COURT OF APPEALS
DECISION
DATED AND RELEASED

October 24, 1996

NOTICE

No. 96-1242-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KEVIN W. COFFEY,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Dane County: DANIEL R. MOESER, Judge. *Affirmed*.

EICH, C.J.[1] Kevin Coffey appeals from a judgment convicting him of operating a motor vehicle while intoxicated. He argues that his arrest was unlawful because it was (1) the product of an "unlawful entry by police into his hospital room," and (2) unsupported by probable cause. We reject the arguments and affirm the judgment.

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

The facts are not in serious dispute. Coffey was involved in a one-car accident near Madison under circumstances indicating he lost control of his car on a curve and ran off the road, striking a sign and the road embankment. Coffey suffered facial injuries in the crash and, when questioned by a police officer arriving at the scene, stated that he lost control of the car when he swerved to avoid hitting a deer crossing the road. The officer noticed Coffey's breath had a "strong odor of intoxicants" and his speech was "slurred"—or, in the officer's words, "drawn out, not ... clear ... [or] sharp." At about that time, an ambulance arrived and transported Coffey to a Madison hospital.

The officer went to the hospital and entered a "cubicle" in the emergency room where Coffey was lying on a cot, being attended to by a nurse. The officer continued his questioning and Coffey acknowledged that he had been traveling at a speed in excess of sixty miles per hour on the curve, which was marked with a twenty-five m.p.h. cautionary sign.[2] Again the officer noticed the odor of intoxicants about Coffey's person and his slurred speech. When asked whether he had been drinking that evening, Coffey responded in the affirmative, stating that he consumed "approximately three beers ... prior to leaving [his sister's house] which was minutes before the accident." Believing he had cause to do so, the officer placed Coffey under arrest for operating under the influence and gave him the information required under the implied-consent law. Coffey also signed a waiver of his ***Miranda*** rights and a medical release form.

Coffey filed several suppression motions and in one he challenged his arrest, arguing that he had an expectation of privacy in the emergency-room cubicle, which the officer's presence had breached. He also argued that the officer did not have probable cause to arrest him. The trial court denied the motions and Coffey appeals.

I. Expectation of Privacy

[2] Apparently the speed limit on the highway was 45 m.p.h., and 25 was the "recommended" speed at the curve.

The Fourth Amendment right to be free from unreasonable searches and seizures turns, in the first instance, on whether the defendant had a justifiable, reasonable or legitimate expectation of privacy in the area that was the subject of the search and which the government action invaded. ***State v. Callaway***, 106 Wis.2d 503, 520, 317 N.W.2d 428, 437, *cert. denied*, 459 U.S. 967 (1982); ***State v. Fillyaw***, 104 Wis.2d 700, 714-15, 312 N.W.2d 795, 802-03 (1981), *cert. denied*, 455 U.S. 1026 (1982). It is a two-step inquiry, asking first, whether the defendant, by his conduct, "has exhibited an actual subjective expectation of privacy" and, if so, "whether that expectation is justifiable in that it is one which society will recognize as reasonable." ***State v. Stevens***, 123 Wis.2d 303, 316, 367 N.W.2d 788, 795, *cert. denied*, 474 U.S. 852 (1985).

Analogizing from cases, such as ***Minnesota v. Olson***, 495 U.S. 91 (1990), in which an overnight guest in another person's home was held to have a reasonable expectation of privacy against nonconsensual police intrusion, Coffey argues that he had a similar expectation with respect to the emergency-room cubicle. He says he had a "personal stake" in, and an immediate concern for, medical treatment while in the room, and, as a hospital patient, a per se expectation of privacy "founded in the ethical canons upon which the practice of medicine is regarded as a profession" that he will not expose either his "anatomy" or "intimate information" to anyone other than medical personnel. He also points to his testimony at the suppression hearing that he did not expect a police officer to enter the cubicle.

He points to nothing in the record, however, from which we might ascertain whether he had "by his conduct ... exhibited an actual, subjective, expectation of privacy" in the cubicle. ***Stevens***, 123 Wis.2d at 316, 367 N.W.2d at 795. Indeed, the only "conduct" evident from the record consists of his voluntary responses to the officer's questions and his voluntary signing of the waiver and medical release forms.

Additionally, as the State points out, the defendant's own expectations do not govern the issue for, to be protected, they must be objectively reasonable or "legitimate"; they must be expectations which society is prepared to recognize as reasonable or justifiable under the circumstances. ***Smith v. Maryland***, 442 U.S. 736, 740 (1979). And one of the considerations figuring in the answer to the question is whether the defendant "took precautions customarily taken by those seeking privacy." ***Fillyaw***, 104 Wis.2d

at 712 n.6, 312 N.W.2d at 801. Again, as the State points out, one who "`"knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."'" ***Florida v. Riley***, 488 U.S. 445, 449 (1989) (quoted sources omitted). Coffey made no attempt to secure his privacy in the cubicle. He did not ask that the door be closed or that the officer leave, and he went on to freely discuss the case with the officer.

Nor are we persuaded by Coffey's argument that the fact that the room was in a medical facility to which he had been taken for treatment gives rise to a per se expectation of privacy. Relying on the Hippocratic Oath and cases and statutes discussing the physician-patient privilege and the confidential nature of health-care records, he contends that "the expectation of privacy and confidentiality in medical treatment ... is a universal social understanding."

There is, however, no suggestion in the record—or in the parties' briefs—that the officer had access to or received any medically related information as a result of his presence in the cubicle. Coffey complains only that the officer, while in the room, asked him questions about the evening's occurrences—all of which he answered freely. In ***Muskego v. Godec***, 167 Wis.2d 536, 482 N.W.2d 79 (1992), another driving-while-intoxicated case, the supreme court rejected a Fourth Amendment challenge to the obtaining and use by police of results of blood tests hospital personnel administered for diagnostic reasons. The defendant in ***Godec*** argued that the various medical confidentiality and privilege rules covering medical treatment and information prohibit the release of test results without his consent. The supreme court disagreed, holding that the implied-consent law and § 905.04(4)(f), STATS., which states that no privilege attaches to "the results of or circumstances surrounding any chemical tests for intoxication ....[,]" override any such considerations and therefore the test results were admissible in Godec's drunk-driving trial. ***Id***. at 546, 482 N.W.2d at 83. We do not see Coffey's medical-privilege arguments as compelling the result he seeks.

II. Probable Cause

Coffey argues that all that may be gleaned from the record in this case is that he had been drinking and had been in an accident, and that evidence

is inadequate to establish probable cause to arrest. He maintains that, because the officer's entry into the emergency-room cubicle constituted an improper search (or seizure, or both), nothing of what was said there may be considered in the probable-cause equation. We have, of course, found no Fourth Amendment violation in the officer's conduct.

We said ***State v. Pozo***, 198 Wis.2d 706, 712, 544 N.W.2d 228, 231 (Ct. App. 1995):

> Probable cause ... is neither a technical nor a legalistic concept; rather, it is a "flexible, common-sense measure of the plausibility of particular conclusions about human behavior"...—conclusions that need not be unequivocally correct or even more likely correct than not. It is enough if they are sufficiently probable that reasonable people—not legal technicians—would be justified in acting on them in the practical affairs of everyday life.

(Citations and quoted sources omitted.)

Thus, the concept of probable cause requires only that the "officer have facts and circumstances within his or her knowledge sufficient to warrant a reasonable person to conclude" that the defendant has violated the law. ***State v. Richardson***, 156 Wis.2d 128, 148, 456 N.W.2d 830, 838 (1990). The information available to the officer must be such as would lead a reasonable police officer to believe that "`guilt is more than a possibility.'" ***Id***. (quoted source omitted).

Here, the officer had observed the accident scene and ascertained that Coffey lost control of his vehicle while going sixty-one or sixty-two m.p.h.in a forty-five m.p.h. zone—in particular, on a curve with a posted recommended speed of twenty-five. He noted that Coffey had a strong odor of intoxicants on his person and his speech was slurred. That evidence, coupled with Coffey's acknowledgement that he had just consumed three beers, is, in our opinion, sufficient to establish probable cause under the standards just discussed.

By the Court.—Judgment affirmed.

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