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DISTRICT IV

April 11, 2013

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

2012AP2002-CR

State of Wisconsin v. William G. Habich (L.C. #2011CF142)

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

William Habich appeals a judgment of conviction for operating a motor vehicle under the influence of an intoxicant, fourth offense. Habich contends that the circuit court erred in denying his motion to suppress evidence that he claims resulted from an unlawful investigatory stop and from unlawful field sobriety tests. After reviewing the briefs and record at conference, we

conclude that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).¹ We affirm.

Habich argues that evidence resulting from the investigatory stop of his vehicle should have been suppressed because the officer who stopped his vehicle did not have reasonable suspicion to do so. Nate Jacobsen, a police officer for the Village of McFarland, testified that he stopped Habich's vehicle at approximately 2:00 a.m. on January 24, 2011, after learning that the operator's license of the sole registered owner of vehicle was revoked. Habich argues that this information was insufficient to provide Officer Jacobsen with reasonable suspicion because, immediately prior to stopping Habich's vehicle, Officer Jacobsen "did not verify the vehicle was in fact the same vehicle he had seen earlier in the evening," when he ran the vehicle's plates and determined that the owner's operator's license was revoked. Habich acknowledges that Officer Jacobsen testified:

Q. And is it your testimony today that before you pulled it over you could read the license plate on that car?

A. Yeah. I confirmed that it was the same vehicle that I had observed in the parking lot.

Q. Was that based on your reading of the license plate?

A. Yes.

However, he claims that Officer Jacobsen's testimony is not credible because Jacobsen was not able to specify when he confirmed that the license on Habich's vehicle was the same license number he had run earlier and because Jacobsen pulled the vehicle over very quickly. The circuit court, as fact finder, determines the weight and credibility given to witnesses' testimony.

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

See *O'Connell v. Schrader*, 145 Wis. 2d 554, 557, 427 N.W.2d 152 (Ct. App. 1988). Here, the circuit court clearly found Officer Jacobsen's testimony to be credible.

Habich argues that Officer Jacobsen did not have reasonable suspicion to stop this vehicle because Officer Jacobsen observed two individuals in the car and thus could not reasonably suspect that he was the person driving the vehicle.

In *State v. Newer*, 2007 WI App 236, ¶¶7-8, 306 Wis. 2d 193, 742 N.W.2d 923, we stated an officer's knowledge that a vehicle's owner's license is revoked will support reasonable suspicion for a traffic stop as long as the officer remains unaware of any facts that would suggest that the owner is not driving. If, for example, the officer has knowledge that the driver appears to be much older, much younger, or a different gender than the vehicle's registered owner, reasonable suspicion dissipates. *Id.*, ¶8. Officer Jacobsen testified that prior to stopping Habich's vehicle, he did not observe the driver. Officer Jacobsen was therefore not aware of any facts inconsistent with Habich being the driver. Just because it might also be reasonable to suspect that Habich was not the driver, this does not mean there was not reasonable suspicion that he was the driver. "[R]easonable suspicion is not a requirement of absolute certainty." *Id.*, ¶7. "[S]ufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment." *Id.* (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 346 (1985)).

Habich also challenges the lawfulness of the field sobriety tests he performed. He argues that Officer Jacobsen lacked reasonable suspicion to believe that he was operating his vehicle while intoxicated and thus unlawfully extended the stop to administer field sobriety tests.

An officer may lawfully extend a traffic stop if, during the stop, "the officer discover[s] [additional] information ... which, when combined with information already acquired, provide[s]

reasonable suspicion that [the defendant] was driving while under the influence of an intoxicant.” *State v. Colstad*, 2003 WI App 25, ¶19, 260 Wis. 2d 406, 695 N.W.2d 394. Reasonable suspicion exists when, under the totality of the circumstances, “the facts of the case would warrant a reasonable police officer, in light of his or her training and experience, to suspect that the individual has committed, was committing, or is about to commit a crime.” *State v. Post*, 2007 WI 60, ¶13, 301 Wis. 2d 1, 733 N.W.2d 634.

Officer Jacobsen testified that when he made contact with Habich, he observed that Habich’s eyes appeared bloodshot, Habich’s speech appeared slurred, Habich admitted to having consumed alcohol, and he detected an odor of alcohol emanating from the vehicle’s interior and later from Habich when Habich exited his vehicle.

Habich argues that Officer Jacobsen’s testimony was not credible because his speech did not appear slurred on a video of the stop. However, the circuit court, not this court, determines the weight and credibility given to a witness’s testimony. *See O’Connell*, 145 Wis. 2d at 557. We conclude that here, excluding Officer Jacobsen’s observation that Habich’s speech was slurred, the odor of intoxicants, Habich’s blood shot eyes, Habich’s admission that he had consumed alcohol, and the time of the stop (bar time), were sufficient to give rise to a reasonable suspicion that Habich had enough alcohol to impair his ability to drive. *See Post*, 301 Wis. 2d 1, ¶¶10, 13, 36.

IT IS ORDERED that the judgment appealed is summarily affirmed under WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals