COURT OF APPEALS
DECISION
DATED AND FILED

February 28, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP579 **Cir. Ct. No. 2005CT2457**

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

IN THE MATTER OF THE REFUSAL OF RONALD J. HETTINGER:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RONALD J. HETTINGER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: DANIEL R. MOESER, Judge. *Affirmed*.

¶1 HIGGINBOTHAM, P.J.[1] Ronald J. Hettinger appeals a judgment of conviction for violating the implied consent statute, WIS. STAT. § 343.305. Hettinger argues the circuit court erroneously exercised its discretion when it granted the State's motion for a protective order after the State failed to respond to Hettinger's requests for admission. He also argues that the arresting officer lacked reasonable suspicion for the stop and the arresting officer lacked probable cause to arrest him for operating a motor vehicle while intoxicated.

¶2 We conclude that the circuit court's decision to allow the case to proceed to the refusal hearing despite the State's failure to respond to Hettinger's requests for admission represented a proper exercise of its discretion, albeit for different reasons than those stated by the court. We further conclude that there was reasonable suspicion to stop Hettinger and probable cause to arrest him for operating a motor vehicle while intoxicated. We therefore affirm.

BACKGROUND

¶3 On September 11, 2005, Village of McFarland Police Officer Robert Geitz observed a motorcycle driven by Hettinger traveling northbound on Marsh Road in a twenty-five mile-per-hour zone. Geitz's radar clocked the motorcycle's speed at forty-four miles per hour. Geitz followed Hettinger and stopped him after Hettinger pulled the motorcycle into his driveway.

¶4 Geitz approached Hettinger and noticed that Hettinger had bloodshot eyes and slowed speech. Geitz asked Hettinger where he was traveling from.

[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.

Hettinger was unable to give the address of his friend's house or the route he had taken home. Geitz also asked Hettinger for the name of the owner of the motorcycle. Hettinger was able to provide the owner's name, but could not provide his address or phone number. Based upon Hettinger's responses, Geitz performed field sobriety tests on Hettinger.

¶5 Geitz first performed the horizontal gaze nystagmus test, which measures how well the eyes track a stimulus. Geitz observed four of six possible "clues" of intoxication associated with this test. Geitz also smelled a moderate odor of alcohol on Hettinger's breath.

¶6 Geitz next had Hettinger perform the "walk-and-turn test." Geitz noticed that Hettinger did not walk heel to toe, took an incorrect number of steps, started early and improperly turned. Geitz stated that four out of a possible eight clues on this test indicated impairment.

¶7 The third test Geitz administered was the "one leg stand test." This test involves standing, feet together and arms at the sides, while raising one foot about six inches off of the ground and counting out loud. Hettinger did not perform the test as demonstrated or described, standing with his hands clasped behind his back, knee bent and foot behind him. Geitz stated Hettinger's performance on this test indicated impairment.

¶8 Based on Hettinger's performance of the field sobriety tests, Geitz determined that Hettinger was impaired due to alcohol and placed him under arrest and transported him to the McFarland Police Department. Geitz read the Informing the Accused statement to Hettinger and asked him to submit to a breathalyzer. Hettinger refused. The State charged Hettinger with operating a

motor vehicle while under the influence of an intoxicant (OWI) and violating the implied consent statute.

¶9 On February 27, 2006, Hettinger filed fifty-six requests for admission, as well as interrogatories and production of documents. On July 6, 2006, the State moved for a protective order requesting that it not be required to respond to the previously filed discovery requests because the requests were unduly burdensome and not relevant to the issues of a refusal. Hettinger argued at the hearing that, because the State had failed to respond to his admission requests within thirty days as required by WIS. STAT. § 804.11(1)(b), the requests should be deemed admitted. The court decided not to rule on the motion for a protective order and did not address the effect of the State's failure to provide a timely response to the admission requests. The court noted that a trial had been scheduled on the OWI charge, and speculated that the State would not pursue the refusal matter, rendering moot all discovery issues relating to the refusal.

¶10 Contrary to the circuit court's speculation, the State went forward with the refusal matter and dropped the OWI charge. On September 27, 2006, the court again heard arguments about the motion for a protective order and the effect the State's failure to respond in a timely manner to the requests for admission. The circuit court concluded that the State did not have to answer the requests for admission.

¶11 A refusal hearing was held. The circuit court concluded that reasonable suspicion existed to conduct a stop, and that probable cause existed to arrest for a refusal to submit to a breathalyzer. Hettinger appeals.

DISCUSSION

¶12 A refusal hearing is not a criminal matter. ***State v. Krause***, 2006 WI App 43, ¶9, 289 Wis. 2d 573, 712 N.W.2d 67. In ***State v. Jakubowski***, 61 Wis. 2d 220, 224 n.2, 212 N.W.2d 155 (1973), the supreme court concluded that a "proceeding under [WIS. STAT. §] 343.305 is a special proceeding and must be so defined." In a refusal hearing, the rules of civil procedure apply. *See* ***State v. Schoepp***, 204 Wis. 2d 266, 272, 554 N.W.2d 236 (Ct. App. 1996) (a refusal hearing is a special proceeding and the discovery procedures of WIS. STAT. ch. 804 apply); ***State v. Nordness***, 128 Wis. 2d 15, 32, 381 N.W.2d 300 (1986) (a refusal hearing "shall proceed in the Court in the same manner as other civil proceedings") (citations omitted).

¶13 Hettinger argues the circuit court erroneously exercised its discretion when it granted the State's motion for a protective order after the State failed to respond to Hettinger's requests for admission. Hettinger filed requests for admission on February 27, 2006. The State never filed a response, moved for additional time to respond or argued that its failure to respond constituted excusable neglect. Instead, three months after receiving the requests for admission, the State moved for a protective order seeking to enjoin Hettinger from obtaining any discovery beyond that required by WIS. STAT. § 971.23(1) or WIS. STAT. § 345.421.

¶14 Absent a written answer or objection to a request for admission, "the matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request

is directed serves upon the party requesting the admission a written answer or objection addressed to the matter …."[2] WIS. STAT. § 804.11(1)(b). Withdrawal of an admission may be permitted "when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal … will prejudice the party in maintaining the action or defense on the merits." WIS. STAT. § 804.11(2).[3]

¶15 A court's decision regarding whether to grant a motion for a protective order is reviewed under the erroneous exercise of discretion standard. ***Hegarty v. Beauchaine***, 2006 WI 248, ¶37, 297 Wis. 2d 70, 727 N.W.2d 857. In general, a proper exercise of discretion requires that the circuit court examine the relevant facts, apply the proper standard of law, and arrive at a conclusion using a demonstrated rational process. ***Id.*** However, where the circuit court's stated reasoning is not consistent with a proper exercise of its discretion, we may also affirm the circuit court's action based on our authority to "independently review

[2] As of April 29, 2006, parties to a refusal hearing no longer have the right to discovery, except that the defendant may be allowed to inspect documents and to test any devices used to determine whether a violation was committed. 2005 Wisconsin Act 332, amending WIS. STAT. § 343.305(9)(a) and (am), and creating WIS. STAT. § 125.14(6) and (6)(b). It is undisputed that this provision had yet to take effect when Hettinger made his requests for admission.

[3] WISCONSIN STAT. § 804.11(2) provides as follows:

> EFFECT OF ADMISSION. Any matter admitted under this section is conclusively established unless the court on motion permits withdrawal or amendment of the admission. The court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice the party in maintaining the action or defense on the merits. Any admission made by a party under this section is for the purpose of the pending action only and is not an admission for any other purpose nor may it be used against the party in any other proceeding.

the record to determine whether additional reasons exist to support the trial court's exercise of discretion." ***Stan's Lumber, Inc. v. Fleming***, 196 Wis. 2d 554, 573, 538 N.W.2d 849 (Ct. App. 1995).

¶16 We conclude that the circuit court's decision to allow the case to proceed to a refusal hearing represented a proper exercise of its discretion, but for different reasons than those stated by the court. We agree with Hettinger that the failure of the State to respond—in any way—to his requests for admission within the thirty-day period prescribed by WIS. STAT. § 804.11(1)(b) resulted in the admission of these requests. However, the fact that the circuit court should have deemed these requests admitted does not mean that Hettinger wins—even though it is undisputed that the State would be unable to prove its case if the admissions had been given effect.

¶17 If the circuit court had properly admitted the requests under WIS. STAT. § 804.11(1)(b), it would still have permitted the refusal hearing to proceed under the principle stated in § 804.11(2), that to allow the admissions to stand would subserve the presentation of the merits in this case. Withdrawal of the admissions was appropriate in this case, where the admissions would have subserved a determination of the ultimate issue of whether Hettinger's refusal was improper, and where withdrawal would not have prejudiced Hettinger on the merits. The court's failure to deem the requests admitted under § 804.11(1)(b) effectively denied the State the opportunity to move under § 804.11(2) to withdraw the admissions, where withdrawal was clearly appropriate. We therefore conclude that the circuit court's exercise of discretion was proper, albeit for different reasons.

¶18 Next, Hettinger argues that the officer lacked reasonable suspicion to stop his motorcycle. Whether reasonable suspicion existed for an investigatory stop is a question of constitutional fact. ***State v. Williams***, 2001 WI 21, ¶18, 241 Wis. 2d 631, 623 N.W.2d 106. We apply a two-step standard of review to questions of constitutional fact. ***Id.*** First, we review the circuit court's findings of historical fact, and uphold them unless they are clearly erroneous. ***Id.*** Second, we review questions of constitutional fact de novo. ***Id.***

¶19 As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred. ***Whren v. United States***, 517 U.S. 806, 810 (1996). That is what happened here; Geitz observed Hettinger speeding and conducted a lawful stop of Hettinger. We therefore affirm the circuit court's finding of reasonable suspicion.

¶20 Hettinger finally argues that Geitz lacked probable cause to arrest for operating a motor vehicle while intoxicated. We disagree.

¶21 Whether the facts found by the circuit court satisfy probable cause is a question of law to be reviewed de novo. ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 316, 603 N.W.2d 541 (1999). A lawful arrest must be based on probable cause. ***State v. Secrist***, 224 Wis. 2d 201, 212, 589 N.W.2d 387 (1999). "Probable cause for arrest exists when the totality of the circumstances within the arresting officer's knowledge at the time of arrest would lead a reasonable police officer to believe that the defendant probably committed the crime." ***State v. Koch***, 175 Wis. 2d 684, 701, 499 N.W.2d 152 (1993). In determining whether probable cause exists, the court applies an objective standard. ***State v. Riddle***, 192 Wis. 2d 470, 476, 531 N.W.2d 408 (Ct. App. 1995). The court is to consider information available to the officer from the standpoint of one versed in law

enforcement, taking the officer's training and experience into account. *See* ***State v. Pozo***, 198 Wis. 2d 705, 712-13, 544 N.W.2d 228 (Ct. App. 1995). When a police officer is confronted with two reasonable competing inferences, one justifying arrest and the other not, the officer is entitled to rely on the reasonable inference justifying arrest. *See* ***State ex rel. McCaffrey v. Shanks***, 124 Wis. 2d 216, 236, 369 N.W.2d 743 (Ct. App. 1985).

¶22 In this case, Geitz testified that Hettinger had bloodshot eyes, his speech was a little slow, he could not remember the route he took home from his friend's house, the address of his friend's house, the address or phone number of the owner of the motorcycle and that he smelled a moderate odor of intoxicants on Hettinger's breath. Additionally, Geitz administered three field sobriety tests. Hettinger showed signs of impairment on two of the tests and did not follow the directions on the third test. We conclude, that at the time Hettinger was arrested, a reasonable officer could have inferred that Hettinger had operated a vehicle while under the influence of an intoxicant.

By the Court.—Judgment affirmed.

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