authorities things that are "not … exposed to the public at large." ***Dionisio***, 410 U.S. at 4, 14 (citation omitted). Paul extrapolates this holding to argue that actions performed during FSTs are not generally exposed to the public, and that means that FSTs cannot be requested after an arrest absent a warrant. We are unpersuaded by Paul's Fourth Amendment argument.

First of all, Paul points to no binding authority that has held that a warrant is required to administer FSTs when reasonable suspicion exists. Furthermore, Wisconsin courts, in both published and unpublished cases, have never analyzed the administration of FSTs as anything other than an extension of a ***Terry*** stop.[2] *See*, *e.g.*, ***State v. Betow***, 226 Wis. 2d 90, 94–95, 593 N.W.2d 499 (Ct. App. 1999) (holding that an officer may extend a stop briefly to conduct a new investigation and request a driver to perform FSTs when the officer has reasonable suspicion that the driver is impaired); *accord* ***Colstad***, 260 Wis. 2d 406, ¶¶19–21. Thus, consistent with binding precedent, the circuit court did not err in applying the reasonable suspicion standard here.

Secondly, it would be illogical to apply the reasoning of ***Dionisio*** only to post-arrest FSTs. Paul baldly asserts: "the question regarding the inferences to be drawn from a person's *pre*-arrest performance on field tests is different than one in which a person is being compelled to provide evidence *post*-arrest." However, he does not explain why or how the inferences are "different," nor does he provide any binding legal authority in support of this assertion. If we were to interpret ***Dionisio*** to require a warrant to administer FSTs *after* arrest, then it would defy

[2] *See* ***Terry v. Ohio***, 392 U.S. 1 (1968).

logic to apply the less-burdensome reasonable suspicion standard *before* arrest. Thus, by adopting Paul's position, we would effectively be overruling ***Betow***, ***Colstad***, and their progeny, which this court cannot do. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189–90, 560 N.W.2d 246 (1997).

Returning to the facts here in light of this analysis, Barber testified that he smelled the odor of intoxicants on Paul's breath after he arrested Paul for his attempt to flee. This new fact, when combined with knowledge Barber gained leading up to and during the chase, provided reasonable suspicion for Barber to begin a new investigation into the suspected OWI. *See* ***Colstad***, 260 Wis. 2d 406, ¶¶19–21. Contrary to Paul's assertion, the inferences to be drawn from Paul's inability to perform the FSTs successfully—that he was intoxicated—would have been the same had the FSTs been performed at the scene rather than minutes later at the police station.

For the foregoing reasons, we reject Paul's argument that a warrant was required to conduct the FSTs post-arrest and conclude that the circuit court did not err in applying the reasonable suspicion standard of ***Colstad*** and related cases.

Therefore,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals