COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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

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

Appeal Nos. 2014AP1420
2014AP1421
2014AP1422

Cir. Ct. Nos. 2013TR7198
2013TR7199
2013TR7243
2014TR264

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

CITY OF CHIPPEWA FALLS,

PLAINTIFF-RESPONDENT,

V.

DOUGLAS M. BUCHLI,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Chippewa County: JAMES M. ISAACSON, Judge. *Affirmed*.

¶1 HOOVER, P.J.[1] Douglas Buchli appeals the final order denying his motion to suppress evidence relating to his arrest for first-offense operating while intoxicated (OWI). We affirm.

BACKGROUND

¶2 Buchli was arrested for OWI in December 2013. He moved to suppress evidence relating to his arrest, asserting the arresting officers lacked probable cause. A hearing on the motion was conducted May 22, 2014.

¶3 At the hearing, Chippewa Falls police officer Lee Hakes testified he responded to a report of a one-vehicle crash the evening of December 20. Upon arrival, he observed a sports utility vehicle had struck a tree. Hakes testified he observed footprints in the snow leading away from the vehicle, and he believed the prints came from snow boots, approximately size ten. Shortly after he arrived, Hakes was approached by a woman later identified as Colleen Mahoney, who claimed responsibility for the accident. Hakes warned Mahoney "that if she wasn't telling me the truth, that she could possibly be in trouble for hindering my investigation or obstructing it." Hakes further testified, "Eventually … she started to cry, and then she made a comment that he did that. I asked her who, and she stated Doug." Mahoney told Hakes that Buchli was at home and gave Hakes the address of their shared residence.

¶4 Two officers were dispatched to Mahoney and Buchli's home. Meanwhile, Hakes continued his on-scene investigation. He observed fishing

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

equipment, an open eighteen-pack of beer, and several empty beer cans inside the vehicle. Hakes then joined the other officers at Buchli's residence. Hakes observed Buchli was wearing outdoor clothing, including woolen pants, a flannel shirt, and boots. He opined Buchli was intoxicated, as indicated by his slurred speech, glassy and bloodshot eyes, the strong odor of intoxicants, and his difficulty communicating with the officers.

¶5 Officer Tim Strand testified he and officer Sheridan Pabst were dispatched to Buchli's home. They knocked on the back door, and Buchli answered. Strand stated, "[We] told [Buchli] that we were investigating a crash that had happened down the street. I believe he allowed us in the residence before we actually talked about the crash." On cross-examination, Strand testified, "I recall that he allowed us inside the residence … I knocked on the door. He answered the door. I don't remember what our initial conversation was at the door, but he allowed us to come inside the residence." Buchli was drinking coffee and initially denied involvement with the accident. Strand testified Hakes arrived and began to question Buchli about the footprints leading away from the vehicle, which Hakes described as consistent with Buchli's boots. Strand stated:

> Buchli eventually started to make several small admissions towards the fact that he was driving, eventually then did state that quote, "I fucked up," end quote, and then admitted to driving. He made statements to the fact that he was ice fishing earlier in the day on Pokegama Lake in Barron County and then had been consuming beers with a friend. … And they had stopped and had some beers at a couple of bars on the way back and that he was on his way home when he got into the crash.[2]

[2] Hakes' testimony included the following description of the conversation with Buchli:

(continued)

Strand further testified that Buchli smelled of intoxicants and was slurring his speech.

¶6 Strand ultimately arrested Buchli for OWI. No standardized field sobriety tests were conducted, nor was a preliminary breath test administered.

¶7 Colleen Mahoney also testified at the hearing. Mahoney testified she was driving the vehicle when she lost control and crashed. She denied telling Hakes that Buchli had been driving. She testified she instructed the officers to wait for her before entering her home.

¶8 At the conclusion of the hearing, the circuit court denied Buchli's motion. The court stated:

> [T]he question of probable cause must be assessed on a case by case basis looking at the totality of the circumstances. Here, the circumstances are we have a car accident. We have got at one point Miss Mahoney saying [Buchli] was driving. We have [Buchli] admitting at some point according to the testimony so far that I have heard that he was driving. We have a partial 12-pack or 18-pack of beer in the vehicle partially consumed. We have the odor of intoxicants. We have slurred speech. We have an admission that he had been drinking while ice fishing and stopp[ed] at at least two bars on the way home. We also

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> Q. What did Mr. Buchli eventually tell you as to operation of the vehicle?
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> A. He would make, I call it, small admissions to operating. He never came right out and gave a full detailed explanation of what occurred [in] reference [to] the crash.
>
> Q. Did he state who was driving?
>
> A. He stated in one of those comments that he had been operating.

> have to consider the officer's training and experience. … When a police officer is faced then with two competing reasonable inferences, one justifying arrest and one not, the officer is entitled to rely on the reasonable inference justifying arrest. … So I think there is a reasonable inference here that Mr. Buchli was driving.

¶9 Buchli subsequently pleaded no contest, conditioned on his right to appeal the denial of his motion.

DISCUSSION

¶10 At our request, the parties first briefed the issue of whether Buchli forfeited his right to appeal the order denying his motion to suppress when he pleaded no contest to a noncriminal ordinance for first-offense OWI. A guilty or no-contest plea typically forfeits[3] the right to raise nonjurisdictional defects and defenses, including claimed violations of constitutional rights. *See* ***County of Racine v. Smith***, 122 Wis. 2d 431, 433-38, 362 N.W.2d 439 (Ct. App. 1984). WISCONSIN STAT. § 971.31(10) provides an exception in criminal cases for orders denying motions to suppress or motions challenging the admissibility of a defendant's statement. However, that exception does not apply to first-offense OWIs, which are noncriminal traffic regulation matters. ***County of Racine***, 122 Wis. 2d at 436.

¶11 Nevertheless, forfeiture is a principle of judicial administration. ***Schill v. Wisconsin Rapids Sch. Dist.***, 2010 WI 86, ¶45 n.21, 327 Wis. 2d 572, 786

[3] See ***State v. Ndina***, 2009 WI 21, ¶28, 315 Wis. 2d 653, 761 N.W.2d 612, for discussion of "forfeiture" versus "waiver," citing ***State v. Kelty***, 2006 WI 101, ¶18 n.11, 294 Wis. 2d 62, 716 N.W.2d 886 (acknowledging that the "guilty-plea-waiver" rule could more accurately be called "the 'guilty-plea-forfeiture' rule, or something to that effect").

N.W.2d 177. In deciding whether to apply the forfeiture rule here, a court considers: (1) the administrative efficiencies resulting from the plea; (2) whether an adequate record has been developed; (3) whether the appeal appears motivated by the severity of the sentence; and (4) the nature of the potential appellate issue and whether the potential appellate issue is addressed in published case law. ***County of Ozaukee v. Quelle***, 198 Wis. 2d 269, 275-76, 542 N.W.2d 196 (Ct. App. 1995), *other language withdrawn by* ***Washburn Cnty. v. Smith***, 2008 WI 23 ¶64, 308 Wis. 2d 65, 746 N.W.2d 243.

¶12 The parties agree the ***Quelle*** test has been satisfied here with respect to Buchli's OWI offense.[4] We also agree. Buchli's no contest plea conserved judicial time and resources by avoiding a trial. An adequate record has been developed through the suppression hearing. The penalty for an OWI first is comparatively light; therefore, it is unlikely Buchli's appeal was motivated by severity of the sentence. Lastly, Buchli identifies two issues on appeal he asserts are under-addressed in case law.[5] The first is "a situation where an officer has to

[4] Buchli also filed notices of appeal for his no-contest pleas to hit and run causing damage to property, and failure to notify police of an accident, case numbers 2014AP1420 and 2014AP1421, respectively. The City of Chippewa Falls asserts that no issues are preserved for review with respect to those orders. Buchli does not contest this, nor does he apply the ***Quelle*** factors to anything beyond the scope of his OWI conviction, case number 2014AP1422. ***County of Ozaukee v. Quelle***, 198 Wis. 2d 269, 275-76, 542 N.W.2d 196 (Ct. App. 1995), *other language withdrawn by* ***Washburn Cnty. v. Smith***, 2008 WI 23 ¶64, 308 Wis. 2d 65, 746 N.W.2d 243. Accordingly, case numbers 2014AP1420 and 2014AP1421 are deemed abandoned and the underlying orders are affirmed. ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

[5] We note the City qualified its agreement, asserting consensus with Buchli as to the first three ***Quelle*** factors, but opining there is sufficient legal authority present to govern and support probable cause for the arrest. Nonetheless, it deems the issues in this case significant for any person cited for OWI and worthy of review.

decide whether or not he has enough probable cause to [e]ffect an arrest when there is no observation or eye witness account of the suspect driving and the suspect is not found at the scene." Second, Buchli insists "it is a vital issue regarding how a Circuit Court should proceed when there is differing testimony between an officer and a person claiming responsibility for an incident." Accordingly, as the forfeiture rule is discretionary, we choose to proceed to the merits. *See* ***County of Racine***, 122 Wis.2d at 434, 437 (application of the forfeiture rule is discretionary).

¶13 In reviewing the denial of a motion to suppress, we will uphold the circuit court's findings of fact unless they are clearly erroneous. ***State v. Kutz***, 2003 WI App 205, ¶13, 267 Wis. 2d 531, 671 N.W.2d 660. Whether those facts amount to probable cause to arrest is a question of law subject to de novo review. ***Id.***

¶14 To determine whether probable cause exists, we consider the totality of the circumstances. ***State v. Secrist***, 224 Wis. 2d 201, 209, 212, 218, 589 N.W.2d 387 (1999). Probable cause to arrest for operating while under the influence of an intoxicant refers to that quantum of evidence within the arresting officer's knowledge at the time of the arrest that would lead a reasonable law enforcement officer to believe that the defendant operated a motor vehicle under the influence of an intoxicant. ***State v. Kasian***, 207 Wis. 2d 611, 621, 558 N.W.2d 687 (Ct. App. 1996). The quantum of evidence necessary for probable cause to arrest is less than that for guilt but requires more than mere suspicion. ***State v. Drogsvold***, 104 Wis. 2d 247, 254, 311 N.W.2d 243 (Ct. App. 1981). The court considers the information available to the officer and the officer's training and experience. ***State v. Lange***, 2009 WI 49, ¶20, 317 Wis. 2d 383, 766 N.W.2d 551.

An arresting 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).

¶15 Buchli argues the facts of his case do not amount to more than a possibility or suspicion that he committed an offense that justified a warrantless arrest. Buchli identifies and highlights those facts favorable to his position: inconsistencies that could have supported the conclusion that Mahoney had been driving at the time of the accident. He emphasizes that the officers never personally observed him driving; there was no eyewitness testimony that he was driving; Mahoney admitted driving, losing control of the vehicle, and running home to get help; and the officers did not have the benefit of the results of a preliminary breath test or observing Buchli perform field sobriety tests.[6]

¶16 Given those facts, Buchli argues:

> All of these pieces of evidence when added together create a possibility that Mr. Buchli committed the offense he is accused of. However, it is also possible that Ms. Mahoney is telling the truth. It is also possible that there was another person operating the vehicle that neither the court nor the officers is aware of. However, the only one of these that amounts to more than a possibility is that Ms. Mahoney is telling the truth because it is the only one that has a person willing to testify that they drove the vehicle.

[6] In his reply brief, Buchli also asserts an undeveloped warrantless entry argument based on Mahoney's instruction that the officers wait to enter her and Buchli's home until she arrived. Officer Strand testified to Buchli's consent to the officers' entry at the hearing, and Buchli fails to present evidence that this testimony was erroneous or inaccurate. We need not address arguments that are inadequately briefed and first raised in a reply brief. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

¶17 We disagree. The court had the opportunity to consider all of the facts now reasserted by Buchli, through the complete testimony of Mahoney, Hakes, and Strand. At the conclusion of the hearing, the court stated, "With regards to Miss Mahoney testifying that initially she said she was driving, the Officer, I think, was reasonably suspect when the boot size, the track that he saw leaving the vehicle didn't appear to him to be of [] Mahoney's size." Hakes had no obligation to take Mahoney at her word when she claimed responsibility for the accident, and his decision to continue to investigate was appropriate. Further, as pointed out by the court and the State, and unrefuted by Buchli, when an officer is confronted with two reasonable competing inferences, one justifying arrest and the other not, the officer is entitled to rely on the reasonable inference justifying arrest. ***Kutz***, 267 Wis. 2d 531, ¶12 (citing ***State ex. rel. McCaffrey v. Shanks***, 124 Wis. 2d 216, 236, 369 N.W.2d 743 (Ct. App. 1985)).

¶18 In denying the motion to suppress, the court found Hakes' and Strand's testimony credible. *See* ***Wille***, 185 Wis. 2d at 682 ("The trial court takes evidence in support of suppression and against it, and chooses between conflicting versions of the facts. It necessarily determines the credibility of the officers and other witnesses."). Its findings of fact were supported by the evidence in the record, and are not clearly erroneous. Hakes testified that after Mahoney's initial claim of culpability, Mahoney began to cry and admitted Buchli was responsible for the accident. There was also testimony that: Buchli was wearing boots consistent with the footprints leading away from the accident, as well as outdoor clothing appropriate for a day of fishing; Buchli later admitted he had been drinking while ice fishing and afterward; and fishing equipment and alcohol were in the vehicle at the accident scene. In addition, there was testimony that Buchli

was intoxicated, as evidenced by slurred speech, odors of intoxicants, glassy eyes, and difficulty communicating. Lastly, the officers testified Buchli "made small admissions" regarding his blameworthiness, including that he "fucked up." We also observe there is no requirement that an officer administer field sobriety tests or a preliminary breath test before deciding whether to arrest a person for OWI. *See* ***Kasian***, 207 Wis. 2d at 622; *see also* ***Washburn Cnty.***, 308 Wis. 2d 65, ¶33.

¶19 The facts available to and relied upon by the circuit court supported its ultimate conclusion that the officers had probable cause to believe Buchli had operated a motor vehicle while under the influence of an intoxicant. Based on the totality of the circumstances, a reasonable officer would have reason to believe Buchli had operated a motor vehicle while intoxicated. Therefore, we conclude the officers had probable cause to arrest Buchli for OWI.

By the Court.—Order affirmed.

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