Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2018-187

JULY TERM, 2019

State of Vermont v. Rodney L. L'Esperance*	}	APPEALED FROM:
	}	
	}	Superior Court, Franklin Unit,
	}	Criminal Division
	}	
	}	DOCKET NO. 1436-11-17 Frcr
		Trial Judge: Martin A. Maley

In the above-entitled cause, the Clerk will enter:

Defendant entered a conditional guilty plea to driving under the influence, second offense (DUI #2). He challenges the court's denial of his motion to suppress. We affirm.

Defendant was charged with DUI #2 following a late evening traffic stop in November 2017. He filed a motion to suppress, arguing in relevant part that the arresting officer: unlawfully extended his detention; lacked reasonable suspicion to request his participation in field sobriety exercises (FSEs); lacked reasonable suspicion to ask him to exit his vehicle; and lacked probable cause to arrest him. The court denied the motion after a hearing.

The court made the following findings, relying on the officer's testimony and the video from the officer's body camera. On the evening in question, the officer observed a pickup truck with one headlight out and no front license plate. The officer initiated a traffic stop. Defendant pulled over and another officer arrived on the scene. When the arresting officer approached defendant's truck, he observed several open, empty alcohol containers in the truck bed. There was a passenger in the truck who the officer recognized. Defendant's window was rolled down several inches. He was smoking a cigarette, which in the officer's experience could be intended to mask the odor of intoxicants. The officer introduced himself to defendant. Defendant was looking away from the officer and did not acknowledge the officer's presence. The officer found defendant's response atypical.

When the officer requested defendant's license, registration, and proof of insurance, defendant acknowledged that the officer was speaking to him; he did not roll down his window any further, however. Defendant pulled out a pink "Franklin Rental" receipt and began to study it as if it responded to the officer's request. The officer told defendant that he did not need to see the receipt, but defendant continued to focus on it for several moments. The officer found this behavior odd and confused. He repeated his request for defendant's driver's license and defendant said that he had left his wallet at home. At that point, however, the officer noticed the passenger holding up an ID, which was defendant's driver's license. The officer observed that defendant's eyes were watery and his speech was slurred. After an approximately five-minute interaction, the

officer returned to his cruiser to run defendant's registration information and complete a written warning for the defective equipment.

In his cruiser, the officer pulled up defendant's information and conversed with the other officer about his observations thus far. He noted that it was difficult to tell if defendant was under the influence with his window rolled up most of the way. The officer completed the paperwork for a warning, exited his cruiser, and approached the truck again. Defendant was no longer smoking a cigarette, and for the first time, the officer detected an odor of intoxicants from within the truck. Because the window was barely open, however, the officer could not identify the specific source of the smell from within the car. The officer asked defendant if there was a reason he wasn't rolling down his window. Defendant replied "no," but still did not roll down his window. The officer testified that he had performed approximately 2500 motor vehicle stops since 2012, many of which occurred in the cold winter months, and defendant was the only driver who failed to roll down his window, or, if the window was not operational, to open the driver's side door.

The officer asked defendant about his missing front license plate. He explained at the hearing that he typically inquired about the plate because some people did not realize the plate was missing or did not know that Vermont was a two-plate state. After discussing the plate and given his observations up to that point, the officer asked defendant how much he had had to drink. He told defendant that he could smell alcohol emanating from the truck. Defendant denied consuming alcohol. Defendant refused the officer's request to perform FSEs and to exit the vehicle. The officer then ordered defendant out of the car. When the officer opened the truck's door, he noticed an open, half-full can of beer in the driver's side door. Once defendant was out of the truck, the officer again asked defendant if he wanted to perform FSEs. Defendant refused. The officer handcuffed defendant and arrested him for suspicion of DUI.

Before turning to the court's legal conclusions, we set forth the relevant legal standards. "It is well established that an officer's reasonable suspicion of a traffic violation can form the basis for a lawful stop so long as the detention is temporary and lasts no longer than is necessary to effectuate the purpose of the stop." State v. Manning, 2015 VT 124, ¶ 12, 200 Vt. 423 (citations and footnotes omitted). "[T]he tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's mission—to address the traffic violation that warranted the stop, and attend to related safety concerns." State v. Alexander, 2016 VT 19, ¶ 16, 201 Vt. 329 (quotation omitted). "Authority for the seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed." Id. (quotation omitted). An officer "may make ordinary inquiries incident to the traffic stop and related to ensuring roadway safety," and he or she may also issue a ticket for the traffic violation. Id. ¶ 17 (quotation omitted). The officer may not, however, "prolong a traffic stop to pursue an unrelated criminal investigation" unless the officer has gathered additional information providing reasonable suspicion that some other criminal activity is afoot. Id. ¶¶ 17, 18 (quotation omitted).

> [Where] the officer can point to factors indicating that a suspect has been involved in wrongdoing—here, driving under the influence of alcohol—the initial encounter can escalate, with each inquiry by the officer leading to further evidence justifying further restraints on defendant's freedom until probable cause exist[s] to arrest defendant and process him for DUI.

State v. McGuigan, 2008 VT 111, ¶ 8, 184 Vt. 441 (quotation and alterations omitted).

In determining if an officer lawfully extended a traffic stop, the court must "consider from an objective standpoint whether, given all of the circumstances, the officer had a reasonable and articulable suspicion of wrongdoing." State v. Lussier, 171 Vt. 19, 23-24 (2000). This totality-of-the-circumstances analysis "allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person." Manning, 2015 VT 124, ¶ 14 (quotation omitted). While any given factor considered as part of this analysis could, "in isolation . . . be consistent with innocent behavior, the factors taken together can form the basis for reasonable suspicion." Id. Nonetheless, "[r]easonable suspicion of criminal wrongdoing must be based on specific and articulable facts and not on an officer's inchoate and unparticularized suspicion or hunch." Alexander, 2016 VT 19, ¶ 21 (quotations omitted).

Applying these standards, the court rejected defendant's argument that the officer improperly expanded the motor-vehicle stop by asking defendant about his missing front license plate. At that point, the court concluded, the officer continued to "effectuate the purpose of the stop," State v. Sprague, 2003 VT 20, ¶ 17, 175 Vt. 123, and engage in "tasks tied to the traffic infractions," Alexander, 2016 VT 19, ¶ 16. As the court explained, the officer's initial conversation with defendant lasted roughly five minutes, the officer returned to his cruiser to write a ticket, and immediately returned the truck to discuss the license plate infraction.

The court concluded that the officer did not abandon or suspend his intention of issuing a traffic ticket to defendant until he asked defendant how much he had been drinking. Based on the totality of the circumstances, viewed through the lens of the officer's training and experience, the court concluded that, at that point, the officer had formed a reasonable suspicion of wrongdoing based on specific and articulable facts. Specifically, the officer had observed: the empty containers in the truck bed; defendant's odd and confused behavior and difficulty in responding to the officer's requests; and defendant's watery eyes and slurred speech. Defendant had also been smoking a cigarette, which in the officer's experience could be an intentional tactic to mask the odor of intoxicants. Once the cigarette was extinguished, the officer detected an odor of alcohol from the cab of the truck even though defendant's window was rolled most of the way up. These facts supported the expansion of the motor-vehicle stop. For the same reasons, the court concluded that the officer was justified in asking defendant to perform FSEs and authorized to ask defendant to exit his vehicle.

The court also concluded that the officer had probable cause to arrest defendant for suspicion of DUI. It explained that the officer was an experienced patrol officer who had performed approximately 2500 motor vehicle stops in the course of his career. For all of the reasons set forth above, the officer found defendant's behavior consistent with someone who was DUI. After he issued his exit order, moreover, the officer found an open can of beer tucked inside the driver's side door. The court concluded that, viewed objectively, "the facts and circumstances known to the arresting officer [were] sufficient to lead a reasonable person to believe that a crime was committed and that [defendant] committed it." State v. Richard, 2016 VT 75, ¶ 14, 202 Vt. 519. The court thus denied defendant's motion to suppress. Defendant entered a conditional guilty plea and this appeal followed.

At the outset, we clarify several points. First, our review of the court's ruling is not de novo as defendant asserts. In making this assertion, defendant fails to acknowledge or address our existing caselaw. As we have repeatedly stated, "[a] motion to suppress raises a mixed question of law and fact." State v. Young, 2010 VT 97, ¶ 9, 189 Vt. 37. While "[w]e review a trial court's legal conclusions de novo," we "give substantial deference . . . to the trial court's findings of fact." Id.; see also Alexander, 2016 VT 19, ¶ 13 ("In reviewing a motion to suppress, we apply a de novo

standard to the trial court's legal conclusions and a clear-error standard to its factual findings." (quotation omitted)). The trial court's findings will be upheld "unless, taking the evidence in the light most favorable to the prevailing party, and excluding the effect of modifying evidence, there is no reasonable or credible evidence to support them." Young, 2010 VT 97, ¶ 9 (quotation omitted). We leave it to the trial court to assess the credibility of witnesses and weigh the evidence. Id. Our standard for reviewing the court's findings derived from review of the officer's body camera is equally deferential. Richard, 2016 VT 75, ¶ 8 (citing In re M.K., 2015 VT 8, ¶ 15 n. *, 198 Vt. 233 ("[A]lthough we watched the video as part of the record of the proceedings below, our standard for reviewing the . . . court's findings regarding the video are the same as with other evidence presented in the case.")). "Without making our own factual findings, we may review" the video to determine if it "contain[s] evidence supporting the court's findings." Id.

Second, contrary to defendant's assertion, we have not held that an officer's subjective motivation is relevant in evaluating the totality-of-the-circumstances in determining if an officer had a reasonable and articulable suspicion of wrongdoing. In fact, our holdings are expressly to the contrary. As we have made clear:

> In determining the legality of a stop, courts do not attempt to divine the arresting officer's actual subjective motivation for making the stop; rather, they consider from an objective standpoint whether, given all of the circumstances, the officer had a reasonable and articulable suspicion of wrongdoing. That an officer's true motivation for stopping a vehicle or approaching an individual is to investigate drug possession or other criminal activity has no bearing on the legality of the detention, so long as, from an objective standpoint, the officer had reasonable and articulable suspicion of a traffic or other violation.

Manning, 2015 VT 124, ¶ 12 (citations and footnotes omitted); Lussier, 171 Vt. at 23-24 (stating that court must "consider from an objective standpoint whether, given all of the circumstances, the officer had a reasonable and articulable suspicion of wrongdoing" (emphasis added); see also Richard, 2016 VT 75, ¶ 14 (recognizing that determining whether warrantless arrest supported by probable cause is done "according to an objective standard, not a subjective one"). Defendant again does not address this case law.

We did not hold otherwise in Zullo v. State, 2019 VT 1, ¶ 84, a civil case cited by defendant. Cf. id. ¶ 54 (holding "that a plaintiff seeking damages against the State directly under Article 11 based on a law enforcement officer's alleged violation of that constitutional provision must show that: (1) the officer violated Article 11; (2) there is no meaningful alternative remedy in the context of that particular case; and (3) the officer either knew or should have known that the officer was violating clearly established law or the officer acted in bad faith"). Zullo has no bearing on the case law cited above and it is inapposite here. The remaining cases cited by defendant are equally inapposite. We reject defendant's assertion that we considered an officer's subjective motivations in evaluating the totality-of-the-circumstances in Alexander, 2016 VT 19. Instead, we applied our well-established standard of review, taking the facts as found by the trial court and evaluating the trial court's legal conclusion de novo.

With this in mind, we turn to defendant's arguments. Defendant asserts that the officer impermissibly extended the traffic stop. According to defendant, the officer "admitted that the purpose of the initial equipment violation stop had ended before his second approach," and therefore, "there was no longer any constitutional authority to subject [defendant] to continued

police detention." He appears to suggest that the officer was not even justified in delivering a written warning for the traffic infractions. In support of his argument, defendant relies on the officer's testimony at the hearing that, as he was writing up a warning for defendant, he also intended to investigate if defendant was intoxicated. The officer also testified that he was trying to ascertain if impairment was due to drugs or alcohol. He noted at the scene that it was difficult to tell if defendant was under the influence with his window rolled up most of the way.

As set forth above, "the law is well settled that police may stop a vehicle and briefly detain its occupants to investigate a reasonable and articulable suspicion that a motor vehicle violation is taking place." Alexander, 2016 VT 19, ¶ 16. We agree with the trial court that, at the time the officer returned to defendant's truck, the officer's "tasks tied to the traffic infraction" were not yet completed. Id. (quotation omitted). The missing license plate was one of the reasons for the stop and in questioning defendant about this issue, the officer was engaged in "ordinary inquiries incident to the traffic stop." Id. ¶ 17 (quotation omitted). The interaction was not prolonged; the conversation happened as the officer walked back to the truck to deliver his written warning and it was directly relevant to the traffic stop. The officer's subjective motivations were irrelevant. His statement that it was difficult to tell if defendant was under the influence with his window rolled up most of the way and his testimony that, at the time he was writing up a warning, he wanted to investigate if defendant was intoxicated, do not bear on whether "from an objective standpoint . . . , given all of the circumstances, the officer had a reasonable and articulable suspicion of wrongdoing." Manning, 2015 VT 124, ¶ 12. The statements do not establish that the traffic stop was improperly extended.

Defendant also appears to challenge the court's conclusion that, at the time he asked defendant how much he had been drinking, the officer had a reasonable suspicion that defendant was engaged in criminal activity. He argues that, individually or together, the officer's observations did not support a reasonable suspicion that he was DUI.

We reject this argument as well. The totality of the circumstances here—the empty containers in the truck bed; defendant's odd and confused behavior and difficulty in responding to the officer's requests; his watery eyes and slurred speech; the use of a cigarette to possibly mask the odor of intoxicants; and the odor of alcohol emanating from the truck once his cigarette was extinguished, despite the small window opening—support a reasonable suspicion that defendant was DUI. See State v. Gray, 150 Vt. 184, 186 (1988) (affirming DUI conviction where arresting officer observed, among other things, that "defendant's eyes were bloodshot and watery," and "his speech slurred); see also Richard, 2016 VT 75, ¶ 16 ("Because slurred speech is objectively indicative of intoxication, police officers may consider it as one factor in their determination of whether a defendant is under the influence."). All of these findings are supported by the evidence and we do not disturb the findings on appeal. As the trial court noted, moreover, "the trooper was experienced with drunk drivers," and "[t]his experience adds weight and credibility to the trooper's observations and inferences drawn from defendant's behavior." Id. ¶ 15. Contrary to defendant's assertion, the facts recited above—particularly defendant's watery eyes and slurred speech—are not "too general and vague to exclude a large number of presumably innocent individuals." Alexander, 2016 VT 19, ¶ 29. These facts alone support reasonable suspicion and this conclusion

is not undermined by the absence of other facts cited by defendant, such as observation of impaired driving. These same findings support the exit order and defendant's arrest for suspicion of DUI.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice