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March 5, 2019

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

2017AP2358-CR State of Wisconsin v. Jose Patricio Cantu, Jr. (L.C. # 2016CF494)

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

Jose Patricio Cantu, Jr. appeals from a judgment entered upon his no-contest plea to operating a motor vehicle while intoxicated as an eighth offense. He challenges the traffic stop as unsupported by reasonable suspicion, and contends that he is entitled to one more day of sentence credit. 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 (2017-18).¹ We conclude that the stop was lawful, but also determine that Cantu is entitled to one extra day of sentence credit. On remand, the judgment shall be modified to reflect Cantu’s entitlement to 184 days of sentence credit. We affirm the judgment as modified.

Cantu was pulled over by a police officer on suspicion of drunk driving. While speaking to Cantu and his passengers through the car window, the officer saw a vodka bottle and beer bottles inside the car. Cantu had bloodshot and glassy eyes, his speech was slurred, and the officer detected a strong odor of intoxicants on Cantu’s breath. The results of Cantu’s blood draw revealed a blood-alcohol concentration of .300 grams per 100 milliliters. Cantu was charged with offenses including operating while intoxicated as an eighth offense. He filed a motion to suppress, alleging that the traffic stop was not supported by reasonable suspicion.

At an evidentiary hearing on the suppression motion, the officer testified that, at around 12:30 a.m., he was on directed alcohol patrol when he saw Cantu make a “rapid lane change” from the far north lanes of traffic. Cantu cut across the entire roadway to enter the left-most lane, from which he turned left onto another street. This attracted the officer’s attention. He followed Cantu and watched him make a “large and looping” right turn onto another street. This right turn took Cantu’s car into the oncoming lane of traffic. According to the officer, “If there would have been southbound traffic [at that point] he would have hit somebody.” Cantu “swerved a few times and hit his brakes several times.” He stopped at an intersection which had neither a traffic light nor a stop sign. The officer also testified about the dash cam video recording of the events

¹ All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

leading up to the traffic stop. The circuit court denied Cantu's suppression motion, finding that the officer's testimony was credible and supported by the evidence, and determining that the facts known to the officer constituted reasonable suspicion.

An officer may lawfully perform a traffic stop where, based on specific and articulable facts, he or she reasonably suspects that criminal activity is afoot. *Terry v. Ohio*, 392 U.S. 1, 21, 30 (1968). The determination of reasonableness is a common sense test based on the totality of the facts and circumstances. *State v. Post*, 2007 WI 60, ¶13, 301 Wis. 2d 1, 733 N.W.2d 634. In reviewing a motion to suppress, we apply a two-step standard of review. *State v. Eason*, 2001 WI 98, ¶9, 245 Wis. 2d 206, 629 N.W.2d 625. We will uphold a circuit court's factual findings unless they are clearly erroneous. *Id.* We decide independently whether those facts violate constitutional principles. *Id.*

We conclude that ample reasonable suspicion justified the traffic stop. The supporting facts include the late hour, Cantu's rapid lane change before his left turn, his looping right turn, his swerving, the tapping of his brakes, and his stopping where there was no traffic control. We do not evaluate each observation in isolation, but as part of a totality. *See State v. Waldner*, 206 Wis. 2d 51, 58, 556 N.W.2d 681 (1996) ("The building blocks of fact accumulate. And as they accumulate, reasonable inferences about the cumulative effect can be drawn. In essence, a point is reached where the sum of the whole is greater than the sum of its individual parts.").

Cantu argues that his driving behaviors were not illegal and that there could have possibly been other, innocent reasons for his unusual driving. He asserts, for example, that a lost or out-of-state driver might switch lanes abruptly before making a turn, or briefly stop at an uncontrolled intersection, and that it is not clear whether there were markings on the road when

he performed his looping right turn. We are not persuaded. Police officers “are not required to rule out the possibility of innocent behavior before initiating a brief stop.” *Id.* at 59. There reaches a point when unusual or suspicious behaviors “coalesce to add up to a reasonable suspicion.” *Id.* at 61. That is what happened here.

At sentencing, with trial counsel in agreement, the court awarded Cantu 183 days of sentence credit. On appeal Cantu seeks one additional day of credit, relying on a recent case which clarified that a defendant “is entitled to a day of sentence credit for each calendar day during which he spent at least part of the day in custody.” *State v. Johnson*, 2018 WI App 2, ¶8, 379 Wis. 2d 684, 906 N.W.2d 704 (2017). The State concedes that Cantu is entitled to one extra day, for a total of 184 days of presentence credit. We remand the case with directions to enter a modified judgment granting Cantu one additional day of credit. We affirm the judgment as modified.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is modified to reflect 184 days of presentence credit.

IT IS FURTHER ORDERED that the judgment as modified is affirmed. *See* 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