COURT OF APPEALS
DECISION
DATED AND RELEASED

December 21, 1995

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

Nos. 95-1814
95-1815

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

COUNTY OF ROCK,

Plaintiff-Respondent,

v.

GREGORY J. SENDELBACH,

Defendant-Appellant.

APPEALS from judgments of the circuit court for Rock County: JOHN H. LUSSOW, Judge. *Affirmed.*

VERGERONT, J.[1] Gregory J. Sendelbach appeals from judgments convicting him of operating a motor vehicle with a prohibited alcohol concentration in violation of § 346.63(1)(b), STATS., and hit and run upon striking property in violation of § 346.69, STATS.[2] Sendelbach raises two issues

[1] These consolidated appeals are decided by one judge pursuant to § 752.31(2)(c), STATS.

[2] Sendelbach filed an appeal from each conviction. We granted his motion to consolidate the appeals as they involve the same facts, were resolved together before the

on appeal: (1) may a police officer conduct a traffic investigation by taking a suspect to another location without probable cause to arrest?; and (2) was there probable cause to arrest Sendelbach when he was taken by the officer to a location away from the place where he had been stopped by the officer?

We do not address the first issue because we conclude the officer had probable cause to arrest Sendelbach at the time the officer took him to another location. We therefore affirm the convictions.

Sendelbach moved to suppress his breath test results on the ground that his seizure by Rock County Deputy David Vierck, and Vierck's transporting him to another location, constituted an invalid arrest in that there was no probable cause to believe that he had committed a crime.

The trial court denied the motion to suppress and found Sendelbach guilty of operating a motor vehicle with a prohibited alcohol concentration, and hit and run upon striking property.

Officer Vierck's testimony was as follows. He was patrolling Highway 14 in Rock County at 2:47 a.m. when he observed a vehicle that had left the highway and was sitting in a field. There was extensive damage to the front end of the vehicle. The vehicle had struck some trees. A sign may have been hit, as well as some trees on a fence line. Footprints in the field led to the roadway. Vierck could smell intoxicants in the vehicle. No one was in the vehicle. The keys were not in the ignition. There was no sign that a person had been injured. After Vierck waited for another officer to arrive, he began looking for the person who had been driving the vehicle.

Officer Vierck found a person walking on Highway 14 about a mile from the vehicle. The person, Sendelbach, identified himself as "Greg" and said he had been the driver of the car. Sendelbach was muddy and, "upon contact," he ran into a cornfield. Vierck took Sendelbach back to the accident

(..continued)
trial court, and raise the same issues.

vehicle in the squad car. Vierck said: "Okay. You're coming with me back there."

In reviewing a denial of a suppression motion, we accept the trial court's findings of historical facts unless they are clearly erroneous. *See* ***State v. Whitrock***, 161 Wis.2d 960, 973, 468 N.W.2d 696, 701 (1991). Whether those facts meet the constitutional standard of probable cause to arrest is a question of law, which we review de novo. *See* ***State v. Turner***, 136 Wis.2d 333, 344, 401 N.W.2d 827, 832 (1987).

Sendelbach argues that taking him to the scene of the accident transformed the ***Terry***[3] stop into an arrest, and there was no probable cause for an arrest. In its brief, the State argues that there was probable cause to arrest on at least two grounds. First, § 346.69, STATS., provides:

> The operator of any vehicle involved in an accident resulting only in damage to fixtures or other property legally upon or adjacent to a highway shall take reasonable steps to locate and notify the owner or person in charge of such property of such fact and of the operator's name and address and of the registration number of the vehicle the operator is driving and shall upon request and if available exhibit his or her operator's license and shall make report of such accident when and as required in s. 346.70.

The State argues that, given the testimony that the trees and possibly a sign were struck, and that the damage to the car was extensive, it is reasonable to infer that there was damage to the trees and sign. The State contends that, on finding the driver of the car walking a mile away from the

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[3] In ***Terry v. Ohio***, 392 U.S. 1 (1968), the United States Supreme Court held that where a police officer lacks probable cause to arrest an individual, but has reason to believe that such individual may be involved in the commission of a crime, he or she may stop the individual for questioning.

accident and on seeing the driver run from him after initial contact, Vierck had probable cause to believe that Sendelbach was fleeing the scene of the accident rather than taking reasonable steps to locate and notify the owner or person in charge of the damaged property as required by § 346.69, STATS.

Second, the State cites § 346.70(1), STATS., which requires "[t]he operator of a vehicle involved in an accident resulting in ... any damage to state or other government-owned property ... to an apparent extent of $200 or more or total damage to property owned by any one person or to a state or other government-owned vehicle to an apparent extent of $500 or more shall immediately by the quickest means of communication give notice of such accident to the police department...." The State argues that given the extensive damage to the car, it is reasonable to infer that the minimum amount of damage was met and, again, that the circumstances under which Vierck found Sendelbach and Sendelbach's behavior constituted probable cause to believe that Sendelbach was not communicating the damage to the police or sheriff.

Sendelbach discusses neither of these statutes in his first brief and has filed no reply brief. We consider this a concession that Vierck had probable cause to arrest him for a violation of either one or both of these statutes at the time Vierck transported him in the squad car. *See* ***Schlieper v. DNR***, 188 Wis.2d 318, 322, 525 N.W.2d 99, 101 (Ct. App. 1994) (a proposition asserted by a respondent on appeal and not disputed by the appellant's reply is taken as admitted). We are persuaded that Vierck did have probable cause to arrest for a violation of either one or both of these statutes. We therefore affirm the trial court's denial of the suppression motion and affirm the convictions.

By the Court.—Judgments affirmed.

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