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January 30, 2019

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

2018AP1309-CR State of Wisconsin v. Erin A. Holihan (L.C. #2016CM1188)

Before Hagedorn, J.¹

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).

Erin A. Holihan appeals following her conviction for operating a motor vehicle while intoxicated, with a minor child in the vehicle. Based upon our review of the briefs and record,

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version.

we conclude that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm.

On December 3, 2016, around 10:24 p.m., an officer of the West Bend Police Department responded to a reported driving complaint that described a “vehicle swerving all over the road at varying speeds.” The officer observed the reported vehicle travel in excess of the posted speed limit and twice breach its lane of travel. He stopped the vehicle and identified Holihan as its driver. Informed of the complaint and the observed moving violations, Holihan explained that she had been arguing with her son and looking to turn on an interior light. Holihan stated she had not been drinking.

The officer asked Holihan to exit the vehicle and step toward the back of his vehicle so that they could speak away from her son and out of the way of traffic. Holihan acquiesced, and the officer noticed an odor of alcohol when she walked past him. Holihan then admitted to consuming alcohol within the last couple hours. In confirming with Holihan’s son that there had been a verbal argument, the officer observed unopened alcohol in the vehicle. Thereafter, the officer administered field sobriety tests and then a preliminary breath test (PBT) to confirm that her alcohol concentration matched the impairment he suspected after the field sobriety tests. He arrested her after she recorded a blood alcohol concentration of .105.

Holihan was charged with a misdemeanor for operating a motor vehicle while intoxicated (first offense), with a minor child in the vehicle, WIS. STAT. §§ 346.63(1)(a), 346.65(2)(f)1. She moved to suppress evidence garnered through an unlawful traffic stop. The circuit court denied

the motion following an evidentiary hearing. Holihan later pleaded guilty to the charge. We are now asked to return to the suppression motion.²

The Fourth Amendment to the U.S. Constitution and Article 1, § 11 of the Wisconsin Constitution protect individuals against unreasonable searches and seizures. Whether evidence should be suppressed because this guarantee was violated is a question of constitutional fact. *State v. Floyd*, 2017 WI 78, ¶11, 377 Wis. 2d 394, 898 N.W.2d 560. We apply the clearly erroneous standard to the circuit court’s findings of historical fact; however, we review de novo the circuit court’s application of constitutional principles to those findings. *Id.*

A law enforcement officer may initiate an investigatory traffic stop if he or she reasonably suspects that an individual has violated or is violating a traffic law. *State v. Hogan*, 2015 WI 76, ¶34, 364 Wis. 2d 167, 868 N.W.2d 124. A justifiable stop may also be extended if the officer becomes aware of additional information that is itself supported by a legal basis for further investigation. *Id.*, ¶35. “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.” *State v. Young*, 212 Wis. 2d 417, 424, 569 N.W.2d 84 (Ct. App. 1997).

² After pleading guilty, Holihan moved for postconviction relief. The circuit court denied the “confusing” motion, noting that it was essentially a mis-titled and undeveloped request for reconsideration of the earlier denial of her suppression motion. Instead of pursuing relief in this manner, Holihan should have directly appealed the judgment of conviction. *See* WIS. STAT. § 971.31(10) (allowing review of an order denying a motion to suppress following entry of a final judgment based on a guilty plea); WIS. STAT. RULE 809.30(2)(h) (stating postconviction motions must precede a notice of appeal *unless* seeking relief on issues previously raised). Despite the procedural irregularity—which expanded the time period for which Holihan could pursue this appeal—we will proceed to the merits of Holihan’s appeal of the judgment of conviction.

Holihan challenges for the first time on appeal that the officer did not have reasonable suspicion to initiate the traffic stop because the reported driving complaint lacked reasonable indicia of reliability due to the caller's anonymity and the absence of corroboration. Notwithstanding her forfeiture of this argument,³ we conclude that the circumstances here—namely, the officer's observation of multiple moving violations while responding to a reported driving complaint—provided a lawful basis for initiating the traffic stop.

Holihan next asserts that even if the stop was initiated with reasonable suspicion, it was unreasonably prolonged as that suspicion lapsed before she was ordered to exit the vehicle. She challenges that the officer had no lawful basis to administer the field sobriety tests or request for her compliance with the PBT. We disagree.

Holihan's removal from the vehicle after she was lawfully stopped raises no constitutional concerns. *Floyd*, 377 Wis. 2d 394, ¶24 (“[O]nce a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get out of the vehicle without violating the Fourth Amendment’s proscription of unreasonable searches and seizures.” (quoting *Pennsylvania v. Mimms*, 434 U.S. 106, 111 n.6 (1977))). Likewise, the officer’s administration of the field sobriety tests was reasonable in light of his observation of an odor of alcohol and Holihan’s confirmation of prior consumption, in conjunction with the reported driving complaint and his observation of her driving. *See, e.g., State v. Colstad*, 2003 WI App 25, ¶¶5, 21, 260 Wis. 2d 406, 659 N.W.2d 394 (mild odor of alcohol, admitted consumption, and suspicious circumstances of pedestrian-involved accident). Finally, after observing clues of intoxication during those tests, the officer had probable cause under WIS.

³ *See State v. Reese*, 2014 WI App 27, ¶14 n.2, 353 Wis. 2d 266, 844 N.W.2d 396 (explaining that this court need not address arguments that are raised for the first time on appeal).

STAT. § 343.303 to request a PBT sample. *Colstad*, 260 Wis. 2d 406, ¶¶23, 25 (results of field sobriety tests in addition to above factors).

In sum, based on the totality of the circumstances as shown in the record, we conclude that the officer had reasonable suspicion or probable cause at each stage of the stop through Holihan's arrest. Accordingly, the suppression motion was properly denied.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

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

Sheila T. Reiff
Clerk of Court of Appeals

