COURT OF APPEALS
DECISION
DATED AND FILED

June 7, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP3136-CR **Cir. Ct. No. 2004CM38**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BYRON A. ANDERSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Bayfield County: JOHN P. ANDERSON, Judge. *Affirmed.*

¶1 CANE, C.J.[1] Byron Anderson appeals a judgment of conviction for operating while intoxicated (OWI), third offense. He argues that he was effectively under arrest when the arresting officer told him he did not believe

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

Anderson's statement that he was not the driver of a vehicle in the ditch. He contends the officer did not have probable cause to arrest him at that time and therefore all evidence resulting from the arrest should be suppressed. We conclude a reasonable person would not believe he or she was under arrest at that time, and that even if Anderson was under arrest, the officer had probable cause. We therefore affirm the judgment.

BACKGROUND

¶2 Anderson was walking along a country road in the early morning hours of February 28, 2004. A nearby resident had called the police because Anderson had been knocking on his door. Deputy Robert Miller arrived at the scene and spoke to Anderson. Anderson showed signs of intoxication, including swaying and slurred speech. Initially, Miller told Anderson he would just give him a ride home. While checking Anderson's driver status, Miller became aware that the vehicle in the ditch was registered to Anderson. Miller observed that there was only one set of footprints leading from the vehicle. However, Anderson stated that his cousin, not he, was driving the vehicle. Miller told Anderson that he did not believe Anderson's statement that his cousin was the driver, but instead believed Anderson was the driver. Anderson failed an initial field sobriety test and refused to perform additional tests. A preliminary breath test produced a result of .21%. Miller also determined that the footprints leading from the car matched Anderson's boots. Miller arrested Anderson for operating while intoxicated.

¶3 Anderson filed a motion to suppress evidence obtained after Miller told Anderson he believed Anderson was driving. He argued Miller effectively arrested him at that time. Anderson never disputed that he had been drinking.

Therefore, he contended that a reasonable person in his position would have believed he was not free to leave once Miller told Anderson he believed Anderson was driving. The circuit court disagreed and denied the motion. Anderson subsequently pled no contest to operating while intoxicated.

DISCUSSION

¶4 Upon review of a motion to suppress, we will sustain the trial court's historical findings of fact unless those findings are clearly erroneous. ***State v. Amos***, 220 Wis. 2d 793, 797, 584 N.W.2d 170 (Ct. App. 1998). However, whether those facts satisfy the constitutional requirement of reasonableness presents a question of law that we review de novo. ***Id.*** at 797-98.

¶5 An arrest occurs when a reasonable person in the defendant's position would have considered himself or herself in custody given the degree of restraint. ***State v. Vorburger***, 2001 WI App 43, ¶14, 241 Wis. 2d 481, 624 N.W.2d 398, *rev'd on other grounds*, 2002 WI 105, 255 Wis. 2d 537, 648 N.W.2d 829. "The totality of the circumstances, including what the police officers communicate by their words or actions, controls the outcome under the test." ***Id.*** Custody means something more than the limited and temporary restraint occasioned by a ***Terry***[2] stop. *See* ***Florida v. Royer***, 460 U.S. 491, 501-03 (1983). Whether an arrest occurred, based on a given set of facts, is a question of law that this court decides de novo. *See* ***Vorburger***, 241 Wis. 2d 481, ¶13.

¶6 We conclude, as did the circuit court, that a reasonable person in Anderson's position would not have thought he was under arrest simply because

[2] ***Terry v. Ohio***, 392 U.S. 1 (1968).

Miller told him he did not believe Anderson's story. As the circuit court noted, "in these unique circumstances … a reasonable person under the same circumstances could think quite legitimately I've got a pretty good story going here because I've got—I've got some plausible explanation as to why I'm here." A person in Anderson's position could think that he could have yet persuaded Miller that he was telling the truth.

¶7 Alternatively however, even if Anderson was under arrest at the time he claims, we conclude Miller had probable cause for arrest at that time. In OWI cases, probable cause will be found "where the totality of the circumstances within the arresting officer's knowledge at the time of the arrest would lead a reasonable police officer to believe ... the defendant was operating a motor vehicle while under the influence of an intoxicant." ***State v. Nordness***, 128 Wis. 2d 15, 35, 381 N.W.2d 300 (1986). This is a commonsense test, based on probabilities. ***County of Dane v. Sharpee***, 154 Wis. 2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990). The facts need only be sufficient to lead a reasonable police officer to believe that guilt is more than a possibility. ***Id.***

¶8 Here, Miller determined, and Anderson does not dispute, that Anderson was drinking. Miller observed that Anderson's speech was slurred and that he was swaying. The car in the ditch was registered to Anderson and there was only one set of footprints leading from the car. This led Anderson to believe that there was only one person in the car when it went into the ditch and that Anderson was therefore the driver. Although Anderson had not yet performed any field sobriety tests, they are not always necessary to establish probable cause to arrest. *See* ***State v. Kasian***, 207 Wis. 2d 611, 622, 558 N.W.2d 687 (Ct. App. 1996).

¶9 Based on the totality of the circumstances within Miller's knowledge at the time Miller told Anderson he believed he was driving, it was reasonable to conclude that it was more than a mere possibility that Anderson was operating while intoxicated. Consequently, there was probable cause to arrest Anderson at the time he argues he was effectively under arrest.

By the Court.—Judgment affirmed.

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