COURT OF APPEALS
DECISION
DATED AND RELEASED

December 21, 1995

No. 95-1794

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

COUNTY OF ROCK,

Plaintiff-Respondent,

v.

ROBERT D. HAYLOCK,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Rock County: J. RICHARD LONG, Judge. *Affirmed*.

GARTZKE, P.J.[1] Robert D. Haylock appeals from a judgment convicting him of operating a motor vehicle while under the influence of an intoxicant, contrary to a Rock County ordinance adopting § 346.63(1)(a), STATS., and operating a motor vehicle with a prohibited blood alcohol content, contrary to a Rock County ordinance adopting § 346.63(1)(b). He seeks review of an order denying his motions to suppress evidence. The issues are whether: (1) the arresting officer lacked probable cause to arrest Haylock; (2) obtaining

[1] This appeal is decided by one judge pursuant to § 752.31(2)(g), STATS.

Haylock's blood test results violated his "expectation of privacy" and his right to due process; (3) the affidavit in support of a motion seeking issuance of a subpoena directed to the hospital for release of the blood test results established probable cause. We affirm the judgment of conviction.

Deputy Allen, the arresting officer, testified at the suppression hearing. Following that hearing, the trial court made numerous findings which we summarize. Allen has nine years of experience and has made numerous arrests for driving under the influence. Allen was dispatched to an injury accident about 3:30 a.m. on February 16, 1994. At the scene Allen saw a pickup truck in the ditch and determined that a one-car accident had occurred. The roads were in usual winter driving condition and not icy. The driver told Allen he had lost control of the car, but did not tell him why. The driver said he had been drinking and Allen smelled intoxicants. The driver said he did not know how the accident happened. Allen determined that the driver had been injured. His leg was badly deformed above his boot top. The paramedics took him from the scene. Allen examined the vehicle and smelled intoxicants. He found a cooler containing twelve to twenty-four cans of unopened beer. Allen did not check to see whether the vehicle was in proper operating condition.

Based upon the totality of those circumstances, the trial court concluded that Allen had probable cause to arrest Haylock for operating a motor vehicle while under the influence of an intoxicant. The court noted that the officer on several occasions had referred to the driver being "possibly intoxicated" or "possibly he had been driving under the influence," but the court attributed no particular significance to those phrases. The court concluded that the officer had ample information from which he reasonably could conclude that Haylock had been operating while intoxicated. Haylock smelled of intoxicants, had slurred speech and bloodshot eyes, and admitted without explanation that he had lost control of his car.

The trial court also denied Haylock's motion to suppress the blood test results. The County had earlier moved the court for an ex parte order requiring the hospital which had treated Haylock to release his blood test results pursuant to § 968.135, STATS. That statute provides that upon request from the district attorney "and upon a showing of probable cause under s. 968.12, a court shall issue a subpoena requiring the production of documents, as specified in s. 968.13(2)." Section 968.12(2), STATS., provides in relevant part:

> A search warrant may be based upon sworn complaint or affidavit ... showing probable cause therefor. The complaint, affidavit or testimony may be upon information and belief.

Section 968.13(2) describes "documents" as including, but not limited to, papers and records.

The affidavit by the assistant district attorney for Rock County asserts that he had reviewed the police reports of Deputy Allen and that Allen had reported that he found a truck in the ditch and met with the driver who identified himself as Haylock. The affidavit cited facts similar to Allen's suppression hearing testimony. Haylock's speech was slightly slurred and slow, his eyes were bloodshot and there was a slight odor of intoxicants from his person. Haylock was unsure as to how the accident happened and admitted to drinking before the accident. Haylock was then transported to Memorial Community Hospital in Edgerton for injuries he sustained in the accident. Allen went to the hospital, contacted Haylock and requested he submit to a chemical test of his blood but Haylock refused. Based upon information and belief, the affidavit continues, hospital personnel tested a sample of Haylock's blood for diagnostic purposes. The affidavit states the State sought medical records concerning any blood test results to assist its prosecution of Haylock for operating a motor vehicle while intoxicated and for operating a motor vehicle with a prohibited blood alcohol concentration.

Based upon the affidavit, the court issued the subpoena to the hospital. The hospital responded to the subpoena by producing the records showing test results revealing Haylock's blood alcohol level.

In denying Haylock's motion to suppress medical records disclosing the blood alcohol test results, the court said, referring to § 908.03(6m)(c)2, STATS., that a subpoena may be issued on ex parte order "`for cause shown' ... it doesn't say upon probable cause but simply: ... `for cause shown.'" The court said that no physician-patient privilege existed and therefore the testimony concerning Haylock's blood alcohol test results were admissible at trial.

Haylock first asserts we should suppress the evidence because the arresting officer lacked probable cause to arrest. Whether probable cause exists on the established facts is a constitutional issue we resolve independently of the trial court's ruling. ***State v. Mitchell***, 167 Wis.2d 672, 684, 482 N.W.2d 364, 368 (1992). We will not disturb the trial court's finding of historical fact unless it is clearly erroneous. ***Mitchell***, 167 Wis.2d at 682, 482 N.W.2d at 368.

Haylock relies principally upon ***State v. Swanson***, 164 Wis.2d 437, 475 N.W.2d 148 (1991), to invalidate the arrest. The ***Swanson*** court said that probable cause requires more than bare suspicion. "Unexplained erratic driving, the odor of alcohol, and the coincidental time of the incident form the basis for a reasonable suspicion but should not, in the absence of a field sobriety test, constitute probable cause to arrest someone for driving while under the influence of intoxicants." ***Swanson***, 164 Wis.2d at 454 n.6, 475 N.W.2d at 155. "The unexplained erratic driving could very well have been explained ... by a mechanical failure for the automobile. Without an investigation, the officer would be only left with suspicion." ***Id***.

We think ***Swanson*** does not control the case before us. More than erratic driving occurred in this case. The pickup had gone off the road, the driver admitted he had lost control and could not explain why, and road conditions were not unusual. Under these circumstances, we think the officer had no obligation to examine the truck to determine whether a mechanical condition could have caused the accident. Indeed, an officer would ordinarily have extreme difficulty examining a vehicle that is lying in a ditch.

Nor do we think that the ***Swanson*** decision required the officer to administer field sobriety tests before arresting Haylock for operating while under the influence. It would have been grossly improper for the officer to request Haylock to walk a straight line. A finger-to-nose test undoubtedly was feasible but not necessary for the officer to conclude that he should arrest Haylock for operating under the influence. Haylock slurred his speech. He said he had lost control of his car but could not explain why the accident had occurred. He admitted that he had been drinking. That was enough to establish probable cause.

The next issue is whether the blood test results obtained from the hospital which treated Haylock must be suppressed because they were obtained in violation of his expectation of privacy and without due process of law.

The parties do not dispute that the hospital's records showing the blood test results are patient health care records. Section 146.82(1), STATS., provides in relevant part,

> (1) All patient health records shall remain confidential. Patient health care records may be released only to the persons designated in this section or other persons with the informed consent of the patient or of a person authorized by the patient....
>
> (2)(a) Notwithstanding sub. (1), patient health care records shall be released upon request without informed consent in the following circumstances:
>
> ....
>
> 4. Under a lawful order of the court.

Haylock argues that § 146.82, STATS., creates "an expectation of privacy in a patient's medical records," and that expectation "becomes constitutionally protected under the Fourth Amendment." Haylock further argues that § 146.82 creates a statutory right which cannot be denied without due process.

We reject both arguments. Haylock's expectation of privacy must be based on the entire statute which creates the expectation. Section 146.82, STATS., creates a limited right of confidentiality with defined exceptions including release of patient health care records under a lawful order of a court or record. Section 146.82(2)(a)4. The statute does not create any rights greater than its exceptions.

The remaining issue is whether the court order commanding release of those records was indeed lawful. Haylock asserts that the affidavit seeking issuance of the subpoena failed to establish probable cause to believe

that any tests would indicate the presence of intoxication, or to believe that the hospital even conducted a test for intoxication.

We assume without deciding that the subpoena could only issue upon probable cause. Probable cause exists when there is a "fair probability," or it is "reasonable" to believe that evidence or contraband is located at the place sought to be searched. ***State v. Friday***, 147 Wis.2d 359, 376-77, 434 N.W.2d 85, 92 (1989), *citing* ***Illinois v. Gates***, 462 U.S. 213, 238 (1983); ***State v. Tompkins***, 144 Wis.2d 116, 125, 423 N.W.2d 823, 827 (1988).

The affidavit cites Deputy Allen's report that (1) on February 16, 1994, at 3:44 a.m., he observed a truck in the ditch and that Haylock identified himself as the driver; (2) Haylock's speech was slightly slurred and slow; (3) his eyes were bloodshot; (4) there was slight odor of intoxicants from Haylock's person; (5) Haylock was unsure how the accident happened; (6) Haylock admitted to drinking beer before the accident; (7) Haylock was transported to Memorial Community Hospital in Edgerton for the injuries he sustained as a result of the accident; (8) Deputy Allen detected the odor of intoxicants in Haylock's car; (9) Deputy Allen found a large cooler with between twelve and twenty-four unopened cans of beer inside. These facts create a fair probability that hospital tests would reveal that Haylock was intoxicated.

We also conclude that affidavit states sufficient facts to reasonably believe the hospital had conducted blood tests showing Haylock's level of intoxication. It is reasonable to infer that a person injured in an automobile accident would be subjected to blood tests at the hospital to which he had been admitted.

By the Court.—Judgment affirmed.

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