COURT OF APPEALS
DECISION
DATED AND FILED

November 17, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-0265 **Cir. Ct. No. 03TR008016**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD AUSTIN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Ozaukee County: PAUL V. MALLOY, Judge. *Affirmed*.

Before Anderson, P.J., Nettesheim and Snyder, JJ.

¶1 ANDERSON, P.J. Richard Austin appeals from a refusal order determining that he unlawfully refused to submit to a chemical test in violation of

WIS. STAT. § 343.305 (2001-02).[1] At the refusal hearing, the State presented plausible evidence that the arresting officers had probable cause to believe that Austin was driving while intoxicated. We affirm.

FACTS

¶2 On the night of October 16, 2003, Angela Kuopus was driving on Port Washington Road in Mequon when she observed another vehicle cross the center line long before it was to make a turn and nearly go into a ditch. Kuopus decided to follow the vehicle and to contact the police department. Kuopus informed the dispatcher that she would follow the car until the police department could have an officer meet up with her. Kuopus followed the vehicle for approximately seven minutes and observed "erratic driving," such as driving on the wrong side of the road, speeding up and slowing down, turning the headlights off and switching on turn signals at inappropriate times. Eventually, the driver of the vehicle pulled into a driveway in front of a house, parked the car and headed for the house. The police arrived approximately one to two minutes later; Kuopus answered a couple questions and left.

¶3 City of Mequon police officer, Mark Riley, was dispatched to do follow-up of Kuopus' complaint of an erratic driver who appeared to be intoxicated. When Riley arrived on the scene, at least one other officer had spoken with Kuopus and informed Riley that Kuopus was the informant and was willing to provide a written statement. The officers then walked up to the residence and knocked on the door. Austin's wife, Judith Austin, answered the

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

door. Judith permitted the officers to enter the residence. The officers asked Judith to restrain her dog, which she did. When the officers informed Judith that they were there to speak to the driver of the vehicle, Judith immediately directed the officers into the residence and showed them to Austin.

¶4 The officers approached Austin. When they were within a couple of feet of him, they identified themselves and informed him why they were at the residence. Austin immediately and profanely told the officers to get out of the house. While speaking with Austin, Riley detected a strong odor of intoxicant about the whole entire room, he noticed that Austin's speech was slurred and Austin had very bloodshot glossy eyes.

¶5 The officers spoke with Austin for a total of seven to ten minutes. He continued to ask the officers to leave throughout the conversation. During that time, the officers asked him to perform field sobriety tests; Austin profanely refused. Based on his observations, Riley determined that Austin was under the influence of alcohol and placed him under arrest. Riley then transported Austin to a hospital where he read Austin the Informing the Accused form. When Riley asked him if he would submit to an evidentiary chemical test of his blood, Austin responded "No." Riley then issued him a Notice of Intent to Revoke Operating Privileges.

¶6 On October 27, Austin requested a refusal hearing. On December 15, Austin filed a motion to suppress evidence obtained at the scene of his detention and arrest and evidence procured following the detention and arrest, arguing that Riley did not have probable cause to arrest.

¶7 The trial court conducted the refusal hearing on January 12, 2004. Kuopus, Judith and Riley all testified at the hearing. At the conclusion of the

hearing, Austin argued that the officers did not have reasonable suspicion to conduct the stop nor did they have probable cause to arrest. He maintained that Kuopus was an unreliable citizen informant and the information she provided to the police could not form the basis for reasonable suspicion. He also argued that Judith did not consent to the police entering her home and even if she did, Austin revoked that consent and any information obtained following his revocation could not be used in the court's probable cause determination.

¶8 The trial court rejected Austin's arguments, concluding that a stop did not take place, that Judith had given the officers consent to enter the home without a warrant, and that this was sufficient. The court then reviewed the testimony and determined that the State had presented plausible evidence that the arresting officers had probable cause to believe that Austin was driving while intoxicated, the informational requirements of WIS. STAT. § 343.305 were complied with and he refused to submit to a chemical test without proper justification. The court ordered Austin's driving privileges revoked and required him to undergo alcohol assessment. Subsequently, the court entered a refusal order holding Austin in violation of § 343.305 for refusing to submit to a chemical test. Austin appeals.

STANDARD OF REVIEW

¶9 We will uphold a trial court's findings of fact if the findings are not clearly erroneous. ***State v. Roberts***, 196 Wis. 2d 445, 452, 538 N.W.2d 825 (Ct. App. 1995). Whether a set of facts constitutes probable cause is a question of law that we review de novo. ***State v. Babbitt***, 188 Wis. 2d 349, 356, 525 N.W.2d 102 (Ct. App. 1994).

DISCUSSION

¶10 The sole issue before us on appeal is whether the trial court properly determined that Austin refused to submit to a chemical test in violation of WIS. STAT. § 343.305. Austin asserts that both the police officers' warrantless entry into his home and their subsequent refusal to leave after he demanded that they do so were unlawful. He concludes that as a result of the Fourth Amendment violations we should "vacate the order holding [his] refusal unreasonable and remand with instructions that all evidence obtained following the entry and/or detention of [him] in his home be suppressed…. [A]nd should further direct the trial court to resolve the refusal hearing in [his] favor." We begin our analysis of Austin's appeal with a discussion of § 343.305(9), the statutory subsection which outlines the procedure to be followed at a refusal hearing, and then we will apply the subsection's guiding principles to Austin's claims.

WISCONSIN STAT. § 343.305(9) Refusal Hearing

¶11 ***State v. Nordness***, 128 Wis. 2d 15, 381 N.W.2d 300 (1986), is instructive on (1) the issues within a refusal hearing and (2) the State's burden at the refusal hearing. ***Nordness*** teaches that the refusal hearing is strictly limited to the issues found in WIS. STAT. § 343.305(9)(a)5.a through c. *See* ***Nordness***, 128 Wis. 2d at 25-26. Those issues are limited to:

> a. Whether the officer had probable cause to believe the person was driving or operating a motor vehicle while under the influence of alcohol … and whether the person was lawfully placed under arrest for violation of s. 346.63(1), (2m) or (5) or a local ordinance in conformity therewith or s. 346.63(2) or (6), 940.09(1) or 940.25.
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> b. Whether the officer complied with [the informational requirements of] sub. (4).

> c. Whether the person refused to permit the test. The person shall not be considered to have refused the test if it is shown by a preponderance of evidence that the refusal was due to a physical inability to submit to the test due to a physical disability or disease unrelated to the use of alcohol, controlled substances, controlled substance analogs or other drugs.

Sec. 343.305(9)(a)5.

¶12 ***Nordness*** also plainly instructs that the State has a very low threshold to clear to establish the probable cause element of the refusal hearing.

> We deem the evidentiary scope of a revocation hearing to be narrow. In terms of the probable cause issue, the trial court in a revocation hearing is statutorily required merely to determine that probable cause existed for the officer's belief of driving while intoxicated.
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> We view the revocation hearing as a determination merely of an officer's probable cause, not as a forum to weigh the state's and the defendant's evidence. Because the implied consent statute limits the revocation hearing to a determination of probable cause—as opposed to a determination of probable cause to a reasonable certainty—we do not allow the trial court to weigh the evidence between the parties. The trial court, in terms of the probable cause inquiry, simply must ascertain the plausibility of a police officer's account.

Nordness, 128 Wis. 2d at 35-36 (citation omitted).

¶13 From ***Nordness***, we extract two principles that we will follow when deciding Austin's challenge to the trial court's findings. First, the trial court is not to weigh the competing evidence when determining probable cause. ***Id.*** at 36. Second, the trial court need not believe the officer's account of the events, so long as the State has proven that the officer's account is plausible. ***Id.***; ***State v. Wille***, 185 Wis. 2d 673, 681, 518 N.W.2d 325 (Ct. App. 1994). These principles are self-evident because the implied consent statute limits the refusal hearing, a civil

proceeding, to a determination of probable cause, rather than a determination of probable cause to a reasonable certainty. *See* ***Nordness***, 128 Wis. 2d at 36.

Application of WIS. STAT. § 343.305(9)

¶14 Austin challenges the trial court's probable cause determination to the extent that it was supported by evidence he claims was obtained in violation of his Fourth Amendment rights. Much of his brief is dedicated to explaining how he, as the subject of the police investigation and co-owner of the home, had the constitutional right to revoke Judith's consent to the police officers' entry. While we do not quarrel with Austin's contention that the Fourth Amendment's protections may be invoked in the context of a refusal hearing, *see* ***State ex rel. White v. Simpson***, 28 Wis. 2d 590, 596, 137 N.W.2d 391 (1965) ("The right of an individual to be protected from improper arrests or searches applies with equal vitality to those which stem from civil actions as well as those which stem from criminal actions."), we need not reach Austin's complaint concerning the alleged Fourth Amendment consent to search issue. As explained, the State has a very low threshold to clear to establish probable cause for a warrantless arrest in a refusal hearing, and the State satisfied that low threshold prior to Austin's alleged revocation of Judith's consent.

¶15 Riley testified that before he knocked on the Austins' door, he had seen Kuopus speaking with at least one other officer, he was aware of Kuopus' complaint of erratic driving due to alleged drunk driving and he knew that Kuopus was willing to give a statement concerning the erratic driving. Riley further testified that Judith had permitted them to enter the home and identified Austin as the driver of the vehicle. Although Austin intimates that Judith had merely "acquiesced" in the officers' entry into their home and did not actually give her

consent to their entry, the trial court, after considering the entire record, found that Judith had consented. We see no reason to disturb this finding; it is supported by plausible evidence. Judith and Riley both testified that she permitted the officers to enter and then showed them to Austin.

¶16 Thus, at the time of the arrest, Riley was aware that he had a known tipster at the scene who had provided contemporaneous and verifiable observations regarding Austin's alleged erratic driving, vehicle location and vehicle description.[2] He had been lawfully admitted into the residence and also knew from Judith that Austin had been the driver of the vehicle that was the subject of Kuopus' tip.[3] It is plausible that these facts, taken together, could suggest to a reasonable police officer that Austin was operating a motor vehicle while intoxicated. This is all that is needed to support a finding of probable cause for the purposes of a refusal hearing. *See* ***Nordness***, 128 Wis. 2d at 35-36. Because the officers had probable cause for a warrantless arrest prior to Austin's alleged revocation of Judith's consent, we do not get to the merits of Austin's Fourth Amendment claim that evidence obtained following his revocation should have been suppressed for the purposes of the refusal hearing. ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (court need address only dispositive issues).

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[2] An officer's belief may be partially predicated on hearsay information, and the officer may rely on the collective knowledge of the officer's entire department. ***State v. Cheers***, 102 Wis. 2d 367, 386, 388-89, 306 N.W.2d 676 (1981). Furthermore, an officer can rely upon a layperson's assessment that another person is intoxicated. ***State v. Powers***, 2004 WI App 143, ¶13, __ Wis. 2d __, 685 N.W.2d 869.

[3] In determining whether probable cause exists, the trial court may consider the officer's previous experience, ***State v. DeSmidt***, 155 Wis. 2d 119, 134-35, 454 N.W.2d 780 (1990), and also the inferences that the officer draws from that experience and the surrounding circumstances, *see* ***State v. Pozo***, 198 Wis. 2d 705, 713, 544 N.W.2d 228 (Ct. App. 1995).

¶17 Austin also suggests that Riley was not justified in relying on Kuopus' information to supply the reasonable suspicion necessary to conduct a traffic stop or to supply the probable cause necessary for the warrantless arrest. The question of whether a stop even occurred aside, the tip clearly satisfies the standards for informant reliability set forth in ***State v. Rutzinski***, 2001 WI 22, 241 Wis. 2d 729, 623 N.W.2d 516.

¶18 In ***Rutzinski***, our supreme court discussed the nature of cell phone tips in intoxicated driving cases. It held that when an informant exposes himself or herself to being identified, that exposure enhances reliability because the person could be arrested if the tip proved to be fabricated. ***Id.***, ¶32. It also enhances reliability when the tipster has observed potential imminent danger to society, which drunk driving represents. ***Id.***, ¶34. What further enhanced the tip in ***Rutzinski*** were certain verifiable observations such as the location of the vehicle and its description. ***Id.***, ¶33. Here, the facts more than suffice. First, Kuopus was not an anonymous tipster. Indeed, Kuopus followed Austin back to his home and waited for the police to arrive; she also consented to giving a statement. Second, Kuopus reported that she observed, firsthand, the erratic driving—including that the driver of the car was driving on the wrong side of the road, had almost gone into a ditch, and was switching the vehicle's headlights on and off. Thus, this tip is different from that of a person who calls on a cell phone and anonymously reports a possible drunk driver without reporting that he or she actually observed any erratic driving. Third, innocent details of the tip were corroborated. She provided an accurate description of the vehicle to dispatch, that vehicle was parked in front of the Austin home when the police arrived, and Judith confirmed that Austin had been driving the car. The totality of the circumstances shows that the tip was reliable and that Riley and the other arresting officers were justified in

believing that the driver of the vehicle was intoxicated based, in part, on Kuopus' tip.

CONCLUSION

¶19 In sum, the State, at a refusal hearing, has a very low threshold to clear to establish that the arresting officer had probable cause for his or her belief of driving while intoxicated. The standard is mere plausibility. After reviewing Riley's testimony in the context of all of the State's evidence, we, like the trial court, conclude that Riley's account of his encounter with Austin is plausible and demonstrates that a reasonable officer, when considering all the circumstances of the encounter, including his lawful admission into the home and the information from the known tipster, would believe that Austin was driving while under the influence of an intoxicant. Therefore, we hold that the State carried its burden of establishing probable cause for the warrantless arrest and affirm the order suspending Austin's driving privileges as a result of his refusal to submit to a chemical test of his blood.[4]

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[4] We express no judgment as to whether Austin may have legitimate grounds for the suppression of the evidence in the underlying operating a motor vehicle while intoxicated charge. As explained, the standard for probable cause at a suppression hearing is much higher:

> Determining probable cause for a warrantless arrest in the context of a suppression motion is another matter. Plausibility is not enough. The trial court takes evidence in support of suppression and against it, and chooses between conflicting versions of the facts. It necessarily determines the credibility of the officers and other witnesses. The court then finds the historical facts and determines whether probable cause exists on the basis of those facts.
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> Thus, the State's burden of persuasion at a suppression hearing is significantly greater than its burden of persuasion at a refusal hearing under § 343.305(9)(c), Stats.

(continued)

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

State v. Wille, 185 Wis. 2d 673, 682, 518 N.W.2d 325 (Ct. App. 1994) (citation omitted).