State v. Heller

2009 | Cited 0 times | Court of Appeals of Wisconsin | December 17, 2009

¶1 John Heller appeals from a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant (OWI), fourth offense, in violation of WIS. STAT.§ 346.63(1)(a) (2007-08). He contends the arresting officer did not have reasonable suspicion to stop his vehicle and therefore the circuit court should have granted his motion to suppress evidence. We conclude the circuit court properly denied the motion. Accordingly, we affirm the judgment of conviction.

BACKGROUND

¶2 Heller was arrested for OWI after Deputy Dwayne Shaw of the Rock County Sheriff's Department stopped his vehicle. Deputy Shaw was the only witness at the hearing on Heller's motion to suppress evidence and testified as follows.

¶3 At approximately 1:00 a.m. on April 12, 2008, Deputy Shaw received a call to investigate a traffic accident at Bubba D's Bar. According to dispatch, an unidentified caller reported that a red S-10 truck, driven by a tall white male with a scruffy beard and wearing a hat, had struck a telephone pole at Bubba D's. Deputy Shaw responded to the call along with Deputy T. Lund. They looked for but did not see any damage to a pole. Deputy Lund observed a vehicle matching dispatch's description in the parking lot of Bubba D's and pointed it out to Deputy Shaw. Deputy Shaw walked toward the edge of the road where the vehicle was by then driving. As the vehicle was coming past him, Deputy Shaw yelled for it to stop. Deputy Shaw was in his uniform and he was "lit up" by the headlights of the approaching vehicle. The deputy could not recall whether the vehicle's windows were open when he yelled. The driver appeared to be slowing down and looked out the passenger side window. To Deputy Shaw, it looked as though the driver was going to stop and talk to whomever was calling. The deputy shone his flashlight in the vehicle window and observed a white male looking at him. The driver, later identified as Heller, had a scruffy beard and was wearing a baseball hat. Once Heller saw the deputy, he "took off." In the deputy's opinion, Heller could see him. The deputy did not see any damage to Heller's vehicle before Heller "took off."

¶4 At that point, Deputies Shaw and Lund left in separate squad cars to follow the vehicle, activating their emergency lights. There was no other traffic and they had the vehicle in view the entire time. After about a mile, the driver pulled into a driveway. The driver exited the vehicle and approached the deputies. Based on Deputy Shaw's observations and the results of field sobriety tests, Deputy Shaw arrested Heller for OWI.

¶5 Heller filed a motion to suppress evidence resulting from the stop. He argued that the deputies did

not have reasonable suspicion for a traffic stop because the anonymous tip was insufficient and there was no evidence of an accident, no property damage, and no suspicious activity. Heller also contended he was free to ignore Deputy Shaw's efforts to make a consensual stop while the deputy was standing at the road edge.

¶6 The circuit court denied the motion to suppress. The court reasoned that Heller could have viewed Deputy Shaw's initial effort to flag him down as a consensual stop. However, Heller's failure to stop then and continuing to drive a mile after the officers activated their emergency lights provided the requisite reasonable suspicion to stop the vehicle.

DISCUSSION

¶7 On appeal Heller renews his contention that Deputy Shaw did not have the requisite reasonable suspicion to stop his vehicle.

¶8 The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures, and an investigative stop is a seizure within the meaning of the Fourth Amendment. State v. Post, 2007 WI 160, ¶10, 301 Wis. 2d 1, 733 N.W.2d 634. In order to be lawful, an investigative detention must be supported by a reasonable suspicion, grounded in specific articulable facts and reasonable inferences from those facts, that an individual is or was violating the law. State v. Colstad, 2003 WI App 25, ¶8, 260 Wis. 2d 406, 659 N.W.2d 394. The question of what constitutes reasonable suspicion is a common sense test: Under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience? Id.

¶9 In reviewing the circuit court's determination, we accept the circuit court's findings of historical fact unless they are clearly erroneous, and we review de novo the application of those facts to the constitutional standard. See Post, 301 Wis. 2d 1, ¶8. When a court sitting as fact-finder does not make an express finding but it is necessarily implicit in the court's decision, we accept that implicit finding unless it is clearly erroneous. Town of Avon v. Oliver, 2002 WI App 97, ¶23, 253 Wis. 2d 647, 644 N.W.2d 260.

¶10 Heller contends that an uncorroborated anonymous tip does not create reasonable suspicion, citing State v. Rutzinski, 2001 WI 22, 241 Wis. 2d 729, 623 N.W.2d 516, and related case law. It is true that an informant's tip must contain sufficient indicia of reliability in order to be sufficient to warrant an investigative stop. Id., ¶17. It is also true that the information provided by the anonymous caller here did not contain information that would expose the informant to being identified, as did the anonymous tip in Rutzinski; and we will assume it did not contain information indicating the base of knowledge of the informant. See id., ¶32-33. However, in Rutzinski the issue was whether the anonymous tip alone was sufficient to constitute reasonable suspicion. Rutzinski and the other cases cited by Heller do not hold that a tip that is not sufficient by itself to constitute reasonable suspicion may not, in conjunction with other circumstances, constitute reasonable suspicion.

¶11 In this case, after the officers received the information from dispatch provided by the anonymous caller--that a red S-10 truck driven by a tall white male with a scruffy beard, wearing a hat, had hit a telephone pole at Bubba D's Bar--the officers arrived at the bar and saw a vehicle matching that description leaving the parking lot, and Deputy Shaw saw that the driver matched that description.

¶12 In addition, according to Deputy Shaw's testimony, the driver was slowing down, saw him--an officer in uniform standing on the edge of the road--and "took off." Deputy Shaw also answered "correct" to the question: "and [after the driver looked at Deputy Shaw] that's when he sped up and left you said." Heller first asserts that it is not clear from the record that he understood the officer wanted him to stop. However, Deputy Shaw testified that Heller saw him, and the deputy's testimony, which the court implicitly credited, provides a reasonable basis for the deputy's belief that Heller saw him: the deputy was standing on the edge of the road as the vehicle approached him, he was lit by the vehicle's headlights, he shone a flashlight into the vehicle, and the driver looked at him. The deputy's testimony also provides a reasonable basis for concluding that Heller heard him yell and understood that he wanted him to stop. Although Deputy Shaw testified he did not know if the vehicle's window was up or down, he also testified that the vehicle slowed down after he yelled, the driver looked out the passenger side window, and then "took off" when the driver saw him, a uniformed police officer. Based on these observations, which the court implicitly credited, a reasonable officer could conclude, as Deputy Shaw testified he did, that the driver did hear him yell and slowed down to talk to him.

¶13 Heller also argues that, even if the evidence shows he understood that Deputy Shaw was attempting to stop him at that time, he had the right to continue on and the fact that he did cannot contribute to reasonable suspicion. According to Heller, Deputy Shaw's conduct beside the road did not constitute the "show of authority" required to seize a person within the Fourth Amendment and therefore he was not obligated to cooperate with the deputy. See California v. Hodari D., 499 U.S. 621, 627-28 (1991) (A person has been seized by means of a "show of authority" only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.); see also Florida v. Royer, 460 U.S. 491, 497-98 (1983) (citations omitted) (When an officer, without reasonable suspicion or probable cause, approaches an individual, the individual has a right to ignore the police and go about his business, and any refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure.). Although Heller acknowledges that evading the police may in itself constitute reasonable suspicion, see State v. Amos, 220 Wis. 2d 793, 801, 584 N.W.2d 170 (Ct. App. 1998), he asserts the evidence does not show that he was doing that. Rather, he was simply exercising his right to go on his way and not cooperate.

¶14 For purposes of argument we accept Heller's contention that he was not seized when Deputy Shaw was trying to get him to stop as he stood beside the road and that he had the right not to stop at that time. However, Deputy Shaw's testimony was that Heller "took off" or "sped up" when he saw him. This could provide the basis for a reasonable officer to believe that Heller was attempting to get

away from him, a police officer, not simply to go on about his business. But we acknowledge that this testimony is not free from ambiguity: the testimony might also be understood to mean that Deputy Shaw saw the vehicle go back to the speed it had been traveling before it slowed down upon hearing a call from someone, and, according to the deputy's testimony, that prior speed was only a "little bit" faster. The circuit court did not make any findings on whether a reasonable officer could have viewed Heller's conduct immediately after seeing the deputy as attempting to get away from the police rather than simply going about his business; and it is difficult to tell from the court's analysis which, if any, finding on this point is implicit in the court's ultimate conclusion.

¶15 However, even if we assume a finding that Heller's conduct at that point in time could not reasonably be viewed as evasive by Deputy Shaw, we conclude that Heller's subsequent conduct could reasonably be viewed as evasive, as the circuit court implicitly found. The circuit court credited the deputy's testimony that, after Heller did not stop for Deputy Shaw, both deputies followed him for one mile with their emergency lights activated before he pulled into a driveway. In addition, it is undisputed there was no other traffic, creating the reasonable inference, which the court implicitly found, that Heller was aware of the squad cars' emergency lights and aware they intended him to stop.

¶16 We may consider Heller's conduct after the officers activated their emergency lights and followed him until he stopped. See State v. Powers, 2004 WI App. 143, ¶8, 275 Wis. 2d 456, 685 N.W.2d 869 (Because a seizure does not occur until a person yields to an officer's show of authority, we may consider all the circumstances from the initial tip until the person stops after an officer makes a show of authority.). This evasive conduct, the anonymous tip reporting a person hitting a telephone pole at a bar, and the matching vehicle and driver descriptions are together sufficient to constitute reasonable suspicion that Heller was driving while intoxicated.

¶17 We conclude the circuit court properly denied Heller's motion to suppress evidence. Accordingly, we affirm the judgment of conviction.

By the Court.--Judgment affirmed.

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

1. This appeal is decided by one judge pursuant to WIS. STAT.§ 752.31(2)(f) and (3) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.