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DISTRICT II

July 24, 2019

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

2018AP132-CR State of Wisconsin v. Bradley E. Zika (L.C. #2016CF707)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

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).

Bradley E. Zika appeals from a judgment convicting him of sixth-offense OWI. He alleges that the traffic stop that produced incriminating evidence exceeded its reasonable scope and duration under the Fourth Amendment such that the evidence should be suppressed. 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 affirm.

“In reviewing the circuit court’s determination of a motion to suppress, we accept the court’s findings of historical fact unless clearly erroneous.” *State v. Kilgore*, 2016 WI App 47, ¶20, 370 Wis. 2d 198, 882 N.W.2d 493 (citation omitted).

[W]hen the trial judge acts as the finder of fact ... [it] is the ultimate arbiter of the credibility of the witnesses ... [and] when more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the inference drawn by the trier of fact.

Gehr v. City of Sheboygan, 81 Wis. 2d 117, 122, 260 N.W.2d 30 (1977) (citation omitted).

The following facts are undisputed. Zika was pulled over around midnight for driving at 100 miles per hour—thirty miles an hour over the posted speed limit. When the officers approached Zika, who was alone in the car, he was smoking a cigarette, then lit up another. The officers observed unopened beer cans on the floor of the vehicle, and an open can of a “fruity alcoholic beverage” in the front passenger door. While the primary officer conducted a customary records check, the assisting officer ordered Zika to exit the vehicle and conducted a field sobriety test.² Zika’s records revealed that his driving privileges were restricted to a .02 blood alcohol level due to his prior OWI convictions. The ensuing preliminary breath test (PBT) provided the incriminating evidence underlying Zika’s motion to suppress. The duration of the stop up to the point of the PBT was seven minutes. The officers testified that a traffic stop

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

² Because the traffic stop was lawful, the order to exit the vehicle “is a matter of no constitutional moment.” *State v. Floyd*, 2017 WI 78, ¶24, 377 Wis. 2d 394, 898 N.W.2d 560.

focusing solely on issuing a speeding ticket would take, on average, ten minutes and that the ticket would not have been ready to print by the time they began the OWI investigation. Zika concedes the initial stop of his vehicle was a lawful seizure.

The issue on appeal comprises two parts: whether law enforcement's inquiries unlawfully extended the traffic stop when the officers began the OWI investigation and whether they actually had reasonable suspicion to begin the OWI investigation, as Zika had not exhibited impaired driving. This presents a question of constitutional fact. See *State v. Hogan*, 2015 WI 76, ¶32, 364 Wis. 2d 167, 868 N.W.2d 124. We uphold the circuit court's findings of historical fact unless they are clearly erroneous, then independently apply constitutional principles to those facts. *Id.* It is the appellant's burden on appeal to persuade us that the circuit court erred. See *Seltrecht v. Bremer*, 214 Wis. 2d 110, 125, 571 N.W.2d 686 (Ct. App. 1997). "Generally speaking," a traffic stop's duration is tolerable "so long as the incidents necessary to carry out the purpose of the traffic stop have not been completed, and the officer has not unnecessarily delayed the performance of those incidents." *State v. Floyd*, 2017 WI 78, ¶22, 377 Wis. 2d 394, 898 N.W.2d 560.

The United States Supreme Court has ruled on a similar issue in *Illinois v. Caballes*, 543 U.S. 405 (2005). An Illinois state trooper stopped Caballes for speeding. *Id.* at 406. A second trooper, a member of the state's drug interdiction team soon arrived. *Id.* As the first officer was in the process of writing a speeding ticket, the second walked his narcotics-detecting dog around the stopped vehicle. *Id.* The dog alerted at the trunk, the officers found marijuana, and Caballes was arrested. *Id.* at 406, 408. The incident lasted under ten minutes. *Id.* at 406. The Court held that the dog sniff did not change the character of a traffic stop that was lawful at its inception and otherwise executed in a reasonable manner. *Id.* at 408-09.

Similarly here, the primary officer focused on the speeding ticket and ordinary police procedures while the assisting officer made further contact with Zika. Officers may extend a traffic stop to begin a new investigation when they “become[] aware of additional suspicious factors which are sufficient to give rise to an articulable suspicion that the person has committed or is committing an offense or offenses separate and distinct from the acts that prompted the officer's intervention in the first place.” *State v. Betow*, 226 Wis. 2d 90, 94-95, 593 N.W.2d 499 (Ct. App. 1999). Here, the totality of the circumstances—Zika’s high-speed driving, the time of night, the presence of beer cans on the floor of his car, the open beverage can in the front seat of the vehicle, and his serial cigarette smoking³—provided sufficient suspicion for the officers to extend the traffic stop beyond the issuance of a speeding ticket. The circuit court’s findings as to the length of the stop are not clearly erroneous. We conclude, therefore, that the officers had reasonable suspicion to commence an OWI investigation.

Therefore,

IT IS ORDERED that the judgment of the circuit court is 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

³ Law enforcement officers note that suspects sometimes use smoking materials to mask the smell of alcohol on their breath. *United States v. Moore*, 329 F.3d 399, 401 n.1 (5th Cir. 2003).