COURT OF APPEALS DECISION DATED AND FILED

July 27, 2005

Cornelia G. Clark
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 No. 2005AP729

Cir. Ct. Nos. 2003TR10047
2003TR10048

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

COUNTY OF FOND DU LAC,

PLAINTIFF-RESPONDENT,

V.

JAY D. GRAFF,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for FOND DU LAC County: DALE L. ENGLISH, Judge. *Affirmed.*

¶1 NETTESHEIM, J.[1] Jay D. Graff appeals from a forfeiture judgment of conviction for operating a motor vehicle while intoxicated pursuant to WIS. STAT. § 346.63(1)(a). Graff challenges the trial court's denial of his motion to suppress based upon his claim that his arrest was without probable cause. We uphold the trial court's ruling and affirm the judgment.

¶2 The relevant facts are not in dispute. On August 11, 2003, at approximately 2:19 a.m., Deputy Jason Fabry was advised by dispatch that a motorist had placed a cell phone call reporting that she was following a possible intoxicated driver. The informant identified herself by name and address. She described the vehicle as a convertible which originally had the top down, but the driver had stopped and put the top up. She stated that the vehicle was originally southbound on Highway 151 headed toward Waupun, then "turned going towards Lamartine" and "then it continued toward Highway County Trunk TC." She reported that the vehicle "was traveling all over the roadway" and "had actually exited the roadway on [Highway] 151 numerous times."

¶3 At this time, Fabry was traveling eastbound on County Trunk TC near Lamartine. As he was negotiating a curve, he observed a vehicle traveling in the opposite direction enter the gravel portion of the shoulder "spitting up gravel and dust." Upon passing the vehicle, Fabry noted that it was a convertible. Fabry turned around and pursued and stopped the vehicle. The informant had discontinued following the vehicle and she was not present on the scene of the stop.

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

¶4 Fabry approached the vehicle and established that Graff was the driver. When speaking with Graff, Fabry noticed an odor of intoxicants and that Graff's eyes were bloodshot, red and glossy. Fabry then had Graff perform some field sobriety tests. On the horizontal gaze nystagmus test, Fabry noticed a lack of smooth pursuit in both his left and right eye and nystagmus at maximum deviation in both his left and right eye. According to Fabry, this represented a total of four out of the six clues that he would look for. On the "walk and turn" test, Graff could not keep his balance and could not touch his heel to toe on all of the steps. He also stopped while walking and took an incorrect number of steps. On the alphabet test, Fabry instructed Graff to begin with the letter "F" and recite through the letter "V." Graff performed this test twice. The first time, he began with the letter "G" and recited through the letter "Z." The second time, he began with the correct letter "F" but again recited through the letter "Z." On the "one leg standing" test, Graff swayed while balancing. Following these tests and the administration of a preliminary breath test, Fabry determined that Graff was under the influence of an intoxicant and he arrested Graff.[2]

¶5 The County charged Graff with OWI. Graff responded with a motion to suppress based on his claim that Fabry lacked reasonable suspicion to initially stop his vehicle and probable cause to later arrest him. The trial court denied the motion. A jury subsequently found Graff guilty. Graff appeals, challenging the trial court's denial of his motion to suppress.

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[2] Although Fabry was permitted to testify that he administered a preliminary breath test to Graff, the trial court ruled that the County had not established that the testing device had been approved by the Department of Transportation. Therefore, the court did not permit Fabry to testify as to the results of the preliminary breath test.

¶6 On appeal, Graff does not renew his trial court argument that Fabry did not have reasonable suspicion to stop his vehicle pursuant to WIS. STAT. § 968.24. Rather, his contention is that Fabry did not have probable cause to arrest him. However, in making this argument, Graff contends that the evidence raises questions as to whether the vehicle observed by the informant was, in fact, the Graff vehicle. For instance, Graff notes that the informant did not provide the "make, model, color or license plate number" of the vehicle she had observed. He also notes that Fabry did not testify that the Graff vehicle was "all over the roadway" as reported by the informant. Finally, Graff notes that the informant did not maintain continuous contact with the vehicle she was following and was not present at the scene of Fabry's stop of Graff's vehicle. As a result, Graff argues that "Fabry did not know if the vehicle he was following was the correct vehicle."

¶7 Thus, even though Graff is not challenging the stop of his vehicle by Fabry, we conclude, as did the trial court, that the information leading to the stop is potentially very germane to the totality of the circumstances as it bears on the question of probable cause. We begin with that discussion.

¶8 In ***State v. Rutzinski***, 2001 WI 22, 241 Wis. 2d 729, 623 N.W.2d 516, our supreme court addressed the circumstances under which a cell-phone call from an unidentified motorist may provide sufficient justification for an investigative traffic stop. ***Id***., ¶1. The court began its analysis with the established law that "[i]n some circumstances, information contained in an informant's tip may justify an investigative stop." ***Id***., ¶17. But because "informants' tips vary greatly in reliability," police must consider the "reliability and content" of the tip. ***Id***. This requires an assessment of the informant's veracity and the basis for the informant's information. ***Id***., ¶18.

¶9 In concluding that the informant's information satisfied both the reliability and content ingredients of the analysis, the supreme court noted that the informant had "exposed him- or herself to being identified." ***Id***., ¶32. This was so because, even though the record in the case did not reveal the motorist's name or other identification, the informant was on the scene of the traffic stop. ***Id***., ¶7. In this case, we have just the opposite situation—the informant provided her name and address, but was not present at the scene of the traffic stop. But the fact remains that the police had information as to who the informant was. This supports the informant's credibility. In addition, the informant in ***Rutzinski*** provided the police with verifiable information indicating the basis of her knowledge via her reports of her contemporaneous observations of Rutzinski's driving. We have the exact same situation here.

¶10 Graff makes much of the fact that the informant here described the vehicle only as a convertible without any additional information such as the make, model, color or license plate number. True, the ***Rutzinski*** informant was a bit more specific by describing the vehicle she was following as a "black pickup." ***Id***., ¶5. However, we are not satisfied that this renders the informant here unreliable. The circumstantial evidence strongly indicates that the vehicle reported by the informant was that observed by Fabry. The route of the vehicle reported by the informant was consistent with Fabry's location of the vehicle when he first sighted it. The time was early morning and Fabry had not encountered any other traffic. Although Fabry allowed that the vehicle was not "all over the roadway" as he followed it, Fabry observed the vehicle exit the roadway as it rounded a curve "spitting gravel and dust." Thus, both the informant and Fabry observed erratic driving.

¶11 Circumstantial evidence does not have to remove every possibility before the result can be sustained. *See* ***State ex rel. Hussong v. Froelich***, 62 Wis. 2d 577, 586, 215 N.W.2d 390 (1974). Rather, the test is whether all the facts necessary to the conclusion are consistent with each other and with the main fact sought to be proved such that the circumstances taken together conclusively lead on a whole to a satisfactory conclusion and produce a reasonable and moral certainty that no other conclusion was warranted. *See* ***id***. Stated differently, but to the same effect, we ask whether a fact finder, acting reasonably, could be convinced of the result under the applicable burden of proof. *See* ***id***. The ultimate test is whether the evidence, when viewed as a whole and with each piece properly in place, undoubtedly supports the conclusion. ***Id***.

¶12 We conclude that the informant's information satisfied the "reliability and content" requirements of ***Rutzinski***. Therefore, we hold that the trial court properly factored that information into its probable cause analysis.

¶13 That brings us to the question of probable cause. Although the parties sharply dispute whether the facts of this case demonstrate probable cause, the relevant facts are not in dispute. Whether undisputed facts constitute probable cause is a question of law that we review without deference to the trial court. ***State v. Babbitt***, 188 Wis. 2d 349, 356, 525 N.W.2d 102 (Ct. App. 1994). Despite our de novo standard of review, we nonetheless value a trial court's decision, particularly where, as here, the trial court has provided us with a reasoned and insightful analysis of the evidence and the law. ***Scheunemann v. City of West Bend***, 179 Wis. 2d 469, 475-76, 507 N.W.2d 163 (Ct. App. 1993).

¶14 In examining probable cause, we look to the totality of the circumstances to determine whether the arresting officer's knowledge at the time

of the arrest would lead a reasonable police officer to believe that the defendant was operating a motor vehicle while under the influence of an intoxicant. ***Babbitt***, 188 Wis. 2d at 356. Probable cause to arrest does not require proof beyond a reasonable doubt or even that guilt is more likely than not. ***Id***. at 357. It is sufficient that a reasonable officer would conclude, based upon the information in the officer's possession, that the defendant probably committed the offense. ***Id***. As the supreme court has said, "The trial court, in terms of the probable cause inquiry, simply must ascertain the plausibility of a police officer's account." ***State v. Nordness***, 128 Wis. 2d 15, 36, 381 N.W.2d 300 (1986).

¶15 With these standards in mind, we comfortably uphold the trial court's ruling that Fabry had probable cause to arrest Graff. First, Fabry had the information provided by the informant. Second, Fabry personally observed erratic driving by Graff. Third, Fabry detected the order of intoxicants emanating from Graff and further observed that his eyes were bloodshot, red and glossy. Fourth, Graff failed some of the field sobriety tests.

¶16 Graff focuses on the things that Fabry did not testify to: Graff did not have slurred speech, did not stagger, and had no difficulty in producing his driver's license. Graff also notes that Fabry did not ask Graff if he had been drinking. But it is the factors that were present and upon which Fabry based his decision to arrest that control this case. And, as we have indicated, those factors support the arrest. A reasonable police officer faced with the totality of circumstances confronting Fabry would sensibly conclude that Graff was probably intoxicated. *See* ***Babbitt***, 188 Wis. 2d at 357. We must remember that probable cause is, in the final analysis, a commonsense test which deals with probabilities that are not technical. ***Dane County v. Sharpee***, 154 Wis. 2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990). Those probabilities are the factual and practical

considerations of everyday life on which reasonable and prudent men and women, not legal technicians, act. ***Id***.

¶17 Finally, Graff argues that Fabry's testimony did not explain the significance of the field sobriety test results as measured against Graff's ability to safely operate a motor vehicle. However, Graff cites to no law, and we know of none, which requires this additional level of information when a police officer testifies about a suspect's performance of field sobriety tests.

¶18 We uphold the trial court's ruling that the totality of the circumstances presented probable cause for Fabry to arrest Graff. As such, the court correctly denied Graff's motion to suppress. We affirm the forfeiture judgment.

By the Court.—Judgment affirmed.

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