COURT OF APPEALS
DECISION
DATED AND FILED

September 25, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP683 **Cir. Ct. Nos. 2006TR589, 2006TR863**

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

COUNTY OF DUNN,

PLAINTIFF-RESPONDENT,

V.

STEVEN A. KOLSTAD,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dunn County: WILLIAM C. STEWART, JR., Judge. *Affirmed*.

¶1 HOOVER, P.J.[1] Steven Kolstad appeals a judgment of conviction for operating while intoxicated, first offense. Kolstad argues the circuit court erred by denying his motions to suppress. He contends the arresting officer lacked

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

probable cause. Kolstad further contends his field sobriety tests should have been suppressed because the officer did not advise him of his ***Miranda***[2] rights prior to conducting the tests and he was in police custody at the time.[3] We disagree and affirm the conviction.

BACKGROUND

¶2 Shortly before 1 a.m. on January 19, 2006, Kolstad was found pinned under his rolled over truck. Dunn County Sheriff's Deputy Russell Waddell searched the area and could find no tracks in the snow from persons other than himself and fire and medical personnel. Deputy Matthew Feeney arrived at the scene and spoke to Kolstad while he was still trapped under the truck. Feeney detected the odor of intoxicants emanating from Kolstad. Kolstad informed Feeney that no other person was in the vehicle and admitted drinking eight to nine drinks. Kolstad was extricated from the wreckage and airlifted to the hospital.

¶3 Because Kolstad was immobilized on a backboard due to his injuries, Feeney was unable to do standard field sobriety tests. Thus Feeney administered alternative field sobriety tests. Feeney asked Kolstad to recite the alphabet, which Kolstad did. However, he repeated W, X, and Y. Feeney then administered a finger dexterity test. Finally, Feeney asked Kolstad to count backwards from fifty-two to thirty-eight. Kolstad attempted this multiple times, sometimes not getting past forty-six. Eventually, he counted down to thirty-eight, but continued to thirty-two. Feeney observed Kolstad slur his speech during the

[2] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

[3] Kolstad also argues he did not waive his right to appeal by entering a plea. Because the State agrees, we address Kolstad's case on the merits.

tests. Feeney then arrested Kolstad for operating under the influence of an intoxicant, and a blood test was administered.

¶4 Kolstad had a blood-alcohol concentration of .138%. Feeney issued citations for operating under the influence and operating with a prohibited alcohol concentration. Kolstad moved to suppress the blood test results arguing there was no probable cause to arrest. He also moved to suppress the field sobriety tests arguing he was in police custody and had not been advised of his ***Miranda*** rights. The circuit court denied Kolstad's motions and Kolstad subsequently pled guilty to operating under the influence. The State dismissed the prohibited blood alcohol concentration charge.

DISCUSSION

¶5 Probable cause exists where the totality of the circumstances within the officer's knowledge at the time would lead a reasonable officer to believe a violation has occurred. ***State v. Nordness***, 128 Wis. 2d 15, 35, 381 N.W.2d 300 (1986). The facts need not prove guilt beyond a reasonable doubt, merely "that the information lead a reasonable officer to believe that guilt is more than a possibility…." ***State v. Paszek***, 50 Wis. 2d 619, 625, 184 N.W.2d 836 (1971). "Whether probable cause to arrest exists based on the facts of a given case is a question of law which we review independently of the trial court." ***State v. Kasian***, 207 Wis. 2d 611, 621, 558 N.W.2d 687 (Ct. App. 1996).

¶6 Kolstad contends there was insufficient probable cause to arrest him. Kolstad first argues Feeney did not know over what period of time he consumed the eight to nine drinks and, therefore, his admission to consuming the drinks should not be part of the probable cause determination. Probable cause may exist notwithstanding a possible innocent explanation for the defendant's conduct.

State v. Higginbotham, 162 Wis. 2d 978, 995, 471 N.W.2d 24 (1991). Feeney observed an overturned vehicle and no other vehicle in the area that may have caused the crash. Feeney also detected the odor of intoxicants on Kolstad. Given these circumstances Feeney could have reasonably concluded that Kolstad consumed the eight to nine drinks over a short period of time at the bar where Kolstad was immediately prior to the crash.

¶7 Kolstad also argues that because the officer made the decision to arrest him before he administered the field sobriety tests, the tests should not be used to determine whether there was probable cause. We need not reach the merits of this argument. An officer does not need to perform field sobriety tests in every case. ***Kasian***, 207 Wis. 2d at 622. Even without the field sobriety tests, there was sufficient probable cause to arrest Kolstad. Feeney observed a one-vehicle crash and detected the odor of intoxicants on the driver. Further, the driver of the vehicle admitted coming from a bar and stated he had consumed eight to nine drinks. This information would have led a reasonable officer to conclude that guilt was more than a possibility. *See* ***Paszek***, 50 Wis. 2d at 625.

¶8 Kolstad next argues his field sobriety tests should have been suppressed because Feeney did not advise him of his ***Miranda*** rights prior to administering the tests. However, ***Miranda*** warnings are only required when a person is in police custody. *See* ***State v. Morgan***, 2002 WI App 124, ¶10, 254 Wis. 2d 602, 648 N.W.2d 23. In order for custody to trigger the ***Miranda*** requirements, the custody must be "caused or created by the authorities." ***State v. Clappes***, 117 Wis. 2d 277, 285, 344 N.W.2d 141 (1984). In this case, Kolstad was restrained on a backboard due to his own actions in flipping over his truck. Therefore, Kolstad was not in police custody. Additionally, field sobriety tests are

not considered testimonial. ***State v. Babbitt***, 188 Wis. 2d 349, 361, 525 N.W.2d 102 (1994). Thus, Kolstad's Fifth Amendment rights were not implicated.[4] ***Id.***

By the Court.—Judgment affirmed.

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

[4] Kolstad also makes a brief argument that his statements were not voluntary. A confession may be suppressed if it is involuntary. ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 262, 133 N.W.2d 753 (1965). "Coercive or improper police conduct is a necessary prerequisite for a finding of involuntariness." ***State v. Hoppe***, 2003 WI 43, ¶37, 261 Wis. 2d 294, 661 N.W.2d 407. Kolstad fails to explain how his field sobriety tests could be considered a confession. Kolstad also fails to show how the police conduct was coercive or improper, and we see no evidence that the conduct was coercive or improper. We will not develop Kolstad's amorphous and unsupported arguments for him. *See* ***Barakat v. DHSS***, 191 Wis. 2d 769, 786, 530 N.W.2d 392 (Ct. App. 1995).