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DISTRICT IV

September 11, 2017

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You are hereby notified that the Court has entered the following opinion and order:

2016AP2038-CR State of Wisconsin v. Richard Lee Olmstead, Jr.
(L.C. #2014CF39)

Before Lundsten, P.J., Sherman and Kloppenburg, 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).

Richard Lee Olmstead, Jr., appeals a judgment of conviction for operating a motor vehicle with a prohibited alcohol concentration as a fifth offense. He contends that the circuit court erroneously denied his motion to suppress evidence obtained during a traffic stop. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate

for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).[1] We reject Olmstead's arguments and affirm.

Darlington Police Sergeant Antonio Ruesga stopped Olmstead's vehicle because Ruesga observed a pedestrian in the street near the vehicle and believed that the vehicle had failed to yield. When speaking to Olmstead, Sergeant Ruesga detected a strong odor of intoxicants and observed that Olmstead's eyes were bloodshot and glossy. Olmstead's speech was also slurred. Upon questioning, Olmstead stated that he had consumed three beers. Olmstead failed a field sobriety test and was arrested for operating while intoxicated. A search of Olmstead's car yielded three cans of beer as well as synthetic marijuana, a pipe, and rolling papers. Olmstead later admitted consuming five beers and also admitted that the marijuana and paraphernalia belonged to him.

Olmstead filed a motion to suppress all evidence obtained as a result of the traffic stop, arguing that Sergeant Ruesga did not have reasonable suspicion that Olmstead had failed to yield to a pedestrian. The motion was based on the fact that, on the day after the stop, the pedestrian at issue informed Sergeant Ruesga that Olmstead had not failed to yield to her. Instead, Olmstead had asked her for directions, which is why she was in the street so close to the vehicle when Sergeant Ruesga observed the vehicle driving away. After a hearing at which Sergeant Ruesga was the only witness, the circuit court denied the motion to suppress. Olmstead then pleaded no contest to operating with a prohibited alcohol concentration (fifth offense). He now appeals his conviction and the denial of his motion to suppress.

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

Whether a defendant's constitutional rights were violated is a question of constitutional fact. ***State v. Houghton***, 2015 WI 79, ¶18, 364 Wis. 2d 234, 868 N.W.2d 143. Accordingly, we review the circuit court's determinations of historical facts for clear error, and we review de novo the constitutional question of whether these facts are sufficient to give rise to reasonable suspicion. *See* ***id.***

Olmstead's main argument focuses on whether Sergeant Ruesga had reasonable suspicion to make the traffic stop in light of Ruesga's mistake about why the pedestrian was in the street. He argues that Sergeant Ruesga's testimony did not satisfy the State's burden of establishing reasonable suspicion for the investigative stop. *See* ***State v. Post***, 2007 WI 60, ¶12, 301 Wis. 2d 1, 733 N.W.2d 634 (the state bears the burden of establishing that an investigative stop is reasonable). He further argues that Sergeant Ruesga's testimony demonstrates that Ruesga made an objectively unreasonable mistake of fact. *See* ***Illinois v. Rodriguez***, 497 U.S. 177, 185-86 (1990) (a seizure based on an unreasonable mistake of fact violates the Fourth Amendment).

To the extent Olmstead is arguing that the stop was unreasonable because Sergeant Ruesga misinterpreted the situation, we reject the argument. Searches and seizures can be based on mistakes of fact. *See* ***Houghton***, 364 Wis. 2d 234, ¶75. The fact that Sergeant Ruesga's interpretation turned out to be incorrect does not mean that his suspicion of a traffic violation at the time was unreasonable. *See* ***Rodriguez***, 497 U.S. at 185 ("[W]hat is generally demanded of the many factual determinations that must regularly be made by agents of the government … is not that they always be correct, but that they always be reasonable.").

Regarding the question of whether Sergeant Ruesga's testimony was sufficient to establish that Ruesga had reasonable suspicion at the time of the stop, we conclude that it was.

Sergeant Ruesga first observed Olmstead's vehicle when the vehicle was proceeding west away from an intersection. A pedestrian was standing in the street between the vehicle and the sidewalk. The officer could not tell from his vantage point whether the pedestrian was in the crosswalk. Sergeant Ruesga testified that the pedestrian appeared to be 5 feet from the curb, and the car was 7 to 10 feet from her, partly obstructing the opposite lane of travel. Ruesga further testified that it looked to him as if Olmstead's car had swerved to avoid the pedestrian. The officer recognized the pedestrian as a local citizen who had previously complained to police about vehicles that failed to yield the right of way to pedestrians. The pedestrian looked at Sergeant Ruesga "as though waiting for [him] to do something about it." According to Sergeant Ruesga, the pedestrian stared at him and it felt as if her body language was saying, "What are you going to do?" The only reasonable inference from this part of the officer's testimony is that the pedestrian did more than glance at the officer, but instead stared at the officer for at least a short time. These facts supply reasonable suspicion supporting a temporary investigative stop of Olmstead's vehicle.

Olmstead contends that Sergeant Ruesga's subjective interpretation of the pedestrian's body language and demeanor means that Ruesga was acting improperly on a hunch. *See* ***Terry v. Ohio***, 392 U.S. 1, 27 (1968) (the Fourth Amendment requires that a stop be based on "specific reasonable inferences which [the officer] is entitled to draw from the facts in light of his experience" as opposed to an inchoate and unparticularized suspicion or hunch). Olmstead argues that reasonable suspicion could only arise if the pedestrian had objectively said or done something to indicate that Olmstead had failed to yield to her. We disagree. Ruesga explained why the pedestrian's manner after Olmstead drove away added to reasonable suspicion. Indeed, the very fact that the pedestrian looked at the officer for more than a moment suggests she had an

interest in the officer and the most obvious reason for such interest was that something of interest *to the officer* had just occurred.

Olmstead's remaining arguments are likewise without merit.

Olmstead contends that the circuit court clearly erred in its findings of historical fact when it stated that Sergeant Ruesga saw the pedestrian in the crosswalk. This argument goes nowhere because, even if the circuit court's finding was clearly erroneous, it does not affect our conclusion that the officer's testimony, accepted as true by the circuit court, supplies reasonable suspicion. As our discussion above shows, we rely on the officer's testimony indicating that he thought the pedestrian might be in the crosswalk. We do not rely on the circuit court's finding that the pedestrian was in the crosswalk.

Finally, Olmstead identifies two state statutes governing a motorist's duty to yield to pedestrians and argues that the record is not sufficient to support a finding that he violated either statute. This argument was raised for the first time on appeal and its relevance is not clear to us in light of the circuit court's assumption that Sergeant Ruesga was enforcing a city ordinance. We therefore conclude that this argument is forfeited. We also reject Olmstead's apparent proposition that Sergeant Ruesga had to observe each element of the suspected traffic violation before making the traffic stop because that proposition is incorrect. Police have the authority to "freeze the situation" in order to investigate a *possible* violation. *See* ***State v. Begicevic***, 2004 WI App 57, ¶7, 270 Wis. 2d 675, 678 N.W.2d 293 (in situations involving competing inferences it is "the essence of good police work … to freeze the situation" in order to "sort out the ambiguity").

Upon the foregoing reasons,

IT IS ORDERED that the judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

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

Diane M. Fremgen
Clerk of Court of Appeals