COURT OF APPEALS
DECISION
DATED AND RELEASED

April 17, 1996

No. 95-3185-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

WILLIAM H. WARREN,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Waukesha County: KATHRYN W. FOSTER, Judge. *Affirmed*.

BROWN, J. William H. Warren raises three challenges to his conviction and sentence for operating a vehicle while intoxicated. First, he claims that the trial court erred when it admitted evidence about a police dispatch report identifying him as a possible intoxicated driver. Second, he argues that the trial court should have allowed his proposed jury instruction. The instruction was written to inform the jury about the arresting officer's discretionary power to forcibly withdraw blood from drivers who

refuse chemical testing. Finally, Warren claims that the court erred when it declined to order a new trial or modify his sentence based on new information that he had been bothered by the effects of a stroke during the trial. We conclude that all three decisions were proper exercises of discretion and affirm Warren's conviction and sentence.

The facts in a light most favorable to the guilty verdict are as follows. During the evening of April 26, 1993, a city of Brookfield police officer received a dispatch about a possible drunk driver in the parking lot of a food store. As the officer approached the store, he saw Warren driving the identified car and began following him.

The officer watched Warren drive erratically. Warren accelerated quickly from a stop sign. He then slowed to twenty-five miles per hour in a thiry-five miles per hour zone. Warren wove back and forth within the traffic lane. He also crossed the center line.

Based on these observations, the officer activated his lights and tried to stop Warren's car. Warren, however, continued on. He slowed as if to pull into a fire station and then aborted the turn. Warren then pulled into, and then out of, a gas station. After the officer sounded his siren, Warren finally pulled over.

When the officer approached the car and asked Warren for his license, Warren immediately responded by questioning why he had been pulled over. Warren denied ever crossing the center line. The officer noted that

Warren smelled like he had been drinking and asked Warren if he had been out that night. Warren denied drinking that evening, but admitted that he had been earlier that day.

The officer then asked Warren to get out of the car for some sobriety tests. He saw that Warren had physical difficulty getting out of the car and that Warren needed a cane. Warren explained that he had a bad foot and back. Nonetheless, he agreed to take the field tests.

Testing started with the alphabet. Warren appeared to have some difficulty understanding that he was being requested to recite his ABC's. When Warren finally began reciting, he had little problem getting to "P" but then had to pause for four or five seconds before he could finish. Although Warren claimed that he did not understand the test, the officer believed that Warren had been intentionally stalling in an effort to recall the letters.

After this test was done, Warren told the officer that he had to urinate. Although the officer told him that he would have to wait, Warren went to the back of his car and relieved himself. The officer noted that Warren had to use the car and his cane for balance at this time.

The officer decided to arrest Warren. At trial, he summarized what led him to believe that Warren was intoxicated. He explained that, based on his knowledge as a police officer, he believed that Warren's mannerisms, glassy eyes and smell of drinking were all signs of intoxication. The officer also explained how he had considered whether Warren's medical problems might be

the cause of his poor balance and other suggestive mannerisms, but felt that his nonresponsiveness to testing and questioning outweighed those factors.

After the arrest, Warren was placed in the squad car. The officer drove first to the station to get some paperwork and then took Warren to the hospital for a blood test. There, the officer issued him an OWI citation. The officer also read Warren the Informing the Accused form and asked if he was willing to take a chemical test. Warren refused.

Based on the above facts, the jury found Warren guilty of operating while intoxicated. *See* § 346.63(1)(a), STATS. Based in part on an earlier drunk driving conviction, the court sentenced him to serve sixty days in jail and pay a $790 fine. The court also revoked Warren's operating privileges for eighteen months. Other relevant facts will be set forth later.

We now turn to the first of Warren's three claims. Here, he argues that the court erred when it allowed the officer to testify about the dispatch call he received signaling that Warren was a suspected drunk driver. Warren argues that this was inadmissible hearsay. *See* § 908.02, STATS. He also claims that any probative value of this evidence was substantially outweighed by its prejudicial effect. *See* § 904.03, STATS.

The trial court's decision to allow this testimony is committed to its discretion. *See* ***State v. Rogers***, 196 Wis.2d 817, 829, 539 N.W.2d 897, 902 (Ct.

App. 1995). We may not reverse unless we can identify an error in the court's interpretation of the law or an illogical application of the facts to the law. *See* ***id.***

On the merits, Warren argues that this evidence was used to prove that he was indeed drunk. As a result, Warren contends that the unidentified witness who called this information into the police should be required to appear in court.

But as the State correctly argues, this evidence was not hearsay because it was not being offered to establish "the truth of the matter asserted." *See* § 908.01(3), STATS. Rather, the State offered the dispatch call as foundation to help the jury understand why the officer was looking for Warren's car.

A very similar use of seemingly hearsay evidence was upheld in ***United States v. Sanchez***, 32 F.2d 1002, 1005 (7th Cir. 1994).[1] There, the district court allowed a police officer to testify how an informant had said that the defendant had recently purchased some cocaine and was now seeking payment. On appeal, the defendant claimed that the informant's statement was hearsay. The court, however, explained that this statement was not hearsay because it was only being used to establish why the officer suspected the defendant of drug dealing and why he decided to set up a controlled drug buy. *See* ***id.***

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[1] Wisconsin's hearsay rule duplicates the federal rule. *Compare* § 908.01(3), STATS., *with* FED. R. EVID. 801(c). We may look to federal court decisions to help interpret Wisconsin evidentiary rules that have a federal counterpart. *See* ***State v. Blalock***, 150 Wis.2d 688, 702, 442 N.W.2d 514, 519-20 (Ct. App. 1989).

As the ***Sanchez*** court recognized, the State may use out-of-court statements as background for its witnesses' testimony without violating the hearsay prohibition. Contrary to Warren's claim, the statement was not being used to show that some other person believed that Warren was drunk that evening. It was being used for background purposes. We therefore conclude that the trial court properly applied the hearsay rules.

We also address Warren's alternative claim that the statement, even if it was admissible, was nonetheless prejudicial. On this point, Warren argues that the officer's incorporation of the call into his testimony "clothed" the statement by the unidentified person at the food store with the "power and opinion of the State." His argument, however, is not supported by the record.

> The officer made reference to this statement in the following manner:
>
> [Prosector] And did any— did you receive any information or anything unusual happen at that location?
>
> [Officer] The dispatcher sent us to check for a reported drunk driver at the Grasch's food store located at Lily and North.
>
> ....
>
> [Prosecutor] Did you receive any information on the drunk driver?
>
> [Officer] The dispatcher advised us that according to whoever called there was an intoxicated subject getting into the vehicle. The vehicle was a Buick with a plate of JDE767. The driver of the vehicle was a male with gray hair, a white male with gray layer and red suit coat.

[Prosecutor] And did they indicate if the person got in the car or they were going any direction?

[Officer] Well we headed toward Grasch's food they then said the vehicle is going northbound on Lily Road.

Based on how this statement was incorporated into the officer's testimony, we do not see any attempt by the State to unfairly cloak it with special authority or credibility.

The evidence revealed why the officer targeted Warren's car. Then, in the remainder of his testimony, the officer outlined the steps he took to independently verify if there was any truth to the report. Indeed, the officer's decision to conduct his own investigation implicitly shows that he was noncommittal about the truth of the report. As important, the officer plainly stated that this report of a drunk driver came from a "whoever." The officer did not try in any way to embellish this testimony as carrying special weight. The trial court thus had ample reason to conclude that this testimony was not prejudicial.

Warren next claims that the trial court erred when it did not allow an instruction which would have informed the jury that the arresting officer could have effectively ignored Warren's testing refusal and used reasonable force to obtain a blood sample. His entire instruction is reproduced at the

margin.[2] This instruction is molded after the decision in ***State v. Bohling***, 173 Wis.2d 529, 494 N.W.2d 399, *cert. denied*, 114 S. Ct. 112 (1993), where the supreme court held that law enforcement officers may forcibly obtain a blood sample from a driver when they have probable cause that the suspect is intoxicated. *See* ***id.*** at 547-48, 494 N.W.2d at 406.

Because the officer apparently did not use his ***Bohling*** "authority" to obtain a sample, Warren believed that an instruction which informed the jury that the officer could have conducted such a test would help his case. He hoped that the jury would infer that the officer knew that a chemical test might disprove any claim that Warren was intoxicated. Warren thought that this instruction would lead the jury to conclude that the officer made a conscious decision to refrain from obtaining what would have been dispositive evidence.

The trial court has broad discretion to issue jury instructions based on the facts and circumstances of the case. ***State v. Turner***, 114 Wis.2d 544, 551, 339 N.W.2d 134, 138 (Ct. App. 1983). When we review a discretionary decision, we test whether the trial court rationally applied the appropriate legal standard

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[2] The proposed instruction provided:

> Evidence has been received under the law in the State of Wisconsin, law enforcement officials have the right to use reasonable force to require a person to provide a sample of blood for chemical analysis but chose not to do so in this case. You should consider the evidence along with all the other evidence in the case giving to it just such weight as you decide it is entitled to receive.

to the relevant facts before it. *See* ***Hedtcke v. Sentry Ins. Co.***, 109 Wis.2d 461, 471, 326 N.W.2d 727, 732 (1982).

Accordingly, we will focus on the trial court's reasoning. It believed that ***Bohling*** did not impose a *mandatory* duty on police officers. Rather, it read this decision as giving the police *discretion* to take a blood sample when they felt it was appropriate. Without a record showing that the city of Brookfield had mandated that its officers obtain blood samples in such circumstances, the trial court did not believe that a conscious decision to refrain from seeking exculpatory evidence could be imputed to the officer who arrested Warren. In fact, the only evidence was that the officer did not know about the ***Bohling*** decision when he made this arrest and the city of Brookfield's current policy is to only get blood draws when there is an accident which results in serious injury or death.

The trial court thus refused to give the instruction because the sought-after inference was not supported by the evidence. Since the arresting officer did not know he could have obtained a blood draw, he never made a conscious "decision" not to get a sample. Based on these facts, his actions could not provide any inference about whether the officer really believed that Warren was intoxicated.

We agree with the trial court's interpretation of ***Bohling*** and its assessment of the record. In ***Bohling***, the officer who took the challenged blood draw did so in accordance with his department's policy of blood testing all third and subsequent offenders who otherwise refused testing. *See* ***Bohling,*** 173

Wis.2d at 534, 494 N.W.2d at 400. Because of the facts before it, we believe that the ***Bohling*** court was only authorizing *police departments* throughout the state to develop guidelines for testing suspected drunk drivers who refuse chemical testing under the implied consent law. We do not see the decision as imposing a duty on individual police officers to automatically get a blood draw whenever a driver refuses testing.

We further reject Warren's claim that his proposed instruction was "neutrally written" and would not have led the jury to believe that the arresting officer was under a duty to test Warren. It states that law enforcement officers may draw blood, but it also adds that the arresting officer "chose not to do so in this case." As the trial court recognized, this second statement has no factual foundation because Warren never established that this officer was officially informed to test suspects like Warren or had personal knowledge that he could have tested Warren. The officer did not make a choice between two options and therefore no inference could be drawn from his actions.

Finally, Warren complains that the trial court should have granted him a new trial, or alternatively amended his sentence, when he learned afterwards that he had a stroke sometime prior to the trial. Because this newly-discovered information was not before the court at the time of trial or when he was sentenced, Warren claims that the trial court should have made appropriate adjustments.

A "new factor" that warrants a change in sentence is an event or development which frustrates the purpose of the original sentence. ***State v. Michels***, 150 Wis.2d 94, 99, 441 N.W.2d 278, 280 (Ct. App. 1989). Whether Warren's discovery of these previously unknown medical problems constitutes a new factor is a question of law which we review de novo. *See* ***id.*** at 97, 441 N.W.2d at 279. The trial court's treatment of a new factor, however, is left to its discretion. ***Id.***

The trial court considered Warren's claim at a hearing in October 1995. This hearing came almost one year after his December 9, 1994, sentencing date.

During the later hearing, the trial court reached two conclusions. First, on the issue of how Warren's health problems affected him during trial, it found that there was insufficient evidence to reach any specific conclusion about whether Warren had been impaired. It recalled that he seemed to be well-functioning during the proceedings, but concluded that it was otherwise unable to make any specific finding without any facts or medical records. It therefore denied his motion for a new trial.

We affirm the trial court's ruling. While Warren renews his claim that his recently acquired knowledge about the effects of his stroke is a new factor, he has not pointed to any part of the record supporting his position. His

only "evidence" is the arguments his attorney made before the trial court. Warren has therefore failed to meet his burden of proof. *See* ***Michels***, 150 Wis.2d at 97, 441 N.W.2d at 279 ("defendants must establish the existence of a new factor by clear and convincing evidence.").

The trial court also considered whether Warren's new condition presented grounds for amending his sentence. Here, the trial court explained how it had previously considered Warren's other medical problems and his temporary hospitalization after the trial when it formulated his sentence. It also recalled that it had contacted the county to be sure that Warren could receive proper treatment in jail. The court then found that any deterioration in Warren's condition over the intervening year did not warrant changing a sentence that already accounted for his poor health.

We agree with the trial court's legal conclusion that Warren has not presented a new factor. We further conclude that the trial court properly reasoned that a defendant's "worsening" condition is not a matter that warrants a sentence adjustment. *See* ***id***. at 100, 441 N.W.2d at 281.

By the Court. – Judgment and order affirmed.

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