COURT OF APPEALS
DECISION
DATED AND RELEASED

January 16, 1997

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

NOTICE

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Nos. 96-1385-CR & 96-1386-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SCOTT E. FRYE,

Defendant-Appellant.

APPEAL from judgments of the circuit court for Dane County: JACK F. AULIK, Judge. *Affirmed*.

Before Eich, C.J., Vergeront and Roggensack, JJ.

EICH, C.J. Scott Frye appeals from judgments convicting him of possession of a controlled substance and drug paraphernalia as a repeater, and third-offense drunk driving. He claims that police (1) arrested him for obstructing an officer without probable cause and (2) violated his Fifth Amendment self-incrimination rights by failing to comply with the

requirements of the Miranda rule before administering field sobriety tests. We reject his arguments and affirm the judgments.

Madison police officer Victor Wahl, while on patrol in the late evening hours of December 8, 1995, saw Frye, driving a truck, proceed through an intersection on a red light. Wahl followed Frye and caught up to him as he pulled into a residential driveway several blocks away. As Wahl exited his vehicle, so did Frye. Following a departmental policy geared toward officer safety, Wahl told Frye to get back into his truck.[1] Frye refused, stating: "[W]hy, what did I do?" Wahl repeated his request that Frye return to the truck several times—at least four or five—and Frye refused in each instance, responding with a question. Wahl, realizing that Frye was not going to follow his instructions, arrested him for obstructing an officer and failing to stop at a red light, handcuffed him and placed him in the rear seat of the squad car. According to Wahl, Frye could not produce a driver's license, smelled of intoxicants and had bloodshot eyes. In addition, an occupant of the house where the vehicles were parked told Wahl that Frye was "a whiskey drinker" and that he had just been at a bar with him.[2]

Wahl took Frye to police headquarters where, during a custodial search, a bindle of cocaine was found on his person. Field sobriety tests[3] and an Intoxilyzer test were administered, the latter reporting a blood-alcohol concentration of .21%. Neither Wahl nor any other officer read Frye a ***Miranda*** warning before administering the sobriety tests.

Frye moved to suppress the cocaine found on his person—as well as the breath test results—on grounds that his arrest was illegal. The trial court

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[1] Wahl testified that, because of the peril sometimes faced by officers stopping vehicles, police officers are trained—and it is their standard procedure—to have the driver of a stopped vehicle remain in the vehicle as the officer approaches.

[2] Frye himself acknowledged consuming seven "whiskey sours" prior to being stopped by Wahl.

[3] Wahl stated that he decided to administer the field tests at the police station rather than at the scene where it was "impractical and unsafe" because the sidewalk and roads were snow-covered and slippery and there was no dry, level surface.

denied the motion, concluding that he was properly arrested because he had committed a traffic violation and did not have a driver's license in his possession. The court also ruled that ***Miranda*** warnings were not required prior to requesting Frye to submit to field sobriety tests.

I. Probable Cause to Arrest

Frye argues first that Wahl lacked probable cause to arrest him for obstructing an officer.[4] In general terms, probable cause to arrest exists "`where the totality of the circumstances within the arresting officer's knowledge at the time ... would lead a reasonable police officer to believe that the defendant probably committed [an offense].'" ***State v. Riddle***, 192 Wis.2d 470, 476, 531 N.W.2d 408, 410 (Ct. App. 1995) (quoted source omitted).

> 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.

State v. Pozo, 198 Wis.2d 705, 711, 544 N.W.2d 228, 231 (Ct. App. 1995) (citations and quoted sources omitted).

The offense of obstructing an officer has three elements: (1) the defendant obstructed an officer; (2) the officer was acting in his or her official capacity with lawful authority; and (3) the defendant knew or believed that he or she was obstructing the officer. Section 946.41, STATS. Frye's challenge goes to the first element: he maintains that no "obstruction" occurred as a matter of

[4] Because we conclude that there was probable cause for the arrest, we need not consider Frye's ancillary argument that, contrary to the trial court's ruling, probable cause was also lacking to arrest him for the traffic offense.

law. Citing ***Henes v. Morrissey***, 194 Wis.2d 338, 533 N.W.2d 802 (1995), and ***State v. Hamilton***, 120 Wis.2d 532, 356 N.W.2d 169 (1984), he argues that he has an "absolute right not to answer questions," and that "invoking that right cannot be obstructing."

We think Frye paints ***Henes*** and ***Hamilton*** with too broad a brush. We agree with the State that the most that can be said of the two cases, from the standpoint of this appeal at least, is that mere silence, or a refusal to identify oneself to police officers—at least where the State has not shown how the refusal may have affected the officer, *see* ***Henes***, 194 Wis.2d at 354, 533 N.W.2d at 808, ***Hamilton***, 120 Wis.2d at 543, 356 N.W.2d at 175—will not, without more, establish a violation of § 946.41, STATS. We reject Frye's attempts to equate his situation with that of the defendants in ***Henes*** and ***Hamilton***.

In ***Henes***, the supreme court did not discuss the facts of the defendant's conduct other than to state that he declined to identify himself to the police: "[A]ll [he] did was remain silent." ***Henes***, 194 Wis.2d at 354, 533 N.W.2d at 808. The court, rejecting the State's argument that the defendant's refusal to identify himself was the equivalent of "knowingly giving false information" within the meaning of § 946.41(2)(a), STATS.,[5] concluded: "Without more than mere silence, there is no obstruction." ***Id***. In ***Hamilton***, the defendant was asked for identification and responded: "I'm not telling you anything," whereupon he was arrested for obstructing. ***Hamilton***, 120 Wis.2d at 534, 356 N.W.2d at 170. The supreme court, characterizing the State's argument as asking it to rewrite the obstruction statute to declare anyone refusing to furnish identifying information to be guilty of obstructing an officer, declined to do so and concluded that evidence of the defendant's refusal to identify himself to officers was insufficient to constitute obstructing, primarily because the information sought by police—the defendant's identity—was "readily available" from another person on the scene. ***Id***. at 543, 544, 356 N.W.2d at 175.

Neither ***Henes*** nor ***Hamilton*** compels the result sought by Frye. This is not a case of mere silence, or a refusal to provide requested information that is readily ascertainable from another person at the scene. Unlike the

[5] As indicated above, the statute's definition of "obstruct[ing]" includes the defendant's knowledge in knowingly "giving false information to the officer ...." Section 946.41(2)(a), STATS.

suspects in ***Henes*** or ***Hamilton***, Frye was not a passive, silent observer. He exited his truck after a nighttime traffic stop by a lone police officer and refused to follow the officer's instructions, which are routine in such potentially dangerous situations, to return to his vehicle. He also persisted in attempting to engage Wahl in a dialogue, repeatedly asking him to explain the reasons for the request.

Obstructive conduct within the meaning of § 946.41, STATS., is that which "prevents or makes more difficult the performance of the officer's duties." WIS J I-CRIMINAL 1766 (1992). Certainly self-preservation—in this case, maintaining the officer's personal safety when confronting a detained suspect—is among the duties, and within the range of appropriate and expected conduct, of any law enforcement officer. We believe that, under the totality of the circumstances Wahl faced that night, a reasonable officer could conclude that Frye's conduct delayed and impeded Wahl in the performance of his duties and at the very least—and as Wahl testified—made the performance of his duties more difficult and more dangerous in that "it compromised [his] safety."

We thus conclude that Wahl had probable cause to arrest Frye for obstructing an officer and that the cocaine was admissible in evidence as the fruit of a lawful search because it was seized during a search of Frye's person at police headquarters.

II. Necessity for *Miranda* Warnings

Frye next argues that because he had been arrested and was in custody, he was entitled to be advised of his rights under ***Miranda v. Arizona***, 384 U.S. 436, 444 (1966), prior to the administration of field sobriety tests. It is conceded that he was never so advised, and he maintains that, as a result, the results of the tests must be suppressed.

Miranda is a Fifth Amendment self-incrimination case, ***id***. at 439, and Frye offers no legal authority for his argument's major premise: that the field sobriety tests are the equivalent of a "statement" obtained in violation of his ***Miranda*** rights. The State correctly points out that nothing in the record indicates that Wahl ever questioned Frye when he was arrested or when he was taken to police headquarters; nor is there anything to indicate that Wahl gave any written or verbal statements to police that would be susceptible to exclusion

under ***Miranda***. As the State also points out, ***Miranda*** warnings "are not required when an arrested driver is asked to submit to a breathalyzer or other chemical test pursuant to sec. 343.305, Stats." ***State v. Bunders***, 68 Wis.2d 129, 133, 227 N.W.2d 727, 730 (1975).[6] Nor are they required before administration of field sobriety tests.

> Like the [breath] test, suspects also have no fifth amendment right to refuse to perform a field sobriety test .... Field sobriety tests are not testimonial in nature .... Furthermore, field sobriety tests involve no requirement that the suspect make admissions or respond to police inquiries regarding prior alcohol use. Finally, there is no compulsion in violation of the fifth amendment because the suspect is not required to perform the test.

State v. Babbitt, 188 Wis.2d 349, 361-62, 525 N.W.2d 102, 106 (Ct. App. 1994).

Frye also argues that because he was under arrest for obstructing and in custody at the time, Wahl needed probable cause to arrest him for operating under the influence in order to request him to perform field sobriety tests. We rejected a similar argument in ***County of Dane v. Campshure***, 204 Wis.2d 27, 34, 552 N.W.2d 876, 878 (Ct. App. 1996), noting, "We would not have undertaken a discussion [in ***Babbitt***] whether the refusal to take a field sobriety test could be used as a factor in determining probable cause to arrest if probable cause was necessary before such a request could be made."[7]

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[6] Relying on ***Schmerber v. California***, 384 U.S. 757 (1966)—where the Supreme Court held that withdrawal of blood for alcohol-content testing was not a testimonial or communicative act within the meaning of the Fifth Amendment—the ***Bunders*** court concluded that "***Miranda*** warnings ... are not required when an arrested driver is asked to submit to a breathalyzer or other chemical test pursuant to sec. 343.305, Stats." ***Bunders***, 68 Wis.2d at 131-33, 227 N.W.2d at 729-30.

[7] It is true, as Frye stresses in his brief, that he not been formally placed under arrest for operating while intoxicated when sobriety tests were administered—contrary to usual practice, as in ***Bunders***. But we do not see why that fact should lead to a different result—especially where, as here, the facts of the case lead to the conclusion that Wahl acted reasonably in administering the field tests to Frye.

We conclude, therefore, that Wahl's failure, after arresting Frye for obstructing an officer, to advise him of his ***Miranda*** rights before asking him to submit to field sobriety tests does not render the results of those tests inadmissible in evidence.

It follows that the trial court did not err in denying Frye's motions to suppress evidence.

By the Court.—Judgments affirmed.

Not recommended for publication in the official reports.

(..continued)

Although Frye was not arrested for operating while intoxicated, he is, as a driver, subject to the provisions of the implied consent law stating that all persons driving on public roads within the state are deemed to have consented to tests for the presence of alcohol in their blood. Section 343.305(2), STATS. Additionally, while field sobriety tests are not normally administered to subjects arrested for a nontraffic-related violation such as obstructing an officer, it is undisputed in the record that Wahl saw Frye run a red light, smelled the odor of intoxicants about his person and noted his bloodshot eyes, and that Frye was plainly uncooperative, arguing with Wahl and refusing to follow his instructions. The supreme court, in ***State v. Seibel***, 163 Wis.2d 164, 181-83, 471 N.W.2d 226, 234, *cert. denied*, 502 U.S. 986 (1991), found probable cause to arrest for drunk driving when the officer observed erratic driving, an odor of intoxicants, and a "belligeren[t]" lack of cooperation on the defendant's part. Wahl observed that much and more with respect to Frye's actions and conduct on the night in question.

While the defendant's driving in ***Seibel*** had a serious and tragic result not present in this case (he had crossed the center line, precipitating a head-on collision resulting in the injury and death of several occupants of the vehicles), ***id***. at 167, 471 N.W.2d at 228, Frye has not persuaded us that a traffic violation without such serious consequences should be treated any differently—at least insofar as evidence supporting a probable cause determination for the offense is concerned. One running a red light could, under the right circumstances, cause an equally devastating collision, whereas another could cross a center line without incident.