COURT OF APPEALS
DECISION
DATED AND FILED

June 14, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1254-CR **Cir. Ct. No. 2007CF792**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LETERRYS T. GREEN,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Waukesha County: RICHARD CONGDON and MARK D. GUNDRUM, Judges. *Affirmed*.

Before Vergeront, Higginbotham and Blanchard, JJ.

¶1 PER CURIAM. Leterrys Green appeals judgments of conviction. The issues are probable cause to arrest and whether the circuit court was permitted to reconsider its order allowing Green to withdraw his plea. We affirm.

¶2 The first issue is whether there was probable cause to arrest Green. Green argues that police lacked probable cause as to either operating while intoxicated or sexual assault. The parties agree on the legal test for probable cause and our standard of review, and therefore we do not repeat them here.

¶3 As to the OWI, while it is a close call, we conclude there was probable cause based on the officer's testimony about the time of day and date (late at night on New Year's eve), the odor of alcohol on Green, his glassy and bloodshot eyes, Green's performance on the field sobriety tests, the fact that he had been at a bar, and the preliminary breath test result of 0.07%.

¶4 Green argues that this breath test result, because it is below the legal limit, should be seen as evidence that probable cause did *not* exist. We disagree. Arrests can be made not only for having a prohibited alcohol concentration, but also of a driver operating "[u]nder the influence of an intoxicant … to a degree which renders him … incapable of safely driving." WIS. STAT. § 346.63(1)(a) (2009-10).[1] For that purpose, the breath test result indicates consumption of alcohol to a degree that supports, rather than negates, probable cause for the offense under sub. (1)(a). The combination of that test result and the other evidence is sufficient to provide probable cause. Because we conclude there was probable cause to arrest for the OWI, it is not necessary to decide whether there was also probable cause on a second charge.

¶5 Green next argues that the circuit court improperly reinstated his no-contest plea, over his objection, after originally allowing him to withdraw it before

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

sentencing. Green's argument proceeds in the following steps: a circuit court is permitted to reconsider a prior decision to correct "substantive error"; the court's original decision here did not contain substantive error; a court may reconsider only to correct an "error of law"; the court's stated reasons for reconsidering in this case were not to correct errors of law; therefore, the court could not reconsider its decision allowing him to withdraw his plea.

¶6 Green's argument fails because he has not convinced us that the circuit court's original decision to allow plea withdrawal was made without substantive error. The circuit court appears to have made at least one error of fact in its original decision to allow plea withdrawal, and possibly two. While Green concedes that a court can reconsider due to "substantive error," he then narrows that concession so as to concede reconsideration only for errors of law. However, Green does not argue that a court is barred from reconsidering when it misunderstands the facts.

¶7 The first apparent error by the circuit court is that it did not understand that, by the time of the motion to withdraw the plea, Green had already obtained review by a DNA expert. Green sought to withdraw his plea on the ground that, having now become eligible for appointed counsel, he was also financially able to retain an expert to review DNA evidence. As we discuss further, the court appears not to have realized that the DNA review had already been completed. Instead, it appears the court believed that allowing Green to withdraw the plea would enable that review to occur in the future.

¶8 The record is clear that the DNA review by the expert had already occurred. Before the hearing at which Green's plea withdrawal motion was argued and decided, there were several adjournments while Green attempted to

obtain an expert. It was clear from those discussions that Green's attorney did not want to argue the motion until after he had received the expert's opinion. Then, at the start of the motion hearing itself, Green's attorney clearly stated that he "did have an opportunity to have a DNA analysis conducted and the results of that DNA test being my client became aware of a defense that he never fully appreciated prior to this." In closing argument, Green's attorney stated that "we were able to get the DNA testing done which has brought to Mr. Green's attention an additional defense that he wasn't aware of."

¶9 However, in allowing Green to withdraw his plea, the court appeared to believe that the DNA expert review would occur in the future. The court used the terms "opportunity" and "possibility" to refer to that review. The court described DNA analysis as "crucial to the defendant," noted that Green could not previously afford that, and finished by saying "now there is an opportunity to have that DNA analysis." The phrase "there is an opportunity" usually suggests a potential for *future* action.

¶10 Later in that hearing, the court stated that it was granting the plea withdrawal motion "on the basis of the possibility of having evidence that wasn't available in a practical manner to the defendant at the time [of the original plea]." If the court knew the analysis was already done, we would not expect it to refer to the "possibility" of having further evidence. If the analysis was done, Green (and the court) should be able to *know* whether there is more evidence.

¶11 In the factual statement in Green's brief on appeal, he correctly states that the DNA review was already completed at the time of the plea withdrawal hearing. However, in the argument sections of his briefs, Green implies that the DNA review occurred *after* the plea withdrawal. For example, in

his opening brief he writes: "In effect, the court granted the plea withdrawal to provide the opportunity for him to consult with a DNA expert. Green did, in fact, take advantage of that opportunity." By saying that he took advantage of the opportunity, Green incorrectly implies that he obtained the DNA review after the court granted plea withdrawal.

¶12 Similarly, in his reply brief Green stands firm in saying the circuit court's original decision "misunderstood neither the law nor the facts." To show that the court did not misunderstand the facts, Green describes the court as having allowed plea withdrawal so he could have the "possibility" of DNA analysis, and he says the DNA analysis "did, in fact, come to fruition, and Green retained the services of a DNA expert." Again, Green's phrasing is not an accurate reflection of the record. The phrase "come to fruition" incorrectly implies that the DNA review came after the plea withdrawal.

¶13 The possible misunderstanding of the circuit court is significant because Green concedes that the court can reconsider to correct substantive error. If the court erroneously believed that plea withdrawal would enable Green to conduct a future DNA review, that was a substantive error—a mistake of fact. If the court mistakenly believed that plea withdrawal was necessary to allow Green to obtain an expert review, then correction of that mistaken belief might lead to a different decision. That mistake would negate Green's argument on appeal that the original decision to allow plea withdrawal was sound, and thus immune from reconsideration.

¶14 The court also may have made a second factual error in allowing Green to withdraw his plea. Several months after the court granted that motion, the State moved for reconsideration on the basis of events that had occurred since.

During that time, it had become clearer to the State that Green's expert was not going to testify at trial. The State argued on reconsideration that "[t]here apparently is no DNA analysis and therefore representations made at the motion to withdraw plea appear to be without merit."

¶15 In granting the State's motion for reconsideration and reinstating Green's no-contest plea, the court appeared to say that it originally believed Green would have actual DNA evidence to present at trial. The court said it had made an "assumption which later proved to be incorrect, that there would be this DNA analysis that would be used in court or that would be helpful to the defense," and that this has turned out not to be true.

¶16 Green argues on appeal that the court would have been wrong to make the assumption that he would use his DNA expert at trial, and that there are reasons in the record to doubt whether the circuit court actually did make such an assumption at the original hearing. However, these points are not sufficient to undercut the court's perception of its own mistake. Only the court is in a position to conclusively state what its own understanding was at the earlier time. For us to conclude that the court was wrong in stating that it originally believed the expert would testify, we would have to conclude that the court either did not correctly recall its own beliefs, or was deliberately misstating them at the reconsideration hearing. There is no basis in this record for us to draw either conclusion. Therefore, we accept the court's statement on reconsideration that it incorrectly believed Green would be offering DNA evidence at trial. Because this was a mistake of fact that could affect the ultimate decision, reconsideration was proper.

¶17 We point out that, once we conclude the court was permitted to reconsider, the question of whether it then reached a correct decision on the

substance of Green's plea-withdrawal motion is a separate issue. In other words, a court that makes a factual error in its first decision is permitted to reconsider, even though it might still make the same error, or a different error, in its second decision. The presence of factual error in the second decision does not mean that the reconsideration was not permitted. It means only that there may be a basis to reverse the second decision due to a substantive error. However, in this case Green does not argue that the court erred in its ultimate decision on the substance of his motion. He argues only that we should reinstate the original plea-withdrawal decision because the court was not permitted to reconsider it. He does not argue that the court's ultimate decision on the substance of his motion was wrong, and that we should reverse and remand for a further decision on his motion to withdraw his plea.

By the Court.—Judgments affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.