COURT OF APPEALS
DECISION
DATED AND FILED

December 21, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-0975-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ROGER M. SPENCER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: ROBERT DeCHAMBEAU, Judge. *Affirmed.*

¶1 DYKMAN, P.J.[1] Spencer appeals from a judgment convicting him of operating a motor vehicle while under the influence of a combination of an intoxicant and controlled substance in violation of WIS. STAT. § 346.63(1)(a)

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1997-98).

(1997-98).[2] Spencer first argues that the police did not have probable cause to arrest him. We disagree and conclude that the arresting officer had probable cause to arrest Spencer for driving under the influence. Spencer also argues that the police violated his Fourth Amendment right against unreasonable searches and seizures by drawing his blood without a warrant. We disagree and therefore affirm.

I. Background

¶2 In October 1998, while driving his van, Spencer struck a pedestrian who was attempting to cross the road. The accident occurred during daylight hours. Sergeant Dennis Weiner made the initial police contact with Spencer, and Officer Russell Waddell also responded to the accident scene.

¶3 Waddell noticed that Spencer's eyes were watery and bloodshot, and thought that Spencer was dazed. He performed three field sobriety tests. First, Waddell administered the horizontal gaze nystagmus (HGN) test, which yielded all six clues of intoxication. Waddell then administered the "walk and turn" test and the "one-leg stand" test. Spencer passed these two tests. Spencer admitted to Waddell that he had been drinking at a local bar. Spencer also told Weiner that he

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[2] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted. WISCONSIN STAT. § 346.63 states:

> (1) No person may drive or operate a motor vehicle while:
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> (a) Under the influence of an intoxicant, a controlled substance, a controlled substance analog or any combination of an intoxicant, a controlled substance and a controlled substance analog, under the influence of any other drug to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving.

had "a few beers" at the bar on his way home from work. Both officers could smell the odor of intoxicants on Spencer even though he was smoking a cigarette.

¶4 The speed limit at the scene of the accident was twenty-five miles per hour. At the time Waddell arrested Spencer, the officers had not determined how fast Spencer was driving, but none of the witnesses interviewed thought that Spencer was speeding. After Waddell arrested Spencer, he took him to the University of Wisconsin Hospital to test his blood for alcohol content. Waddell did not read Spencer an "informing the accused" form, nor did Waddell ask for Spencer's consent before having Spencer take the blood test.

¶5 The State filed a criminal complaint against Spencer for operating a motor vehicle while under the influence of a combination of an intoxicant and controlled substance (OWI) in violation of WIS. STAT. § 346.63(1)(a) and for operating a motor vehicle with a prohibited alcohol concentration (PAC) in violation of § 346.63(1)(b). Spencer moved to suppress all evidence of intoxication the police obtained after his arrest on the ground that they lacked probable cause for the arrest. Spencer also moved to suppress the results of the blood test on the ground that he did not consent to the test, and that the blood test was an unreasonable seizure under the Fourth Amendment. The trial court denied the motions. Spencer pleaded no contest to the OWI count. The trial court dismissed the PAC count and entered a conviction for OWI.[3] Spencer appeals.

[3] The record does not contain a plea hearing transcript. However, the court minutes indicate Spencer's plea and the trial court's dismissal of the PAC count.

II. Analysis

A. Probable Cause to Arrest

¶6 Spencer first argues that Waddell did not have probable cause to arrest him. Whether the facts in a given case constitute probable cause to arrest is a question of law that we decide without deference to the trial court. ***State v. Kasian***, 207 Wis. 2d 611, 621, 558 N.W.2d 687 (Ct. App. 1996). Probable cause to arrest refers to the quantum of evidence that would lead a reasonable police officer to believe that the defendant probably committed a crime. ***State v. Paszek***, 50 Wis. 2d 619, 624, 184 N.W.2d 836 (1971). Proof beyond a reasonable doubt need not be established nor does it need to be more likely than not that the defendant committed a crime. ***State v. Mitchell***, 167 Wis. 2d 672, 681-82, 482 N.W.2d 364 (1992). In determining probable cause, we look at the totality of the facts and circumstances faced by the officer at the time of the arrest to determine whether a reasonable police officer could believe that the defendant had committed an offense. ***County of Dane v. Sharpee***, 154 Wis. 2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990).

¶7 In support of his position that Waddell did not have probable cause to arrest him, Spencer presents a chart in his reply brief listing observations made by the police that Spencer argues weigh "for" or "against" probable cause. The "for" side contains two items, while the "against" side contains ten. However, Spencer omits from the chart his admission of drinking and the fact that he hit a pedestrian.

¶8 Moreover, some facts that Spencer claims weigh against probable could just as easily weigh in favor of probable cause. For example, the fact that it was the "middle of the day" could suggest that Spencer was less likely to have

been driving while intoxicated than if it were later at night. However, it is equally reasonable to infer that the presence of daylight makes it much more likely that a driver going approximately twenty-five miles per hour that hits a pedestrian in the road is under the influence of an intoxicant. We do not choose between conflicting inferences if one supports a basis for probable cause. ***State ex rel. McCaffrey v. Shanks***, 124 Wis. 2d 216, 236, 369 N.W.2d 743 (Ct. App. 1985).

¶9 That such competing inferences exist underscores the true nature of the totality of the circumstances test, which Spencer's chart analysis misconstrues. We do not dissect each fact, categorize it as for or against guilt or innocence, and then discount one fact in favor of probable cause for each fact that weighs against it. Instead, we simply ask whether there was enough evidence, given the facts of the particular case, such that a reasonable police officer could believe the defendant was probably committing a crime. ***Paszek***, 50 Wis. 2d at 624-25.

¶10 While Spencer passed two field sobriety tests, he failed the HGN test, which yielded all six clues of intoxication. Waddell admitted he had been drinking, and his eyes were watery and bloodshot. Both officers could smell the odor of intoxicants on Spencer even though he was smoking a cigarette. Finally, Spencer was unable to avoid a pedestrian in the roadway during daylight while traveling approximately twenty-five miles per hour. Considering all these facts, along with any circumstances which might tend to show innocence, we conclude that a police officer could have reasonably believed that Spencer was driving while intoxicated and that his driving was impaired.

¶11 Spencer points out that, in the context of a suppression hearing, the mere plausibility of a police account does not amount to probable cause. *See* ***State v. Wille***, 185 Wis. 2d 673, 682, 518 N.W.2d 325 (Ct. App. 1994). Such

plausibility is only enough at a refusal hearing. ***Id.*** at 681-82 (quoting ***State v. Nordness***, 128 Wis. 2d 15, 36, 381 N.W.2d 300 (1986)). At a suppression hearing, the trial court is to take evidence from both parties, make credibility determinations, and choose between conflicting versions of facts. ***Id.*** at 682. Only then does the trial court make a probable cause determination. ***Id.***

¶12 Spencer correctly notes that the State relies on ***Nordness***, a refusal hearing case, in its brief. However, an opposing party's misconception of the law is not grounds for reversal, and we have no reason to conclude that the trial court was under any similar misconception. The trial court entered a detailed written decision that cited the proper legal standards and included relevant findings. Spencer did not call any witnesses at the suppression hearing, and that was his choice. Spencer did, however, use police reports as exhibits. The trial court gave him the opportunity to cross-examine the State's witnesses, and Spencer did so. It then concluded that Waddell had probable cause to arrest, and as we have already stated, we agree.[4]

B. Blood Test Evidence

¶13 Spencer next argues that the police violated his Fourth Amendment right against unreasonable searches and seizures by drawing his blood without a warrant. Whether a search or seizure is reasonable is a question of constitutional

[4] Spencer states that the trial court relied on preliminary breath test (PBT) results that are not a part of the record when it determined that Waddell had probable cause to arrest Spencer. Spencer also points out that he was not afforded an opportunity to rebut this evidence by a cross-examination of the officer that administered the test. Therefore, Spencer argues, the PBT should not be considered on appeal. We need not determine whether the trial court properly relied on the PBT or whether we may consider the PBT, because we have concluded that a reasonable police officer could conclude that he or she had probable cause to arrest Spencer without considering the PBT results.

law that we review de novo. ***State v. Griffin***, 220 Wis. 2d 371, 386, 584 N.W.2d 127 (Ct. App. 1998).

¶14 As Spencer concedes in his reply brief, his argument presents the same constitutional issue as that in our recent decision in ***State v. Thorstad***, 2000 WI App 199, 238 Wis. 2d 666, 618 N.W.2d 240, *review denied*, 2000 WI 121, ___ Wis. 2d ___, 619 N.W.2d 93. In ***Thorstad***, we explained that under ***State v. Bohling***, 173 Wis. 2d 529, 494 N.W.2d 399 (1993), warrantless blood draws are permissible when the following four requirements are met:

> (1) the blood draw is taken to obtain evidence of intoxication from a person lawfully arrested for a drunk-driving related violation or crime, (2) there is a clear indication that the blood draw will produce evidence of intoxication, (3) the method used to take the blood sample is a reasonable one and performed in a reasonable manner, and (4) the arrestee presents no reasonable objection to the blood draw.

Thorstad, 2000 WI App 199 at ¶7 (quoting ***Bohling***, 173 Wis. 2d at 533-34).

¶15 We have already concluded that Waddell lawfully arrested Spencer. We also conclude that, given all the circumstances, there was a clear indication[5] that a blood draw would produce evidence of intoxication. The method used to take Spencer's blood was a reasonable one and performed in a reasonable manner. Just as in ***Bohling*** and ***Thorstad***, Spencer's blood was taken in a medical environment. *See* ***Bohling***, 173 Wis. 2d at 535; ***Thorstad***, 2000 WI App 199 at ¶15. A registered nurse performed Spencer's blood test, and she recalled that

[5] "[I]n the context of a blood draw incident to arrest, 'clear indication' is the legal equivalent of 'reasonable suspicion.'" ***State v. Thorstad***, 2000 WI App 199, ¶13, 238 Wis. 2d 666, 618 N.W.2d 240 (citing ***State v. Seibel***, 163 Wis. 2d 164, 179, 471 N.W.2d 226 (1991)), *review denied*, 2000 WI 121, ___ Wis. 2d ___, 619 N.W.2d 93.

there was nothing unusual about it. It was performed in the usual manner that a blood draw is conducted in a clinical setting. Nothing in the record indicates that Spencer made any objection to the blood test. In fact, according to Waddell, Spencer gave no objection at any time to the blood draw. The attending nurse stated that Spencer was "quiet and cooperative."

¶16 We briefly address Waddell's failure to read Spencer an "informing the accused" form, which would have informed Spencer of his right to revoke implied consent to chemical testing under WIS. STAT. § 343.305. Under § 343.305, Wisconsin motorists give implied consent to chemical tests for blood alcohol content. ***County of Ozaukee v. Quelle***, 198 Wis. 2d 269, 277, 542 N.W.2d 196 (Ct. App. 1995). However, drivers asked to take a chemical test under § 343.305 have the choice to "revoke" consent and are to be informed of their choice to do so. ***Id.*** at 277-78. The consequence of "revoking" implied consent is the potential loss of driving privileges. WIS. STAT. § 343.305(9) and (10).

¶17 We conclude that Waddell's failure to read the form does not affect our analysis for purposes of Spencer's motion to suppress blood test evidence. The facts surrounding Spencer's blood test meet the requirements of ***Bohling***, and ***Bohling*** embodies an exception to the warrant requirement based on exigent circumstances, not consent.[6] ***Bohling***, 173 Wis. 2d 539-40. As we explained in ***Thorstad***, "***Bohling*** does not require that the subject of the blood test give consent or voluntarily take the test, nor does ***Bohling*** thus depend on whether the subject

[6] We are not convinced by Spencer's argument that when police do not offer a breath test, thus precluding a defendant's chance to refuse a breath test, no exigency exists. The exigency is not the defendant's refusal to take a breath test; it is the rapid dissipation of alcohol from the defendant's blood stream. ***State v. Bohling***, 173 Wis. 2d 529, 539-40, 494 N.W.2d 399 (1993).

of the blood test was deemed to have consented under WIS. STAT. § 343.305." ***Thorstad***, 2000 WI App 199 at ¶10 (citation omitted). Therefore, Spencer cannot rely on Waddell's failure to follow § 343.305 procedure to argue that the results of his blood test should be suppressed.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports. WIS. STAT. RULE 809.23(1)(b)4.