COURT OF APPEALS
DECISION
DATED AND FILED

July 21, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1487-CR **Cir. Ct. No. 2011CT380**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK G. MCCASKILL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Portage County: JOHN V. FINN, Judge. *Affirmed*.

¶1 SHERMAN, J.[1] Mark McCaskill appeals a judgment of conviction for operating a motor vehicle with a prohibited alcohol concentration (PAC), fourth offense, in violation of WIS. STAT. § 346.63(1)(b). McCaskill contends

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise indicated.

that: (1) the circuit court erred in denying his motion to suppress evidence obtained following his arrest; (2) the evidence at trial was insufficient to support his conviction; (3) the circuit court erred in denying his motion collaterally attacking a prior third offense conviction for operating a motor vehicle while under the influence (OWI); and (4) that he should be granted a new trial in the interest of justice because the real controversy was not tried. For the following reasons, I affirm.

BACKGROUND

¶2 McCaskill was charged with OWI and PAC, both as fourth offenses. *See* WIS. STAT. § 346.63(1)(a) and (b). McCaskill moved to suppress all evidence obtained following his arrest.

¶3 At the suppression hearing, Jeffrey Thomas, a Village of Plover police officer, testified that at approximately 12:30 a.m. on August 31, 2011, he received a call from dispatch concerning a vehicle with its lights on that had been parked in front of a private residence for approximately one hour. Officer Thomas testified that as he approached the vehicle, he observed an individual, later identified as McCaskill, sitting in the driver's seat of the vehicle. No other individuals were in the vehicle, and there was no evidence that another individual had been in the car. Officer Thomas testified that he was informed by dispatch that the vehicle was registered to a rental car company, and he subsequently found paperwork inside the vehicle indicating that McCaskill had rented the vehicle.

¶4 Officer Thomas testified that when he made contact with McCaskill, he observed that McCaskill appeared to be sleeping, was not wearing a shirt or shoes, and Officer Thomas smelled the odor of alcohol coming from inside the vehicle. Officer Thomas testified that he attempted to wake McCaskill, but that

McCaskill was unresponsive to both verbal and physical stimuli. Officer Thomas testified that while he was waiting for emergency personnel, McCaskill vomited down the front of his body, at which point the odor of alcohol became "more strong."

¶5 McCaskill was transported to the local hospital by ambulance. Officer Thomas testified that when McCaskill regained consciousness, Officer Thomas questioned McCaskill about the events that led to him being found unresponsive in his vehicle. McCaskill informed Officer Thomas that he had been drinking at a friend's house, but that he was unable to recall anything between then and waking up at the hospital.

¶6 The circuit court denied McCaskill's motion to suppress, concluding that there was sufficient probable cause to justify McCaskill's arrest. McCaskill also moved the court to collaterally attack one of his prior OWI convictions. The court denied that motion as well.

¶7 A jury found McCaskill guilty of PAC, but not guilty of OWI, and the circuit court entered a judgement of conviction for PAC. McCaskill appeals.

DISCUSSION

A. Motion to Suppress

¶8 McCaskill contends that his arresting officer lacked probable cause to arrest him and, therefore, evidence obtained following his arrest should have been suppressed.

¶9 This court's review of the denial or grant of a motion to suppress presents a mixed question of fact and law. The circuit court's factual findings are reviewed under the clearly erroneous standard, but this court reviews de novo

whether the circuit court properly applied those facts to the constitutional principles. ***State v. Knapp***, 2005 WI 127, ¶19, 285 Wis. 2d 86, 700 N.W.2d 899. Neither party disputes the circuit court's factual findings, so this court addresses only the legal question of whether suppression was warranted under applicable law.

¶10 "Probable cause is a flexible, commonsense standard," ***State v. Nieves***, 2007 WI App 189, ¶14, 304 Wis. 2d 182, 738 N.W.2d 125, and it is assessed on a case-by-case basis, looking at the totality of the circumstances. ***State v. Lange***, 2009 WI 49, ¶20, 317 Wis. 2d 383, 766 N.W.2d 551. A police officer has probable cause to arrest when "the totality of the circumstances within the arresting officer's knowledge would lead a reasonable police officer to believe that the defendant probably committed a crime." ***State v. Kutz***, 2003 WI App 205, ¶11, 267 Wis. 2d 531, 671 N.W.2d 660. This standard requires "more than a possibility or suspicion that [the] defendant committed an offense, but the evidence need not reach the level … that guilt is more likely than not." ***State v. Mitchell***, 167 Wis. 2d 672, 681-82, 482 N.W.2d 364 (1992). When competing reasonable inferences could be drawn, the office is entitled to rely on the one justifying arrest. ***Kutz***, 267 Wis. 2d 531, ¶12.

¶11 WISCONSIN STAT. § 346.63(1)(b) provides that "[n]o person may drive or operate a motor vehicle while … [t]he person has a prohibited alcohol concentration." McCaskill argues a police officer could not have reasonably believed that he had driven or operated the vehicle because there was no direct evidence that he had done so. McCaskill asserts that the facts of this case are similar to those in ***Village of Cross Plains v. Haanstad***, 2006 WI 16, ¶1, 288 Wis. 2d 573, 709 N.W.2d 447. In ***Haanstad***, our supreme court concluded that there was insufficient evidence that the defendant's conduct constituted OWI

where there was undisputed evidence that the defendant "did nothing more than sit in the driver's seat with her feet and body facing the passenger seat, never touching or manipulating the gas pedal, steering wheel, or the keys which were in the ignition, or any of the other controls of the car," and where there was evidence that the defendant was driven to the location of the arrest by a friend, who had left the vehicle running and the headlights on, after which the defendant slid over from the passenger's seat into the driver's seat. ***Id.***, ¶¶3-4, 10.

¶12 Unlike ***Haanstad***, it is not undisputed in the present case that McCaskill only sat in the driver's seat of the vehicle and there was no direct evidence that McCaskill had been driven to the location where the vehicle was found by someone else. The State in this case presented circumstantial evidence from which a reasonable inference could be drawn that McCaskill did "drive" or "operate" his vehicle within the meaning of WIS. STAT. § 346.63(1)(b). Specifically, there was evidence that McCaskill's car was found, with its lights on, parked in front of a private residence that McCaskill had no association with, McCaskill was found in the driver's seat of the vehicle, McCaskill had rented the vehicle, and McCaskill admitted that he had consumed alcohol prior to being found unresponsive in his vehicle.

¶13 Certainly there is disputed evidence as to whether McCaskill had driven or operated the vehicle in which he was found—the officers could not remember if the car was running or whether the keys to the vehicle were in the ignition, and it is a possibility that someone drove McCaskill to the location where his vehicle was found and McCaskill moved to the driver's seat after the vehicle was parked. However, there was ample circumstantial evidence from which a police officer could reasonably conclude that McCaskill had driven or operated the

vehicle. Accordingly, I conclude that the circuit court did not err in denying McCaskill's motion to suppress.

B. Sufficiency of the Evidence

¶14 WISCONSIN STAT. § 346.63(1)(b) prohibits the operation of a motor vehicle with a prohibited alcohol concentration. McCaskill contends that the evidence at trial was insufficient to support the jury's conclusion that he had operated the motor vehicle.

¶15 This court reviews the sufficiency of the evidence de novo, but in the light most favorable to sustaining the conviction. ***State v. Hanson***, 2012 WI 4, ¶15, 338 Wis. 2d 243, 808 N.W.2d 390. A conviction will be sustained unless the evidence is so insufficient "that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). If there is any possibility that the trier of fact "could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt," an appellate court may not overturn the verdict even if the court believes "that the trier of fact should not have found guilt based on the evidence before it." ***Id.*** at 507. This court's standard of review of a challenge of the sufficiency of the evidence is the same regardless of whether the conviction relies upon direct or circumstantial evidence. ***Id.*** at 503.

¶16 I conclude that a reasonable jury could have found beyond a reasonable doubt that McCaskill had operated the motor vehicle in which he was found unconscious.

¶17 At trial, Officer Thomas testified that at approximately 12:30 a.m. on August 31, 2011, he responded to a call about a suspicious vehicle that had been

parked in front of a residential home with its lights on for approximately one hour. Officer Thomas testified that he found the vehicle parked on the side of the road with its lights still on, and that there was a single occupant inside the vehicle who was located in the driver's seat. Officer Thomas testified that he smelled the odor of alcohol coming from inside the vehicle, and that the vehicle's occupant, who was later identified as McCaskill, was not awake and was unresponsive to both verbal and physical stimuli. Officer Thomas testified that while he waited for emergency personnel to assist McCaskill, he learned from dispatch and a search of the vehicle that the vehicle had been rented by McCaskill from a car rental company.

¶18 Officer Thomas testified that he was unable to recall where the keys to the vehicle were located, but that his investigation did not reveal any evidence that there had been any other individuals in the vehicle besides McCaskill. Officer Thomas further testified that McCaskill informed him that McCaskill had been drinking at his former wife's home that night, but that McCaskill did not remember anything between then and when he woke up in the hospital.

¶19 McCaskill does not dispute that a jury's verdict can be based entirely on circumstantial evidence, and he concedes that the evidence viewed most favorably to the verdict, supports a finding that he "could have driven the car" to the location where it was found parked "and is in fact the most likely person to have done so." McCaskill argues, however, that "could have" is insufficient to prove beyond a reasonable doubt that he did. I disagree.

¶20 The law is clear that if more than one inference can be drawn from the evidence, this court will follow the inference that supports the jury's finding "unless the evidence on which that inference is based is incredible as a matter of

law." ***Id.*** at 506-07. McCaskill does not assert that the trial evidence set forth above in ¶¶17-18 is "incredible as a matter of law." I conclude that the evidence supports a reasonable inference that, beyond a reasonable doubt, McCaskill operated the vehicle, and therefore, it is sufficient to support McCaskill's conviction.

C. Collateral Attack of Prior Conviction

¶21 McCaskill contends that the circuit court erred in denying his motion collaterally attacking a prior conviction for OWI, third offense. *See* ***Oneida Cty. DSS v. Nicole W.***, 2007 WI 30, ¶¶27-28, 299 Wis. 2d 637, 728 N.W.2d 652 (a collateral attack is an attack on a judgment in a proceeding other than in a direct appeal for the purpose of vacating, reviewing or annulling the proper conviction). Whether a collateral attack is permissible is a question of law that this court reviews independently of the circuit court. *See* ***State v. Campbell***, 2006 WI 99, ¶27, 294 Wis. 2d 100, 718 N.W.2d 649.

¶22 A defendant may collaterally attack a prior conviction to prevent its use as a penalty enhancer when the prior conviction was obtained in violation of the defendant's Sixth Amendment right to counsel. ***State v. Hahn***, 2000 WI 118, ¶¶28-29, 238 Wis. 2d 889, 618 N.W.2d 528. A circuit court is required to undertake a colloquy with the defendant to ensure that the defendant knowingly, intelligently, and voluntarily waived his right to counsel. ***State v. Klessig***, 211 Wis. 2d 194, 206, 564 N.W.2d 716 (1997). Pursuant to ***Klessig***, for a waiver of counsel to be valid, the circuit court's colloquy must ensure that the defendant: "(1) made a deliberate choice to proceed without counsel, (2) was aware of the difficulties and disadvantages of self-representation, (3) was aware of the seriousness of the charge or charges against him [or her], and (4) was aware of the

general range of penalties that could have been imposed." ***Id.*** at 206. When seeking to collaterally attack a prior conviction, the defendant must do more than allege that the circuit court "'failed to conform to its mandatory duties during the plea colloquy.'" ***State v. Ernst***, 2005 WI 107, ¶25, 283 Wis. 2d 300, 699 N.W.2d 92 (quoted source omitted). The defendant must "point to facts that demonstrate that he or she 'did not know or understand the information which should have been provided' in the previous proceeding and, thus, did not knowingly, intelligently, and voluntarily waive his or her right to counsel." ***Id.*** (quoted source omitted).

¶23 If the defendant makes a prima facie showing, the burden shifts to the State to "prove [by clear and convincing evidence] that the defendant knowingly, voluntarily, and intelligently waived the right to counsel in the prior proceeding." ***State v. Baker***, 169 Wis. 2d 49, 77, 485 N.W.2d 237 (1992). Whether a defendant has made a prima facie showing is a question of law, which we review de novo. ***Id.*** at 78.

¶24 I conclude that McCaskill failed to make a prima facie showing that he was not aware of the information that should have been provided by the court under ***Klessig***. In support of his motion collaterally attacking his third offense OWI conviction, McCaskill submitted to the circuit court an affidavit and transcripts from his initial appearance and plea hearing in that case. In his affidavit, McCaskill averred that he was not represented by counsel at any time during his third offense OWI case, that he was not examined "as to whether [he] was competent to proceed, either with or without an attorney," and that "[a]t the time [he] entered the guilty plea, [he] was not advised of the maximum penalties [he] faced."

¶25 McCaskill averred only that the court did not inquire into his competency to proceed pro se, not that he was not competent, and he does not point to any facts that he was not competent to proceed pro se. In addition, McCaskill averred that he was not informed of the maximum penalties at the plea hearing; however, he did not aver or point to any facts that he did not understand what those penalties were. In fact, the transcript from McCaskill's initial appearance shows that McCaskill was provided a copy of the complaint, McCaskill acknowledged that he had read the complaint, the circuit court informed McCaskill of the potential penalties he faced, and McCaskill acknowledged that he understood the potential penalties. McCaskill's averment that he was not advised of the maximum penalties when he entered his plea cannot stand up to evidence that he had previously been informed of those penalties.

¶26 Because McCaskill failed to "point to facts that demonstrate that he … 'did not know or understand the information which should have been provided,'" in his third offense OWI case, McCaskill failed to make the requisite prima facie showing that his plea in that case was not knowing, intelligent or voluntary. *See* ***Ernst***, 283 Wis. 2d 300, ¶25 (quoted source omitted). Accordingly, I conclude that the circuit court did not err in denying his motion to collaterally attack that conviction.

D. Real Controversy

¶27 McCaskill contends that he should be granted a new trial in the interest of justice under WIS. STAT. § 751.06 on the ground that the real controversy was not fully tried, as evidenced by what he characterizes as "inconsistent" jury verdicts.

¶28 The jury found that McCaskill was not guilty of OWI, but that he was guilty of PAC. As best I can tell, McCaskill is arguing that in order to find him guilty of PAC, the jury must have necessarily found him also guilty of OWI. I disagree.

¶29 OWI requires proof that the defendant drove or operated a motor vehicle at a time when the defendant was under the influence of an intoxicant, which is defined as "to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle." WIS JI—CRIMINAL 2663. PAC requires proof that the defendant drove or operated a motor vehicle on a highway when the defendant had a prohibited alcohol concentration. WIS JI—CRIMINAL 2660C. Unlike PAC, OWI requires the additional element of impairment—whether McCaskill was "able to exercise the clear judgment and steady hand necessary to handle and control" the vehicle when he drove. As pointed out by the State, no evidence of this additional element was submitted at trial, thus it was entirely consistent for the jury to find that the State had not established all the elements of OWI, but that it had established the elements of PAC. Accordingly, I conclude that McCaskill has not established that the real controversy was not fully tried, and I decline to exercise my discretion to reverse his conviction on that basis.

CONCLUSION

¶30 For the reasons discussed above, I affirm.

By the Court.—Judgment affirmed.

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