COURT OF APPEALS
DECISION
DATED AND FILED

April 9, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2294-CR **Cir. Ct. No. 2013CF88**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARCUS NORFLEET,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Fond du Lac County: ROBERT J. WIRTZ, Judge. *Affirmed*.

¶1 REILLY, J.[1] Marcus Norfleet appeals from a judgment of conviction for operating a motor vehicle with a prohibited alcohol concentration,

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

second offense. The main issue on appeal is whether at the time of Norfleet's arrest for attempting to elude an officer, police had probable cause to believe Norfleet was the driver of the suspect vehicle. The circuit court found probable cause and denied Norfleet's motion to suppress evidence subsequent to his arrest. We affirm as the circuit court properly found that police had probable cause for Norfleet's arrest on multiple charges, and therefore, Norfleet's motion to suppress was properly denied.

BACKGROUND

¶2 Norfleet was charged in this case with attempting to flee or elude a traffic officer, second-offense operating a motor vehicle while intoxicated, and second-offense operating with a prohibited alcohol concentration. Norfleet moved to suppress the evidence obtained during his stop by police.

¶3 In deciding the suppression motion, the court relied on testimony given by Fond du Lac Police Officer Kristen Kachelmeier, who testified that she was on patrol shortly before 1:00 a.m. on February 25, 2013, when she spotted a vehicle traveling "at a high rate of speed." Kachelmeier testified that she got behind the vehicle and, when she did so, it sped up. Kachelmeier activated her emergency lights and the suspect vehicle accelerated. Kachelmeier observed the vehicle go through a stop sign without stopping, after which she lost sight of it for a couple of seconds. When Kachelmeier next saw the vehicle, it was in a snowbank and no one was inside. The only person that Kachelmeier saw near the vehicle was a man walking eastbound. Kachelmeier learned from dispatch that the vehicle was owned by Norfleet.

¶4 Kachelmeier's supervising lieutenant went to Norfleet's home to observe. At 1:26 a.m., Norfleet returned to his home as a passenger in a vehicle

driven by Norfleet's neighbor, who told police that Norfleet had called him and offered him $20 to pick him up. Norfleet's neighbor picked him up less than a mile from where Norfleet's car had been abandoned. Following Norfleet's arrest for eluding an officer, Kachelmeier placed Norfleet in her patrol car, whereupon she observed the odor of intoxicants and Norfleet's bloodshot eyes. Kachelmeier was aware that Norfleet had a previous drunk driving conviction and asked Norfleet if he had been drinking and if he would perform field sobriety tests. Norfleet refused to answer whether he had been drinking and refused to perform field sobriety tests. Kachelmeier arrested Norfleet for drunk driving. Subsequent blood test results showed that Norfleet had an alcohol concentration of .122.

¶5 Norfleet argued at the suppression hearing that police did not have probable cause at the time of his arrest to believe that he had been operating his vehicle under the influence of alcohol. The court found police had probable cause to arrest Norfleet and denied his suppression motion. Norfleet pled no contest to second-offense operating with a prohibited alcohol concentration in return for the dismissal of the eluding charge. Norfleet appeals the denial of his suppression motion.

STANDARD OF REVIEW

¶6 Whether evidence should be suppressed to remedy a Fourth Amendment violation raises a mixed question of fact and law. ***State v. Sobczak***, 2013 WI 52, ¶9, 347 Wis. 2d 724, 833 N.W.2d 59. A circuit court's findings of fact will not be overturned unless clearly erroneous. ***Id.*** Application of constitutional principles to these facts is de novo. ***Id.***

DISCUSSION

¶7 The Fourth Amendment to the United States Constitution prohibits unreasonable seizures, and our case law provides that evidence obtained in violation of this prohibition will be suppressed. ***State v. Smith***, 119 Wis. 2d 361, 364-66, 351 N.W.2d 752 (Ct. App. 1984). Accordingly, police must have probable cause that a person probably committed a crime before the person can be placed under arrest. ***State v. Young***, 2006 WI 98, ¶22, 294 Wis. 2d 1, 717 N.W.2d 729. "An officer's [probable cause] belief may be partially predicated on hearsay information, and the officer may rely on the collective knowledge of the officer's entire department." ***State v. Wille***, 185 Wis. 2d 673, 683, 518 N.W.2d 325 (Ct. App. 1994). Only evidence speaking to the totality of the facts and circumstances available to the officer at the time of arrest is relevant to a probable cause determination at a suppression hearing. ***State v. Nordness***, 128 Wis. 2d 15, 36-37 & n.6, 381 N.W.2d 300 (1986). "The evidence need not reach the level of proof beyond a reasonable doubt or even that guilt is more likely than not." ***Id.*** at 35 (citation omitted).

¶8 The main issue in this appeal can be boiled down to a single question: did police have probable cause to believe that Norfleet was driving his vehicle in an attempt to elude police prior to his arrest? Norfleet argues that police did not have probable cause at the time of his arrest to suspect he was the vehicle's driver during the attempt to elude police and that, as they did not have probable cause on the eluding charge, the evidence they obtained while he was under arrest for that charge could not be used to support probable cause for drunk driving. Norfleet claims that the evidence presented to the circuit court showed that police had "nothing more than speculation" to go on at the time of his arrest to believe he was operating his vehicle when it was involved in the attempt to elude police. He

concedes that the police had evidence that his vehicle was probably involved in a crime, but he contends that they did not learn that Norfleet had offered to pay a neighbor $20 to pick him up near his abandoned vehicle close to the time of its abandonment until after he had been arrested. We disagree with Norfleet's argument.

¶9 Contrary to Norfleet's assertion, the record is unclear as to exactly when police talked to Norfleet's neighbor in relation to when he was placed under arrest for eluding an officer. Even so, this information was only additive to the collective knowledge of the police that pointed to Norfleet's probable commission of a crime. Police knew that Norfleet was away from his home shortly after 1 in the morning as they saw him return home as a passenger in another's vehicle. They could reasonably infer that Norfleet was the driver of his own vehicle when he attempted to elude Kachelmeier and thereafter abandoned the vehicle after he drove it into a snowbank, and that Norfleet then left the scene on foot. We believe that this was sufficient information to form probable cause to place Norfleet under arrest on the eluding charge.

¶10 Norfleet alternatively argues that even if police had probable cause to arrest him as the driver of his vehicle on the eluding charge, they did not have probable cause to later arrest him for drunk driving. We again disagree. Based on his lawful arrest on the eluding charge, police already had reason to believe that Norfleet had exercised impaired judgment and shown a lack of ability to safely operate his motor vehicle and that his actions might have been motivated to avoid prosecution for illegal behavior, such as drunk driving. Kachelmeier detected the odor of intoxicants on Norfleet and observed that his eyes were bloodshot. She also knew from dispatch that Norfleet had a previous drunk driving conviction. *See* ***State v. Lange***, 2009 WI 49, ¶33 & n.14, 317 Wis. 2d 383, 766 N.W.2d 551.

Norfleet's refusal to perform field sobriety tests was an additional factor supporting probable cause. *See* ***State v. Babbitt***, 188 Wis. 2d 349, 360, 525 N.W.2d 102 (Ct. App. 1994). The totality of these facts and circumstances indicated that Norfleet probably had driven while he was intoxicated, giving police probable cause to arrest him for drunk driving. The circuit court properly denied Norfleet's motion to dismiss the evidence obtained subsequent to his arrests for eluding an officer and drunk driving.

¶11 Finally, we reject Norfleet's argument that the warrantless draw of his blood was unconstitutional. Norfleet concedes that at the time of the blood draw, police could rely in good faith on ***State v. Bohling***, 173 Wis. 2d 529, 494 N.W.2d 399 (1993), *abrogated by* ***Missouri v. McNeely***, 569 U.S. ___, 133 S. Ct. 1552 (2013), and the only way that his blood draw would be inadmissible is if it were the result of an unlawful arrest. As we have found that his arrest was lawful, the court properly denied Norfleet's request to suppress the blood test results. *See* ***State v. Reese***, 2014 WI App 27, ¶22, ___ Wis. 2d ___, ___ N.W.2d ___ (recommended for publication).

By the Court.—Judgment affirmed.

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