COURT OF APPEALS DECISION DATED AND FILED

May 17, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP1697

Cir. Ct. No. 2005TR760

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

IN THE MATTER OF THE REFUSAL OF MICHAEL R. FOSS:

COUNTY OF DANE,

PLAINTIFF-RESPONDENT,

V.

MICHAEL R. FOSS,

DEFENDANT-APPELLANT.

COUNTY OF DANE,

PLAINTIFF-RESPONDENT,

V.

MICHAEL R. FOSS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: JAMES L. MARTIN, Judge. *Affirmed*.

¶1 BRIDGE, J.[1] Michael R. Foss appeals a judgment convicting him of operating a motor vehicle while intoxicated in violation of a municipal ordinance based on WIS. STAT. § 346.63(1)(a). Foss claims that the circuit court erred in denying his motion to suppress evidence gathered following his stop by a police officer because the officer lacked a proper basis to stop his vehicle. Foss also claims that the evidence at trial was insufficient to convict him. We reject Foss's arguments and affirm his conviction.

BACKGROUND

¶2 On January 3, 2005, at approximately 6:50 p.m., an assistant manager of a Road Ranger service station located at the intersection of I/90 and Highway N in Stoughton contacted 911. The assistant manager told the 911 operator that a man who was exhibiting erratic behavior had just left the service station and was driving a vehicle, and she thought the matter should be checked out by the Sheriff's Department. The assistant manager described a man, later identified as Michael R. Foss. She stated that Foss had asked her several times how much money he owed her, and repeatedly tried to hand her his credit card, in spite of the fact that she told him several times that he had not pumped any gas and did not have any items in his hands or on the counter that he was attempting to purchase. Foss then began talking with a man he appeared to know who had just

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

exited the restroom. Foss asked the assistant manager "am I free to go?" to which she answered yes.

¶3 Foss and his acquaintance left the building. Both men got into a vehicle and Foss drove them away. The assistant manager provided the 911 operator with a description of a black van, its license plate number and its occupants, and told the operator that the van was headed southbound on Highway N.

¶4 The Southeast Precinct of the Dane County Sheriff's Department is located two and one-half miles south of the Road Ranger on Highway N. Dane County Deputy Sheriff James R. Nisius, a twelve-year veteran of the Sheriff's Department, was on duty and received the 911 report from dispatch, including the description of the van, and that the vehicle was registered to an address in Stoughton. Neither the 911 call nor the dispatch report mentioned a suspicion of alcohol. At the time, the deputy was in a patrol car in the precinct parking lot. The deputy saw the van pass by his location at which time he exited the parking lot onto Highway N, following about four to five car lengths behind.

¶5 The deputy followed the van about two- to three-tenths of a mile. He did not believe that the van was speeding, but did notice that the vehicle's right tires drifted over the fog line before correcting and continuing in its lane. About one-tenth of a mile after the fog line drift, the van braked and made a left turn, without signaling, onto the driveway of a residential farm. The driveway was approximately 300 yards long and had the appearance of a road, although there was a dead end sign at the entrance. The residence was not the registered address of the van. The van accelerated to forty to forty-five miles per hour. Upon reaching the residential portion of the property, the van turned right, leaving the

paved portion of the driveway. It then proceeded behind and around a barn. As the van emerged from the back side of the barn, the deputy shined a door-mounted spot light on the van and it came to a stop.

¶6 Foss and the passenger immediately exited the van and moved towards the hood area. As Foss exited, the deputy noticed him take a step backwards to steady himself. The deputy testified that he thought the occupants were going to flee. Exiting his patrol car, the deputy approached the front of the van where Foss and the passenger were attempting to open the hood. The deputy asked Foss if there was a problem and Foss responded that the van was overheating. The deputy did not notice any steam or leaking from the van. The deputy asked if Foss knew who lived on the property. Foss did not.

¶7 The deputy then asked Foss why he pulled around to the back of the barn if his vehicle was overheating and Foss answered in the incomplete sentence: "Because I …." The deputy then asked, "Because you what?" Foss responded, "Because I didn't want to.…" Foss indicated that he had seen the deputy at the police station and knew the deputy was following him. Asked why he came down the driveway, Foss responded, "You know why I came down here." The deputy testified that during this exchange, Foss was swaying back and forth, had bloodshot watery eyes, delayed speech, and the odor of intoxicants. At one point the deputy had to grab Foss by the front of his shirt for fear that he might fall over.

¶8 Foss denied that he had been drinking when questioned by the deputy. Foss refused the deputy's requests to perform field sobriety tests and he refused to cooperate with the deputy stating, "Just go ahead and do what you're going to do." The deputy attempted to ask Foss more questions, but Foss requested a lawyer. The deputy testified that based upon his training and

experience, the dispatch report of unusual behavior at the Road Ranger, Foss's crossing the fog line, failing to signal before making a turn, driving behind a barn off of the paved driveway, his appearance and conduct after exiting the van, and his refusing to submit to field sobriety tests, all led the deputy to believe that Foss was intoxicated. Foss was placed under arrest and transported to the Stoughton Police Department where he refused to submit to an evidentiary chemical test of his breath without reasonable medical excuse.

ANALYSIS

Suppression of Evidence

¶9 When reviewing a circuit court's determination regarding the suppression of evidence, we will uphold the court's findings of fact unless they are against the clear preponderance of the evidence. *See* ***State v. Richardson***, 156 Wis. 2d 128, 137, 456 N.W.2d 830 (1990). However, whether an investigative stop meets statutory and constitutional standards is a question of law which we review de novo. *See* ***State v. Krier***, 165 Wis. 2d 673, 676, 478 N.W.2d 63 (Ct. App. 1991).

¶10 The Fourth Amendment protects "[t]he right of the people … against unreasonable searches and seizures…." U.S. CONST. art. IV. In ***Terry v. Ohio***, 392 U.S. 1, 22 (1968), the United States Supreme Court recognized that although an investigative stop is technically a "seizure" under the Fourth Amendment, a police officer may, under the appropriate circumstances, detain a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest. *See* ***State v. Waldner***, 206 Wis. 2d 51, 54-55, 556 N.W.2d 681 (1996).

¶11 A police officer may stop an individual when, at the time of the stop, he or she possesses specific and articulable facts which would warrant a reasonable belief that criminal activity was afoot. ***Id.*** at 55. The fundamental focus is reasonableness. ***Id.*** An inchoate and unparticularized suspicion or "hunch" will not suffice. ***Id.*** at 56. Rather, reasonable suspicion must be based on specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. ***Id.*** In determining what facts are sufficient to authorize police to stop a person, the court must take the totality of the circumstances into account. ***Richardson***, 156 Wis. 2d at 139. The essential question is whether the action of the law enforcement officer was reasonable under all the facts and circumstances present. ***Waldner***, 206 Wis. 2d at 56.

¶12 The question of what constitutes reasonableness is a common sense test. What would a reasonable police officer reasonably suspect in light of his or her training and experience. ***Id***.

¶13 In this case, the deputy was acting on information from someone he knew to be a reliable witness that the person operating the vehicle was behaving erratically. After observing Foss's vehicle cross over the fog line, the deputy thought it was "possible" that Foss might have been intoxicated or "something [was] going on in the vehicle."[2] Within three-tenths of a mile after the deputy pulled behind him, Foss turned without signaling onto the private driveway of a

[2] Foss contends that because the deputy never observed a traffic violation, there was no basis for making an investigative stop. We disagree. The fact that the deputy did not observe a traffic violation by Foss is irrelevant on these facts. The deputy did not base the stop on an observed violation of a separate traffic law; rather the stop was based upon the deputy's suspicion that criminal activity was afoot.

residence that was not registered to the vehicle. Upon reaching the end of the paved driveway, Foss continued to drive behind and around the back of a barn.

¶14 In determining whether these actions supported a reasonable suspicion that criminal activity was afoot,

> We look to the totality of the facts taken together. 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.

Id. at 58.

¶15 When a police officer observes lawful but suspicious conduct, if a reasonable inference of unlawful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, police officers have the right to temporarily detain the individual for the purpose of inquiry. ***Id.*** at 60. Suspicious activity justifying an investigative stop is "by its very nature … ambiguous, and the principal function of [an] investigative stop is to quickly resolve that ambiguity." ***Id.***

¶16 We agree that Foss's actions after leaving the service station were not, in and of themselves, unlawful. However, they were certainly suspicious, particularly after Foss left the pavement and drove behind and around the barn as the deputy followed. Although some innocent explanation could possibly be hypothesized as the reason for Foss's behavior, a reasonable police officer charged with enforcing the law cannot ignore the reasonable inference that Foss's actions might also stem from unlawful behavior.

¶17 The totality of the facts, beginning with a dispatch report of someone exhibiting erratic behavior and moving through the detour off Highway N and

around and behind a barn while the deputy followed, all add up to a reasonable suspicion that this driver was impaired and very well could have been intoxicated. Confronted with the series of events described above, we conclude that it was entirely reasonable for the deputy to stop Foss's vehicle and make inquiry The essence of good police work under these circumstances was to stop the van in order to maintain the status quo temporarily while obtaining more information. *See **id.*** at 61.[3] We conclude that the circuit court did not err in holding that the deputy had sufficient reason to conduct an investigative stop.

Probable Cause to Arrest

¶18 Foss next argues that the circuit court erred in determining that the deputy had probable cause to arrest him. We accept the circuit court's findings unless clearly erroneous. ***State v. Eckert***, 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996). We decide de novo whether those facts are sufficient to constitute probable cause. *See* ***State v. Babbitt***, 188 Wis. 2d 349, 356, 525 N.W.2d 102 (Ct. App. 1994).

¶19 In determining whether probable cause existed, one must look at the totality of the circumstances and examine whether the deputy's knowledge at the time would have lead a reasonable officer to believe that Foss was operating a motor vehicle while under the influence of an intoxicant. *See **id.*** at 356. Probable

[3] We note that the circuit court found that the deputy was acting in a bona fide community caretaker capacity prior to stopping Foss's van. While we agree the deputy was acting as a community caretaker during the initial response to the dispatch report about Foss's erratic behavior, once the deputy began to accumulate evidence that Foss was intoxicated or otherwise impaired, the deputy ceased functioning as a community caretaker. We deem it unnecessary to discuss the issue further because, as we have noted, the deputy possessed a reasonable suspicion that Foss may have been impaired and the stop was justified on that basis.

cause to arrest does not require proof beyond a reasonable doubt, or even that guilt is more likely than not, but rather it is sufficient that a reasonable officer would conclude based on the information in his possession, that the defendant probably committed the offense. ***Id.*** at 357.

¶20 After stopping the vehicle, the deputy observed several factors that lead to Foss's arrest for driving while intoxicated. First, upon exiting the van, Foss took a step back to steady himself against the van. Next, Foss and the occupant made up an untruthful story about the van overheating even though there was no evidence that the van was experiencing any mechanical difficulties. Further, the deputy observed that Foss had trouble maintaining his balance, had bloodshot and watery eyes, delayed speech, and had the odor of intoxicants. These facts gave the deputy reasonable suspicion to request that Foss perform field sobriety tests. Foss refused the tests. As we have noted, refusal to submit to a request to perform field sobriety tests "is indicative of consciousness of guilt" and may be used as evidence to support probable cause to arrest. ***Id.*** at 359. Given the totality of the circumstances of Foss's behavior, the deputy's observations of Foss's physical state, and Foss's refusal to submit to field sobriety tests, we conclude that there was probable cause to arrest Foss for operation of a motor vehicle while under the influence of an intoxicant.

Sufficiency of Evidence of Conviction

¶21 In order to convict Foss of operating a motor vehicle while intoxicated, the county was required to establish that he had "consumed a sufficient amount of alcohol to cause [him] to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle." *See* WIS JI—CRIMINAL 2668. Municipal ordinance cases, such as this one, "involving

acts which are also made criminal by statute must be proved by clear, satisfactory and convincing evidence." ***City of Milwaukee v. Wilson***, 96 Wis. 2d 11, 22, 291 N.W.2d 452 (1980). Further, "[w]hen more than one inference can be drawn from the credible evidence, the reviewing court must accept the inference drawn by the trier of fact." ***Mentzel v. City of Oshkosh***, 146 Wis. 2d 804, 808, 432 N.W.2d 609 (Ct. App. 1988).

¶22 Foss argues there was insufficient evidence to convict him of operating a motor vehicle while intoxicated. Foss bases his argument on the fact that the deputy did not observe unsafe or impaired driving. However, Foss concedes that the circuit court was properly able to consider evidence of the presence of alcohol based upon the deputy's observance of bloodshot eyes, problems balancing, and the odor of intoxicants. Foss contends that there was no other evidence besides the deputy's observations of Foss's behavior to demonstrate that his ability to drive safely was impaired. We disagree.

¶23 In addition to the deputy's observations of physical evidence of intoxication, Foss's refusals to perform to field sobriety tests or submit to a chemical breath test also are factors that weigh in favor of establishing that Foss was operating a motor vehicle while intoxicated. Evidence of a refusal to submit to mandatory testing has been held admissible in Wisconsin as relevant to the defendant's consciousness of guilt. ***Babbitt***, 188 Wis. 2d at 359; *see also* **supra**, ¶20.

¶24 Foss was read the "Informing the Accused" form and knew the consequences of refusing to submit to the chemical breath test. The parties have stipulated that there was no medical reason why Foss could not take the designated test. Foss cannot now use his refusal to submit to a breath test to demonstrate that

there was insufficient evidence to support his conviction. As our supreme court has previously determined, "[f]airness dictates that a defendant who refuses to take a chemical test should be placed in a position no better than that of a defendant who cooperates with police." ***State v. Schirmang***, 210 Wis. 2d 324, 331-32, 565 N.W.2d 225 (Ct. App. 1997).

¶25 We conclude that based on the physical observations by the deputy, the refusal to submit to field sobriety tests, and the refusal to submit to a chemical breath test, there was clear, satisfactory, and convincing evidence to convict Foss of operating a motor vehicle while intoxicated.

CONCLUSION

¶26 For the reasons discussed above, we affirm the judgment convicting Foss of operating a motor vehicle while under the influence of an intoxicant. *See* WIS. STAT. § 346.63(1)(a).

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.