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DISTRICT II

November 23, 2022

To:

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Circuit Court Judge
Electronic Notice

Tara Berry
Clerk of Circuit Court
Winnebago County Courthouse
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Dennis M. Melowski
Electronic Notice

Michael C. Sanders
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You are hereby notified that the Court has entered the following opinion and order:

2021AP2204-CR State of Wisconsin v. Andrew H. Zoellick (L.C. #2020CF637)

Before Neubauer, Grogan and Lazar, 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).

Andrew H. Zoellick appeals from a judgment entered after he pled no contest to fifth-offense operating a motor vehicle while under the influence (OWI) with an alcohol fine enhancer, contrary to WIS. STAT. §§ 346.63(1)(a) and 346.65(2)(g)3 (2019-20).[1] Zoellick contends the police officers lacked reasonable suspicion to extend the traffic stop to conduct field sobriety tests, and therefore he argues the circuit court erred in denying his suppression motion. 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. We affirm.

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[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

In October 2020, shortly after 8:00 a.m., a citizen witness called in a complaint about a vehicle that was "all over the road" and provided the vehicle's license plate number. Two officers responded. Officer Nathan Franzke, who was parked in the area for speed enforcement, observed what he believed to be the described vehicle pass by him. Franzke pulled up behind the vehicle to observe it and confirmed that the license plate number matched what the citizen witness had provided. Franzke then observed the vehicle veer over the lane marker without using a signal and drive while straddling between the two lanes before driving through a red light. Thereafter, the officer conducted a traffic stop.

When Franzke approached the vehicle, the driver—later identified as Zoellick—was digging in the back seat, which triggered a concern for officer safety. Franzke instructed Zoellick to stop digging around, and Zoellick complied while pulling a white towel out and covering his face, indicating he did not have a mask for COVID-19.[2] At the time of the stop, the officer was wearing a mask for COVID-19, and it was a very windy day. The officer thought Zoellick's towel use was unusual and noticed that Zoellick would not make eye contact with him. When asked for his driver's license, Zoellick could not produce it and just gave his name to the officer. When asked for his insurance information, Zoellick first produced two expired cards, and when asked for a current insurance card, Zoellick handed the officer his Wisconsin registration form. Zoellick told Franzke that he ran the red light because he was "going to work and was nervous[,]" although he did not clarify why he was nervous. When Franzke asked Zoellick how much he had to drink, Zoellick said he had "none" and volunteered

[2] The World Health Organization declared a global pandemic of coronavirus disease (COVID-19) on March 11, 2020, due to widespread human infection worldwide.

that he attends "double A"[3] meetings. Franzke asked Zoellick a second time if he had been drinking, and Zoellick again denied it.

When a second officer, B. Barnard, arrived on the scene, Franzke discussed the situation with him. While Franzke ran a check on Zoellick's license, Barnard went to talk to Zoellick and asked to smell the multiple water bottles he saw in Zoellick's car. Barnard did not smell alcohol in any of the water bottles. Neither officer smelled alcohol on Zoellick or observed other classic signs of intoxication, except that the second time Franzke approached Zoellick's vehicle, he noticed Zoellick's eyes were glassy.

Franzke discovered from the license check that Zoellick had multiple prior OWI's[4] and was subject to a .02 blood alcohol concentration (BAC) restriction. Because Franzke and Barnard were unsure whether they had enough information to ask Zoellick to perform field sobriety tests, Barnard contacted Police Lieutenant Amy Wagner to confirm. Wagner advised that the officers could conduct field sobriety tests.

While Zoellick was performing one of the field sobriety tests, Franzke noticed a moderate odor of alcohol. Zoellick failed all the field sobriety tests, refused to do a preliminary breath test (PBT), and was subsequently arrested for OWI. A blood test conducted after obtaining a search warrant showed Zoellick's BAC was .319. Zoellick was charged with sixth-offense OWI, and he

[3] We presume "double A" refers to Alcoholics Anonymous.

[4] Although Officer Franzke's suppression hearing testimony establishes that he learned Zoellick had five prior OWIs at some point during the traffic stop, it is not entirely clear at what point he actually learned the exact number.

filed a motion to suppress arguing that the officers lacked reasonable suspicion to extend the traffic stop to conduct the field sobriety tests.

After hearing Franzke's testimony, the circuit court denied the suppression motion, explaining:

> What we have here was a significant complaint with regard to a reckless driver and then someone who went through a red light. That's what starts this. So that's a concern with regard to potential impaired driving. So that's a different category because of the nature of the driving itself that starts this whole process that would give to the objective officer a basis for which to begin to have suspicion here as to what's impairing a driver to the point that they're driving recklessly, that they're going through a red light. Then there's the stop. Then there's the fumbling with regard to getting the insurance card. Then there's the issue with the towel. And the fact that it was windy at the time and the officer mentioning that here, that it was potentially evasive behavior, number one; number two, the fact there was a towel and the wind and the potential of not being able to smell. There was some evidence of glassy eyes, but we've got--
>
> This isn't a case in which the officers-- Because of the 02, which they found early on, this isn't a case in which they're going to expect to necessarily--it's not that they have to find significant impairment with a high alcohol content.
>
> The fact that we've got someone who's been impaired and they're driving it would appear, the fact that there's some potential fumbling, some potential with regard to-- And, again, there's other explanations, sure, with regard to the towel and the fact that there's Covid, but at the same token, it can also go to the other category of it could be evasive behavior.
>
> When you take all that into consideration and then knowing that there's an 02 limit, there doesn't necessarily have to be, again, significant impairment or a strong odor.…
>
> ….
>
> The Court has to look at this from, again, that objective officer standard and not from what we have here is two officers trying to get advice from the supervisor. But the thing is [if] the law is on this issue to not give them those tests, others are in peril.

> You got, again, significant driving issues. They know there's an 02 here and they couldn't smell it. It's a windy night--or windy morning, I'm sorry. And they would like to at least do some fields. And that's reasonable articulable suspicion and the motion to suppress is denied.

When asked to clarify what it meant by "fumbling," the court explained:

> He gave two insurance cards. I shouldn't say he was not physically fumbling, that's correct. But he was not able to produce the insurance cards and had produced two expired insurance cards and then produced documentation that wasn't the correct documentation, that being the registration.
>
> Now, again, is that something in and of itself is enough? No. But as to the totality of the circumstances, that's just another factor.

The circuit court did grant Zoellick's motion collaterally attacking a prior OWI, which made the current arrest a fifth-offense OWI, rather than a sixth-offense OWI. Zoellick entered a no contest plea to fifth-offense OWI, with an alcohol fine enhancer. Zoellick now appeals.

This case involves review of whether evidence was obtained in violation of the Fourth Amendment[5] and, as a result, should have been suppressed. We review the circuit court's decision on a suppression motion under a two-part standard of review. ***State v. Anderson***, 2019 WI 97, ¶19, 389 Wis. 2d 106, 935 N.W.2d 285. The circuit court's findings of fact will be upheld "unless they are clearly erroneous." ***Id.***, ¶20. We apply "constitutional principles to those facts independently of the decisions rendered by the circuit court[.]" ***Id.*** The Fourth Amendment prohibits unreasonable searches and seizures, "and our analysis focuses on what is *reasonable* in light of the particular circumstances." ***State v. Smith***, 2018 WI 2, ¶1, 379 Wis. 2d 86, 905 N.W.2d 353.

[5] U.S. CONST. amend IV.

Here, Zoellick asserts the extension of the stop to conduct field sobriety tests was unreasonable because the police officers lacked reasonable suspicion. We disagree. Reasonable suspicion is "a suspicion grounded in specific, articulable facts and reasonable inferences from those facts, that the individual has committed [or was committing or is about to commit] a crime." ***State v. Waldner***, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996) (alteration in original; quotation marks and citation omitted). "Reasonable suspicion is 'a low bar[.]'" ***State v. Nimmer***, 2022 WI 47, ¶25, 402 Wis. 2d 416, 975 N.W.2d 598 (alteration in original; citation omitted). We look to "'what would a reasonable police officer reasonably suspect in light of his or her training and experience.'" ***State v. Colstad***, 2003 WI App 25, ¶8, 260 Wis. 2d 406, 659 N.W.2d 394 (citation omitted).

The circumstances here involved a citizen-witness report that Zoellick was driving recklessly. Officer Franzke confirmed the erratic driving after he pulled behind Zoellick's car to observe. Franzke suspected that the driving behavior may be related to intoxication, so he asked Zoellick twice whether he had been drinking. Although Zoellick denied having any alcohol, Zoellick engaged in evasive conduct, including avoiding eye contact with the officers and holding a towel over his mouth—an action made more suspicious in light of Zoellick's .02 restriction because even the slightest hint of alcohol could have been indicative of driving with a prohibited alcohol concentration. Zoellick volunteered that he attends Alcoholics Anonymous meetings, and upon a second look, Officer Franzke noticed Zoellick's eyes were glassy.

Significantly, Franzke learned that Zoellick had five prior OWI convictions and was subject to the .02 BAC restriction. Although it is true that the officers did not observe typical

signs of intoxication such as slurred speech, *bloodshot* eyes,[6] or the odor of alcohol—before conducting the field sobriety tests—such factors may not be present when investigating whether an individual subject to a .02 restriction was driving with a prohibited alcohol concentration. *See* ***State v. Blatterman***, 2015 WI 46, ¶68, 362 Wis. 2d 138, 864 N.W.2d 26 (Ziegler, J., concurring) (recognizing that when a driver is subject to the .02 BAC, a driver may "not exhibit any indicia of intoxication or impairment" for the "obvious reason" that only a small amount of alcohol can create a .02 BAC).[7] "[T]he legality of the extension of the traffic stop … turns on the presence of factors which, in the aggregate, amount to reasonable suspicion that [the defendant] committed a crime the investigation of which would be furthered by the defendant's performance of field sobriety tests." ***State v. Hogan***, 2015 WI 76, ¶37, 364 Wis. 2d 167, 868 N.W.2d 124.

This traffic stop did not involve a missing taillight or even speeding, which are common among all drivers. It involved reckless driving of such a substantial degree that it triggered a citizen witness to take the time to get the license plate number and call the police to report the driver. This case involved erratic driving of such a duration that, after that citizen's report, the erratic driving continued long enough for a responding officer to locate and follow Zoellick and personally observe the reckless driving, which included swerving, straddling between lanes, and running a red light. This information, together with the knowledge that Zoellick had multiple prior OWIs and was subject to the .02 BAC, Zoellick's admission that he attended Alcoholics Anonymous meetings, and Zoellick's having engaged in behaviors that a reasonable

[6] Officer Franzke did notice glassy eyes when he approached Zoellick's vehicle a second time.

[7] Besides the fact that a BAC of .02 would not require a large quantity of alcohol, there are numerous methods with which a driver could mask the odor of alcohol, including chewing gum, sucking on a mint or a cough drop, smoking a cigarette, or even using a COVID-19 mask/towel to cover his mouth.

officer could view as attempts to hide intoxication, provided specific articulable facts (or reasonable inferences therefrom) to constitute reasonable suspicion warranting further investigation into whether Zoellick was violating WIS. STAT. § 346.63(1)(b) (operating with a prohibited alcohol concentration (PAC)).

"Field sobriety tests are 'observational tools that law enforcement officers commonly use to assist them in discerning various indicia of intoxication,' comprising 'visual cues' of a [driver's] 'coordination, balance, concentration, speech, ability to follow instructions, mood and general physical condition.'" *See* ***State v. Adell***, 2021 WI App 72, ¶33, 399 Wis. 2d 399, 966 N.W.2d 115 (quoting ***City of West Bend v. Wilkens***, 2005 WI App 36, ¶¶1, 20, 278 Wis. 2d 643, 693 N.W.2d 324). The field sobriety tests could confirm or dispel the officer's suspicion that Zoellick's reckless driving and evasive behaviors arose from him driving in violation of his .02 BAC restriction. *See* ***Adell***, 399 Wis. 2d 399, ¶34. Further, officers are not obligated to rule out innocent explanations when they observe indicia of an intoxicated driver because "'innocent' behavior frequently will provide the basis for a showing of probable cause." ***State v. Tullberg***, 2014 WI 134, ¶35, 359 Wis. 2d 421, 857 N.W.2d 120 (citations, quotation marks, and bracket omitted). The field sobriety tests could just as easily have dispelled the suspicion that Zoellick was violating the PAC statute.

Zoellick makes much of the fact that Officers Franzke's and Barnard's body camera videos[8] show the officers saying that they did not think they had enough information to get Zoellick out of his car to do field sobriety tests and that Lieutenant Wagner purportedly believed

[8] The body camera videos are not in the Record.

that a .02 restriction *alone* provides a sufficient basis to do field sobriety tests. Neither point is persuasive. First, our review is based on a review of the totality of the circumstances under an objective test—whether a reasonable officer with the known information and reasonable inferences from that information would reasonably suspect that Zoellick was driving with a prohibited alcohol concentration of .02. Even if Franzke and Barnard subjectively believed they needed more explicit signs of intoxication (than what they had observed) before they could do field sobriety tests, that is not determinative. Applying an objective, reasonable officer test, we conclude that reasonable suspicion existed to conduct field sobriety tests.

Second, whether Lieutenant Wagner thought that a police officer can conduct field sobriety tests *any* time a traffic stop occurs with a .02-restricted driver is irrelevant to our analysis. This case did not solely involve a .02-restricted driver without any other facts to suggest the driver was breaking the law. Rather, this case involved a .02-restricted driver who drove so recklessly that a citizen witness took the time to get the license plate number and phone police. This case involved a responding officer who also observed Zoellick's continued reckless driving. This case also involved Zoellick engaging in behavior during the traffic stop that constituted suspicious, evasive behavior and a driver with glassy eyes. Thus, the field sobriety tests were conducted based on the totality of the circumstances in the aggregate—not solely based on the single .02 factor.

These officers certainly could have taken additional steps before proceeding with the field sobriety tests. They could have asked Zoellick to step out of the car, for example, particularly since he was digging around in the back seat when the officer approached. *See* ***Smith***, 379 Wis. 2d 86, ¶31 ("'[e]stablishing a face-to-face confrontation diminishes the possibility, otherwise substantial, that the driver can make unobserved movements' which could

threaten the officer's safety" (alteration in original) (quoting ***Pennsylvania v. Mimms***, 434 U.S. 106, 110 (1977)). They could have engaged in further conversation with Zoellick and insisted he produce a current insurance card. They could have told Zoellick that he did not need to worry about COVID-19 and asked him to remove the towel. But, our focus is not about what more *could* have been done, but rather on what was *actually* done and whether those facts satisfy the legal standard. It is not our job to second-guess how an officer could have better conducted a particular investigation.[9] Rather, our function is to review the facts and apply the law under the proper standard of review to ensure that police operate within the confines of our constitutions. ***State v. Reed***, 2018 WI 109, ¶53, 384 Wis. 2d 469, 920 N.W.2d 56 ("'It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.'" (citation omitted)).

We conclude that the circuit court properly denied Zoellick's motion seeking suppression because the totality of the facts demonstrate that the officers had reasonable suspicion to extend the stop to conduct field sobriety tests to investigate whether Zoellick was operating with a prohibited alcohol concentration.

Therefore,

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

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[9] Our supreme court has cautioned courts to recognize that police officers are tasked with making "split-second," on-the-street decisions, often "'in circumstances that are tense, uncertain, and rapidly evolving[.]'" ***State v. Smith***, 2018 WI 2, ¶32 n.18, 379 Wis. 2d 86, 905 N.W.2d 353 (citation omitted).

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

Sheila T. Reiff
Clerk of Court of Appeals