

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 23, 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. 2005AP604

Cir. Ct. No. 2004TR3187

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

CITY OF DE PERE,

PLAINTIFF-RESPONDENT,

V.

JESSE J. OSKEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County:
RICHARD J. DIETZ, Judge. *Affirmed.*

¶1 CANE, C.J.¹ Jesse Oskey appeals a conviction for operating a motor vehicle while under the influence of an intoxicant in violation of CITY OF DE PERE, WIS. ORDINANCE § 150.1(a), which adopts WIS. STAT. § 346.63(1)(a).

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.

Oskey argues that the circuit court erred when it denied his motion to suppress all evidence derived directly, or indirectly, from his arrest. This court affirms the circuit court, concluding that Oskey's motion was properly denied.

Background

¶2 Early in the morning on August 28, 2003, officer Todd Kerkela was on patrol for the City of DePere Police Department. At 1:27 a.m., Kerkela observed Oskey driving with no headlamps on. Kerkela could also hear the tires on Oskey's car squealing and see the rear of his vehicle "kick out" to the side as Oskey accelerated. Oskey's vehicle leaped forward as he changed gears, tires again squealing, as he continued to accelerate. Kerkela observed Oskey brake heavily as he approached Fourth Street and Kerkela's squad car.

¶3 As Oskey made a right turn onto Fourth Street, again accelerating rapidly and squealing his tires, Kerkela activated his emergency lights and turned onto Fourth Street behind Oskey. Oskey pulled his vehicle over, parking at a forty-five degree angle to the curb. As Oskey stepped out of his vehicle, he looked toward Kerkela, whose emergency lights were still on, and took off running. Kerkela ordered Oskey to stop, but Oskey kept running.

¶4 During the ensuing foot chase, Oskey looked back at Kerkela as the officer again commanded him to stop. Oskey ignored the officer's command. Kerkela caught up with Oskey and grabbed him as he entered a building and attempted to head up some stairs. At this time, Kerkela told Oskey he was under arrest.

¶5 Oskey attempted to pull away from Kerkela as the officer repeatedly told Oskey to lie on the ground. Kerkela then forced Oskey to the ground, after which Oskey stopped resisting and permitted Kerkela to handcuff him.

¶6 Kerkela could smell a strong odor of intoxicants coming from Oskey and noticed that his speech was slurred. Kerkela then asked Oskey to perform field sobriety tests and removed the handcuffs. The field sobriety tests indicated that Oskey was under the influence of intoxicants and a portable breathalyzer was administered, giving a reading of .28.

¶7 Kerkela then advised Oskey that he was under arrest and transported Oskey to St. Vincent's Hospital where he consented to a blood test. While at the hospital, Oskey received citations for operating a motor vehicle while under the influence of an intoxicant and resisting/obstructing an officer. After the blood test, Oskey was surrendered to the Brown County Jail.

¶8 Oskey was ultimately charged with operating a motor vehicle while under the influence of an intoxicant, contrary to CITY OF DE PERE, WIS. ORDINANCE § 150.1(a), which adopts WIS. STAT. § 346.63(1)(a), operating a motor vehicle while having a prohibited alcohol concentration, contrary to CITY OF DE PERE, WIS. ORDINANCE § 150.1(a), which also adopts WIS. STAT. § 346.63(1)(b), and resisting/obstructing an officer, contrary to WIS. STAT. § 946.41.

¶9 On July 21, 2004, Oskey filed a motion requesting that all evidence derived directly, or indirectly, as a consequence of Oskey's arrest be suppressed. Oskey argued that the arrest itself was unlawful, asserting that Kerkela did not have a reasonable suspicion that Oskey was armed and dangerous, and did not have probable cause to place Oskey under custodial arrest.

¶10 At a hearing on August 25, 2004, the circuit court denied Oskey's motion, finding that there was probable cause to arrest Oskey and that there was no violation of Oskey's rights.

¶11 On December 9, 2004, the parties filed a document entitled "Stipulated Trial," wherein the parties stipulated to the evidence the court could consider and the sentence if Oskey were found guilty.

¶12 On that same day, the circuit court found Oskey guilty of operating a motor vehicle while under the influence of an intoxicant, contrary to CITY OF DE PERE, WIS. ORDINANCE § 150.1(a), which adopts WIS. STAT. § 346.63(1)(a). As part of the stipulated trial, the other two charges were dismissed and Oskey was sentenced as stipulated by the parties.

Discussion

¶13 On appeal, Oskey agrees with the circuit court's determination that Oskey was placed under arrest when Kerkela told him that he was under arrest and cuffed him immediately following the foot chase. The City argues that Oskey was not actually placed under arrest at this time, but was only arrested after the field sobriety tests. The City argues that Kerkela handcuffed Oskey only because it was necessary to facilitate an investigatory stop, given that Oskey fled and resisted the stop.

¶14 This court agrees with the circuit court that Oskey was placed under arrest when handcuffed following the foot chase. The test for determining whether someone is under arrest is an objective one, based on the totality of the circumstances. *State v. Swanson*, 164 Wis. 2d 437, 446 n.5, 475 N.W.2d 148 (1991). In this case, Kerkela grabbed Oskey and told him that he was under arrest.

When Oskey disobeyed Kerkela's demands to get on the ground, Kerkela forced Oskey to the ground. Kerkela then handcuffed Oskey. Together, these circumstances suggest that Oskey was under arrest.

¶15 Oskey argues that Kerkela did not have probable cause to arrest him immediately following the foot chase and before the sobriety tests. Oskey argues that Kerkela pulled him over with only a suspicion that Oskey committed a "minor traffic infraction." Oskey also argues that since Kerkela did not have probable cause to arrest him when Oskey was initially pulled over, Oskey could not have been resisting or obstructing an officer because Kerkela was not acting under lawful authority.

¶16 Neither party has provided transcripts of the court proceedings in this case; this court's review of the evidence is confined to the record before it. *Austin v. Ford Motor Co.*, 86 Wis. 2d 628, 641, 273 N.W.2d 233 (1979). As previously mentioned, the parties stipulated to the evidence to be considered by the circuit court. The parties agreed that the court should decide the case based upon the police report and evidence presented at Oskey's motion to suppress hearing.

¶17 Probable cause exists where the circumstances known to the officer at the time of the arrest would lead a reasonable officer to believe that the defendant committed a crime. *State v. Koch*, 175 Wis. 2d 684, 701, 499 N.W.2d 152 (1993). A traffic stop is reasonable if an officer has probable cause to believe that a traffic violation has occurred. *State v. Gaulrapp*, 207 Wis. 2d 600, 605, 558 N.W.2d 696 (Ct. App. 1996). An officer may, without a warrant, arrest an individual for violating a traffic regulation. WIS. STAT. § 345.22.

¶18 Kerkela observed Oskey driving at 1:30 a.m. without lighted headlamps. Driving in darkness without lighted headlamps is a traffic violation. WIS. STAT. § 347.06(1). Kerkela's account of that night suggests that he witnessed Oskey violate other traffic laws as well. Therefore, Kerkela not only had reasonable suspicion to perform an investigatory stop, but also had probable cause to stop and arrest Oskey for a traffic violation.

¶19 Oskey also created probable cause to be arrested for resisting/obstructing an officer, contrary to WIS. STAT. § 946.41, when he fled from the officer, in violation of the officer's commands, and resisted the officer's attempts to restrain him once he was caught. A person violates § 946.41 when he "knowingly resists or obstructs an officer while such officer is doing any act in an official capacity and with lawful authority." WIS. STAT. § 946.41(1).

¶20 Oskey argues that Kerkela did not have lawful authority to arrest him immediately following the foot chase. Such lawful authority was absent, according to Oskey, because Kerkela did not have reasonable suspicion or probable cause to detain Oskey before he fled.

¶21 As stated above, Kerkela not only had a reasonable suspicion to stop Oskey for a traffic violation, but also had probable cost to arrest him for that violation. Thus, Kerkela was acting lawfully when he stopped Oskey. As a result, Kerkela had probable cause to arrest Oskey for resisting/obstructing an officer when Oskey fled during the lawful stop. This is especially true where Oskey ignored Kerkela's commands to stop running. Since the arrest was lawful, the circuit court properly denied Oskey's motion to suppress.

By the Court.—Judgment affirmed.

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

