COURT OF APPEALS
DECISION
DATED AND FILED

January 12, 2012

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. 2011AP1917-CR **Cir. Ct. No. 2010CT168**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

HEATHER M. KOLMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Grant County: ROBERT P. VANDEHEY, Judge. *Affirmed*.

¶1 BLANCHARD, J.[1] Heather Kolman appeals a judgment of conviction for operating a motor vehicle while intoxicated, second offense, in

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

violation of WIS. STAT. § 346.63(1)(a). Kolman contends that the circuit court erred in denying her motion to suppress all evidence obtained after the state trooper who stopped her took the following two actions during their initial encounter following a traffic stop, while Kolman remained seated in the driver's seat of her vehicle: (1) asking her to recite the alphabet, and then (2) subjecting her to a modified, "mini" horizontal gaze nystagmus (HGN) test. She does not challenge the basis for the traffic stop, nor does she challenge the trooper's conduct after those two actions. Instead, she argues that the two actions illegally expanded the scope of a detention that began lawfully.

¶2 This court concludes for the following reasons, based on the totality of the circumstances, that the trooper's first request, that Kolman recite the alphabet, reasonably extended the scope of the detention, and that once Kolman attempted to recite the alphabet in the manner that she did, the trooper had reasonable suspicion of intoxicated driving justifying the trooper's subsequent actions, including conducting the "mini" HGN test.[2] Accordingly, the circuit court is affirmed.

BACKGROUND

¶3 The only witness at the suppression hearing was the trooper who stopped Kolman, and the controlling facts are not in dispute. The trooper used his flashing lights to stop a vehicle Kolman was driving at approximately 11:20 p.m. The trooper stopped the vehicle after noticing that, when the vehicle braked, the

[2] Thus, this court does not need to address whether the officer had reasonable suspicion of intoxicated driving *before* Kolman attempted to recite the alphabet, or whether the "mini" HGN test constituted a reasonable expansion of the detention without reasonable suspicion of intoxicated driving.

high, center-mounted brake light did not operate. The trooper did not notice any erratic driving.

¶4 Upon making contact with Kolman, as she sat in the stopped vehicle, the trooper noted that she had "bloodshot and glassy eyes." In the trooper's experience, bloodshot and glassy eyes can indicate alcohol consumption, but other factors may create that condition. Separately, the trooper testified, "There was an overwhelming odor of cigarette smoke coming from the vehicle because she had just lit up a cigarette." In the trooper's experience, it is "not uncommon for someone to try to cover the odor of intoxicants with [a] cigarette[]."

¶5 During this initial encounter, Kolman voluntarily produced her driver's license, and perhaps also her proof of insurance, without incident. She did not act "confused" or "discombobulated" (in the words of the questioning attorney). The trooper asked Kolman "if she was drinking." She replied no.

¶6 The focus of this appeal is what occurred next. The trooper asked Kolman "to say her ABC's." The circuit court found that at this time Kolman was still seated in the driver's seat of her vehicle; the trooper had not asked her to exit her vehicle. The trooper testified that he had at least two goals in asking Kolman to recite the alphabet: (1) to attempt to detect impairment, and (2) to give the trooper an additional opportunity to see if he could smell the odor of intoxicants on her breath.

¶7 In response to this request, Kolman attempted to recite the alphabet. According to the trooper she "slurr[ed] letters together, she missed some letters …. [O]verall [she] had a hard time saying her ABC's." On cross-examination, the trooper elaborated that Kolman had "extreme difficulty saying the ABC's," "made

numerous mistakes throughout the entire alphabet," and "was pausing while reciting [letters]."

¶8 The trooper then briefly administered, in the characterization of the circuit court, "a modified[,] mini horizontal gaze nystagmus test" for evaluating intoxication, which was a "mini" test that "didn't take very long." The trooper testified that Kolman remained seated in her vehicle during the "mini" HGN test.[3]

¶9 The trooper then returned to his vehicle. The court found that the total elapsed time from the moment the trooper encountered Kolman to the time he went back to his vehicle was about two to three minutes, or perhaps slightly longer than that.

¶10 Back at his vehicle, the trooper obtained Kolman's driving history, and prepared the citation for the defective brake light.

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[3] The trooper's testimony and the circuit court's findings are not detailed as to what the "mini" HGN test precisely entailed. The trooper testified that it was "much different" from the "actual" HGN test that is part of the standard field sobriety test battery, and implied that one difference is that it was shorter.

In a standardized HGN conducted as part of a field sobriety test, the subject, typically standing on a roadside, is instructed to follow an officer's pen with his or her eyes and the officer observes the subject's pupils for involuntary bouncing or jerkiness (nystagmus), indicating impairment. Officers testify to the presence or absence of smooth pursuit in both the left and right pupils; possible nystagmus at maximum deviation of both the left and right pupils; and possible onset of nystagmus prior to forty-five degrees in both the left and right pupils. *See*, *e.g.*, ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 298, 603 N.W.2d 541 (1999).

Here, the unrebutted testimony of the trooper and the uncontested findings of the circuit court appear to establish that the trooper asked Kolman, while she remained seated in the driver's seat and he stood or in some manner crouched next to the driver's side door of her vehicle, briefly to follow his pen with her eyes while he moved it and watched for smooth pursuit and nystagmus. The trooper gave ambiguous testimony as to whether, in fact, he noted any clues of intoxication during this "mini" HGN test, and the circuit court made no factual finding on this point.

¶11 This concludes the facts most relevant to this appeal, but this court adds the following only for general context. The trooper returned to Kolman's vehicle and asked her to step out and walk back to his vehicle. She complied with this request, and after the two reached his vehicle, the trooper asked her again to recite the alphabet. At this time, the trooper reported smelling "the strong odor of intoxicants coming from her."

¶12 In denying the suppression motion, the circuit court concluded that the steps that the trooper took during his initial encounter with Kolman did not unlawfully prolong her temporary seizure, in part because it was "simply an effort to determine in a relatively quick and unintrusive manner whether or not one possible cause of bloodshot and glassy eyes [was] the consumption of intoxicants," and it took a "limited time," with "very limited intrusion."

DISCUSSION

¶13 As suggested above, no findings of fact are at issue. This court reviews de novo, as a question of law, whether the undisputed facts satisfy the constitutional requirement of reasonableness for purposes of the Fourth Amendment. ***State v. Guzy***, 139 Wis. 2d 663, 672, 407 N.W.2d 548 (1987).

¶14 Turning to the substantive legal standards, under the Fourth Amendment, the seizure of a person is unlawful if it is not "reasonable." ***Whren v. United States***, 517 U.S. 806, 809-10 (1996). To determine whether a search or seizure is "reasonable," courts first examine whether the initial interference with an individual's liberty was justified. ***Terry v. Ohio***, 392 U.S. 1, 19-20 (1968). If not, seizure was not reasonable. ***Id.*** If the initial interference was justified, this court then determines whether subsequent police conduct was "reasonably related"

in scope to the circumstances that justified the initial interference. ***Id.***; ***State v. Arias***, 2008 WI 84, ¶30, 311 Wis. 2d 358, 752 N.W.2d 748.

¶15 Most relevant here, and as discussed further below, a lawful seizure "becomes unreasonable when the incremental liberty intrusion resulting from the investigation supersedes the public interest served by the investigation." ***Arias***, 311 Wis. 2d 358, ¶38 (citing ***Pennsylvania v. Mimms***, 434 U.S. 106, 109 (1977)). Thus, when analyzing the reasonableness of police actions extending a lawful traffic stop, courts are to examine, under the totality of circumstances: (1) the public interest served by the action taken; (2) the degree to which the continued seizure advances the public interest; and (3) the severity of the resulting interference with the suspect's liberty interest. ***Id.***, ¶39 (analyzing reasonableness of 78-second dog sniff during traffic stop).[4]

¶16 As stated above, Kolman concedes that the initial traffic stop was justified, because the trooper, at the least, reasonably suspected that Kolman had committed a non-criminal traffic violation. Further, Kolman does not argue that, *after* she performed poorly in reciting the alphabet and the trooper conducted the "mini" HGN test, the trooper thereafter lacked the requisite levels of suspicion and proof, at each stage, to administer the standard field sobriety tests and a preliminary breath test and, ultimately, to place her under arrest.

[4] This three-part test is an application of the rationale upon which rests the seminal case, ***Terry v. Ohio***, 392 U.S. 1, 20-21 (1968). More specifically, for this test, ***State v. Arias***, 2008 WI 84, ¶39, 311 Wis. 2d 358, 752 N.W.2d 748, cites ***State v. Griffith***, 2000 WI 72, ¶37, 236 Wis. 2d 48, 613 N.W.2d 72, which in turn cites ***Brown v. Texas***, 443 U.S. 47, 50 (1979), which in turn cites ***United States v. Brignoni-Ponce***, 422 U.S. 873, 878-83 (1975), which rests on the premise of ***Terry***, as explained in ***Brignoni-Ponce***, that "the reasonableness" of seizures of persons "depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." ***Brignoni-Ponce***, 422 U.S. at 878.

¶17 Kolman exclusively argues that the trooper unreasonably expanded the traffic stop when he asked her to recite the alphabet and performed the "mini" HGN test.[5] Kolman asserts that in order to expand the scope of the investigation justifying detention from a non-criminal traffic infraction investigation to an OWI investigation, the trooper had to possess reasonable suspicion of an OWI-type offense.

¶18 For support, Kolman cites ***State v. Betow***, 226 Wis. 2d 90, 593 N.W.2d 499 (Ct. App. 1999), and specifically the following language: "Once a justifiable stop is made—as is the case here—the scope of the officer's inquiry, *or the line of questioning*, may be broadened beyond the purpose for which the person was stopped *only* if additional suspicious factors come to the officer's attention ...." ***Id.*** at 94 (footnote omitted; emphasis added). Kolman argues from this passage that, in order to expand the scope of detention, the trooper must have been aware of facts that objectively justified reasonable suspicion that Kolman's ability to drive was impaired as a result of alcohol consumption.

¶19 In making this argument, Kolman asks this court to apply an incorrect standard for determining whether an officer's actions exceed the scope of the initial detention. The supreme court explained in ***Arias***, which Kolman does not address, that the "broad dicta" in ***Betow***, on which Kolman relies, "misstates the manner in which courts are to evaluate the reasonableness of the continuation

[5] For the first time on appeal, Kolman clearly adds to her challenge the trooper's decision to ask her whether she had been drinking, in addition to his actions in asking her to recite the alphabet and performing the "mini" HGN test. That is, she now challenges a course of conduct that included not only, in her words, "a small battery of improvised field sobriety tests," but also "questioning whether she had been drinking." For reasons that will be clear from the discussion in the body of this opinion, the brief, non-intrusive inquiry as to whether Kolman had been drinking does not change this court's analysis.

of a seizure that was lawful at its inception." ***Arias***, 311 Wis. 2d 358, ¶45. Instead, this court must examine whether the "incremental liberty intrusion" that resulted from the investigation was unreasonable. ***Id.***, ¶38. As stated above, a seizure is unreasonable if the incremental liberty intrusion to the individual from the police investigation "supersedes the public interest served by the investigation." ***Id.***

¶20 This court focuses first on the trooper's request that Kolman recite the alphabet, while she remained seated in her vehicle. The question is whether the trooper acted unreasonably in making this request and detaining Kolman for the additional length of time it took.

¶21 As stated above, this calls for application of the three-part test, derived from ***Terry***'s interpretation of "reasonable," and restated in authority that includes ***Arias***, under which courts examine the totality of circumstances to determine: (1) the public interest served by the action taken; (2) the degree to which the continued seizure advances the public interest; and (3) the severity of the resulting interference with the citizen's liberty interest. ***Id.***, ¶39. This court concludes that, under the totality of the circumstances here, the trooper's request that Kolman recite the alphabet did not render the stop unreasonable.

¶22 First addressing the public interest served by the trooper's request that Kolman recite the alphabet, the interest is to detect and thereby prevent impaired persons from operating vehicles on Wisconsin's roadways. While the facts possessed by the trooper at the time of this request may have fallen short of reasonable suspicion of intoxicated driving, the trooper had at least some articulable reasons to believe that Kolman might be intoxicated, including the trooper's observation of Kolman's glassy, bloodshot eyes and her apparent

lighting of a cigarette as she was being pulled over, which could be reasonably viewed as at least a possible attempt to cover up the smell of ingested alcohol.

¶23 Turning to the degree to which the continued seizure caused by the request to recite the alphabet advanced this public interest, the facts of this case illustrate the utility of this brief assessment conducted in this manner. An intoxicated Kolman was able to interact in a seemingly unimpaired manner with the trooper, until her significant difficulties in attempting to recite the alphabet revealed strong common-sense signs of impairment. In addition, as the trooper testified, it was also possible (although it did not unfold this way) that Kolman, in attempting to recite the alphabet, might expel an odor of ingested intoxicants.

¶24 Finally, the severity of the interference with Kolman's liberty interest resulting from this request was minimal. Subtracting the time the trooper spent otherwise interacting with Kolman during their initial encounter, the request could not have extended the stop by more than a minute or so, and did not require her even to leave the driver's seat. Merely asking a suspect still seated in her car to recite the alphabet one time, without more, is a minimally intrusive means of attempting to quickly confirm or dispel a belief that the suspect might be intoxicated. Kolman apparently immediately attempted to comply with the request, and the record reflects no suggestion of trickery, intimidation, or badgering on the part of the trooper in making this request.

¶25 This court therefore concludes, using the supreme court decision in ***Arias*** as its primary authority, that the trooper's apparently diligent and speedy attempt to confirm or dispel the suspicion of impaired driving raised by Kolman's bloodshot and glassy eyes and lighting of a cigarette, by asking Kolman to recite the alphabet, while still seated in her vehicle, represented an incremental intrusion

on her liberty that is outweighed by the public interest served by the request.[6] The trooper's request was only minimally more intrusive than asking Kolman if she had been drinking, a question that clearly was permissible, under the totality of the circumstances here, in light of the case law cited in this opinion.

¶26 Without benefit of a pinpoint citation and in an underdeveloped argument, Kolman cites ***Knowles v. Iowa***, 525 U.S. 113 (1998), and asserts that ***Knowles*** stands for the proposition that "where a custodial arrest is statutorily authorized for the offense for which a motorist is initially stopped, the officer must nevertheless restrict his investigation to the grounds justifying the stop." Not only does ***Knowles*** not stand for this proposition, *see* ***Knowles***, 525 U.S. at 116-19 (holding that state statute authorizing full-blown search of vehicle and driver

[6] In her challenge to the circuit court's decision, Kolman does not make, much less sufficiently develop for review, a separate argument that the trooper's request that she recite the alphabet under these circumstances should be deemed, in itself, a standard field sobriety test (FST) and that, as a consequence, the trooper was required to have reasonable suspicion of intoxicated driving to make the request. The FSTs are "observational tools," which in their standard forms consist of such tests as the one-legged stand, the walk-and-turn, and the HGN. *See* ***City of West Bend v. Wilkens***, 2005 WI App 36, ¶17, 278 Wis. 2d 643, 693 N.W.2d 324.

Although Kolman makes no reference to it, this court is familiar with the line of authority providing that, as a general matter, an extension of a traffic stop to conduct the standard, road side FSTs requires proof suggesting impairment to the level of reasonable suspicion. *See, e.g.,* ***State v. Colstad***, 2003 WI App 25, ¶¶14, 19-21, 260 Wis. 2d 406, 659 N.W.2d 394 (concluding that mild odor of intoxicants which officer smelled after initial stop for inattentive driving, coupled with other information already acquired, constituted reasonable suspicion of driving under the influence, justifying extension of stop to conduct field sobriety tests).

However, on appeal Kolman argues exclusively that *any* actions by the trooper that prolonged the stop or shifted its focus from investigation and resolution of the non-criminal equipment defect to an OWI investigation had to be justified by reasonable suspicion of an OWI-type offense. It is that argument that this court rejects. To repeat, Kolman does not argue that an officer must have reasonable suspicion to request a recitation of the alphabet in the circumstances that occurred here on the grounds that such a request constitutes an FST. If Kolman intended to suggest this potential FST-related argument, she failed even to begin to develop it. This court declines to develop the argument in her place, whatever its potential merits or weaknesses. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

pursuant to the mere issuance of a traffic citation, creating a "search incident to citation" rule, violated Fourth Amendment), but in decisions since ***Knowles***, the United States Supreme Court has stated the opposite.

¶27 In ***Muehler v. Mena***, 544 U.S. 93, 95-97 (2005), the Court approved wide-ranging questioning during a police detention. Although ***Muehler*** was not a traffic-stop case, in ***Arizona v. Johnson***, 555 U.S. 323, 333 (2009), the Court removed all doubt that ***Muehler***'s reasoning applies to traffic stops, by holding that an officer does not convert a traffic stop into an unlawful seizure by making brief inquiries into matters unrelated to the justification for the stop.[7]

¶28 The balance might well tip in the other direction in a situation like this, based on the totality of the circumstances, if an officer used even one assessment for impairment that is less than diligent, swift, and professional. Examples might include requiring a motorist to get out of his or her vehicle, persisting in an inquiry or assessment for more than a minute or two, or using tactics involving trickery, intimidation, or badgering. *See* ***Arias***, 311 Wis. 2d 358, ¶40 (noting that the dog sniff at issue was done in a "diligent[]," "quick[]," and "systematic and efficient" manner). To repeat, the record in this case, and the facts found by the circuit court not challenged by Kolman, reveal only diligence, speed, and efficiency.

[7] In addition, Kolman relies on ***United States v. Johnson***, 58 F.3d 356, 357–58 (8th Cir. 1995), but this reliance is puzzling. On the page of ***Johnson*** cited by Kolman, the court states that, if during the course of a traffic stop or as the result of reasonable inquiries initiated by the officer, "the circumstances give rise to suspicions unrelated to the traffic offense, an officer may broaden [the officer's] inquiry and satisfy those suspicions." Here, Kolman's bloodshot and glassy eyes and lighting of a cigarette as she was being pulled over gave rise to "suspicions unrelated to" the non-functioning brake light, resulting in the slightly broadened assessments at issue, which were aimed at swiftly attempting to confirm or dispel the suspicion of impaired driving.

¶29 Finally, consistent with the above discussion, this court concludes that, once the trooper heard and observed Kolman as she gave a distinctly poor recitation of the alphabet, the totality of the circumstances was sufficient for the trooper to form a reasonable suspicion of intoxicated driving that justified the trooper conducting the "mini" HGN test. By the time he conducted the "mini" HGN test, the trooper had observed her bloodshot and glassy eyes, the seemingly freshly lit cigarette, and the feeble alphabet recitation, which together constituted reasonable suspicion. *See* ***State v. Colstad***, 2003 WI App 25, ¶¶14, 19-21, 260 Wis. 2d 406, 659 N.W.2d 394. This resolves against Kolman her challenge to the "mini" HGN test, because whether or not the trooper would have been justified in expanding the detention for this HGN test *without* reasonable suspicion, he possessed reasonable suspicion by the time he decided to conduct the test. Thus, assuming without deciding that the "mini" HGN test constituted a field sobriety test requiring reasonable suspicion, it was objectively justified based on the totality of the information available to the trooper.

CONCLUSION

¶30 For these reasons, this court affirms the circuit court's decision.

By the Court.—Judgment affirmed.

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