COURT OF APPEALS DECISION DATED AND FILED

December 20, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2010AP2609-CR

Cir. Ct. No. 2010CF40

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEFFREY POLAK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Jeffrey Polak appeals from a judgment of conviction entered upon his guilty plea to one count of operating a motor vehicle while intoxicated as a sixth offense. He claims that the circuit court erroneously denied his motion to suppress evidence. We disagree and affirm.

BACKGROUND

¶2 South Milwaukee Police Officer Craig Perkowski arrested Polak late in the evening of December 31, 2009, on suspicion of driving a motor vehicle while intoxicated. A blood alcohol test administered within three hours after the arrest disclosed that Polak had a blood alcohol content of .219 percent. The State charged Polak with operating a motor vehicle while intoxicated and operating a motor vehicle with a prohibited blood alcohol content. Polak moved to suppress the evidence against him on the ground that Perkowski conducted an unlawful traffic stop.

¶3 At the suppression hearing, Perkowski testified that on December 31, 2009, he was patrolling in a squad car when he observed a white Chevrolet in front of him traveling northbound on North Chicago Avenue in the city of South Milwaukee. Perkowski noted that he could see a seatbelt strap crossing the shoulder of the Chevrolet's driver but that he could not see a similar strap crossing the shoulder of the front seat passenger. Perkowski thought that the front seat passenger was not wearing a seatbelt, a violation of Wisconsin law. According to Perkowski, he followed the Chevrolet until it reached the intersection of College and North Chicago Avenues. Perkowski testified that he "pulled next to the vehicle" at the intersection. He explained that when he did so he "looked down. [He] observed the passenger, there was no belt." Perkowski therefore stopped the Chevrolet.

¶4 When Perkowski spoke to the occupants of the Chevrolet, they appeared intoxicated. Perkowski arrested the driver, later identified as Polak. Perkowski permitted the passenger, Joseph Hauke, to leave the scene. Perkowski acknowledged that he did not issue Hauke a citation for a seatbelt violation.

¶5 Polak and Hauke both testified at the suppression hearing. Each man told the circuit court that Hauke wore a seatbelt while he was a passenger in Polak's car on December 31, 2009. They also testified that Hauke habitually fastens his seatbelt when he rides in a car.

¶6 The circuit court credited Perkowski's testimony and rejected the testimony of Polak and Hauke. The circuit court concluded that the traffic stop was justified based on Perkowski's reasonable suspicion that a passenger was not wearing a seatbelt as required by Wisconsin law. The circuit court therefore denied the motion to suppress. Polak pled guilty to operating a motor vehicle while intoxicated, and this appeal followed.[1]

DISCUSSION

¶7 A police officer may conduct a traffic stop when the officer "reasonably suspect[s] that a crime or traffic violation has been or will be committed." ***State v. Popke***, 2009 WI 37, ¶23, 317 Wis. 2d 118, 765 N.W.2d 569. The State has the burden of proving that a stop was reasonable. ***State v. Post***, 2007 WI 60, ¶12, 301 Wis. 2d 1, 733 N.W.2d 634. "[W]hether a traffic stop is reasonable is a question of constitutional fact. A question of constitutional fact is a mixed question of law and fact to which we apply a two-step standard of review." ***Id.***, ¶8 (citation omitted). We uphold the circuit court's findings of historical fact unless they are clearly erroneous. ***Id.*** We independently apply the facts found to constitutional principles. ***Id.***

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[1] We may review the circuit court's order denying Polak's suppression motion notwithstanding Polak's guilty plea. *See* WIS. STAT. § 971.31(10) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶8 Polak does not dispute that an officer may reasonably suspect a traffic violation when the officer sees a moving car with a front seat passenger who is not wearing a seatbelt. Wisconsin law provides that all automobiles bought, sold, leased, traded, or transferred in Wisconsin must be equipped with seatbelts, and further provides that no person who is at least eight years old may ride in the front passenger seat of an automobile that must be equipped with seatbelts unless the person is restrained. *See* WIS. STAT. §§ 347.48(1)(b), 347.48(2m)(d).

¶9 Polak argues, however, that the State failed to prove Perkowski's observation of a seatbelt violation. Polak emphasizes that both he and Hauke testified that Hauke wore a seatbelt on the night of the stop. Further, Polak points out that both he and Hauke also testified that Hauke has a habit of fastening his seatbelt. In Polak's view, the circuit court erred by believing Perkowski and by "ignor[ing] the nature of the testimony presented by Mr. Polak and Mr. Hauke."

¶10 The circuit court did not ignore the testimony of Polak and Hauke. Rather, the circuit court deemed those witnesses less credible than Perkowski. "'[I]t is well settled that the weight of the testimony and the credibility of the witnesses are matters peculiarly within the province of the [circuit] court acting as the trier of fact.'" ***State v. Young***, 2009 WI App 22, ¶17, 316 Wis. 2d 114, 762 N.W.2d 736 (citation and one set of brackets omitted). We defer to "the superior opportunity of the [circuit] court to observe the demeanor of witnesses and to gauge the persuasiveness of their testimony." ***Kleinstick v. Daleiden***, 71 Wis. 2d 432, 442, 238 N.W.2d 714 (1976).

¶11 Here, the circuit court explained that Hauke "admitted he was drunk [at the time of the traffic stop,] and a drunk person does not make reliable

observations." Additionally, the circuit court found that Polak was also drunk at the time of the traffic stop because "just an hour later, [he] tested with a .219 blood alcohol level." The circuit court determined that Polak's intoxication undermined his credibility.

¶12 Polak suggests that the circuit court was required to conduct some additional analysis before concluding that the credibility of Polak and Hauke was adversely affected by their intoxication at the time of the traffic stop. We disagree. Wisconsin courts have long recognized that "'[t]he fact that a witness was intoxicated, on or about the time of the happening of the incident he is testifying to, would affect the accuracy and credibility of his testimony.'" *See* ***Chapin v. State***, 78 Wis. 2d 346, 354-55, 254 N.W.2d 286 (1977) (citations omitted). The circuit court could properly conclude that, because Polak and Hauke were intoxicated when they were stopped on December 31, 2009, their observations and recollections were less trustworthy than those of the on-duty police officer who stopped them.

¶13 When making its credibility assessment, the circuit court acknowledged that Perkowski did not issue a citation based on Hauke's failure to wear a seatbelt, but the circuit court did not view that omission as inconsistent with Perkowski's claim that he observed a seatbelt violation. As the circuit court explained, "[p]olice officers don't always issue ever[y] last ticket that they can. It's a lot more paperwork for them. They've got their hands full of other things." The circuit court concluded that Perkowski was credible and that "his story makes sense as a whole." We accept the circuit court's conclusion. "[T]his court will 'not reweigh the evidence or reassess witnesses' credibility.'" ***Young***, 316 Wis. 2d 114, ¶17 (citation omitted).

¶14 We turn to Polak's contention that the circuit court erred by relying on its own knowledge of the geography of South Milwaukee. The circuit court explained that it was "familiar with this stretch," had "actually traveled these streets" and had a "familiarity with the [c]ity." Polak acknowledges that a factfinder, including a circuit court, is entitled to "take into account matters of ... common knowledge and [its] observations and experience in the affairs of life." *See* WIS JI—CRIMINAL 195. Polak asserts, however, that the circuit court exceeded its entitlement, and in support he cites the following circuit court findings:

> maybe we'll call it [a] dog leg there, may not be as sharp dog leg as this diagram reveals, but North Chicago is headed in kind of a north, northwest direction and then it head[s] due north before it hits the intersection with College.
>
> As [Perkowski] came around the dog leg, that's where the road widens enough that there's room for two lanes, and there's a stop light there, and [Polak] did the right thing, [he] pulled over at the stop light, and that gave [Perkowski] the opportunity to pull next to [Polak's car] and look down.

In Polak's view, the circuit court could not properly take judicial notice of the geographical descriptions in these findings. He believes that the circuit court's alleged error warrants relief because "one of the central issues in the motion hearing was whether the police vehicle pulled alongside the Polak vehicle."

¶15 We need not determine whether a circuit court could make findings about the physical layout of a city intersection based on personal knowledge. When we review findings of fact, we "search the record for evidence to support findings reached by the [circuit] court." ***Noble v. Noble***, 2005 WI App 227, ¶15, 287 Wis. 2d 699, 706 N.W.2d 166. Here, the findings that Polak deems objectionable are supported by the physical evidence and testimony. First,

Perkowski testified that he had been a South Milwaukee police officer for nearly two years, that he had lived in the area throughout his entire life, and that he had travelled North Chicago Avenue "too many [times] to count." Second, trial exhibit one, a diagram that Perkowski drew during the suppression hearing, reflects that North Chicago Avenue runs in a north-south direction. Third, Perkowski testified that "at College, North Chicago goes into two lanes." Fourth, Polak himself acknowledged that traffic at the intersection of North Chicago and College Avenues is controlled by a traffic light. The evidence fully supported the circuit court's findings regarding the intersection of North Chicago and College Avenues.

¶16 In sum, the circuit court properly resolved the issues at the suppression hearing, giving weight to the testimony that the circuit court deemed credible. We affirm.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.