

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 30, 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. 2005AP790-CR

Cir. Ct. No. 2004CM1079

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JON P. TOROK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Eau Claire County: PAUL J. LENZ, Judge. *Affirmed.*

¶1 HOOVER, P.J.¹ Jon Torok appeals a judgment of conviction for operating while under the influence of an intoxicant (OWI), second offense,

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.

contrary to WIS. STAT. § 346.63(1)(a). Torok contends that the circuit court erred by denying his motion to suppress all evidence obtained from his OWI arrest. This court disagrees and affirms his conviction.

Background

¶2 On June 18, 2004, at 2:04 a.m., Wisconsin State Trooper Heidi King was on duty in the City of Eau Claire. While driving north on Hastings Way, she observed Torok's vehicle run a red light and turn left onto Hastings Way. Torok's vehicle crossed all three lanes of traffic and then repositioned itself in the center lane.

¶3 King got behind Torok and activated her emergency lights. Torok continued northbound on Hastings Way. King then activated her siren. Torok took the Birch Street exit and drove through another red light as he made a right turn onto Birch Street. Despite the emergency lights and siren, Torok continued and made a right turn onto Pine Street. He then made another turn onto Hastings Place before pulling into a Dairy Queen parking lot. In the course of Torok's driving maneuvers, King observed Torok's tires cross over the white dotted line on Hastings Way and the fog line on the Birch Street exit.

¶4 Once stopped, King noticed that Torok was having a difficult time talking because of something in his mouth. She could also smell a strong odor of "raw marijuana." Torok reached for a gallon of water to drink. King told Torok to open his mouth. Inside his mouth was a "bunch" of marijuana. Torok also had a green, leafy substance on the front of his clothing.

¶5 King ordered Torok to exit the vehicle and she placed him under arrest for possession of THC and resisting/obstructing an officer. Upon searching

Torok, she found a plastic baggie that appeared to have been ripped open with teeth. King then placed Torok in the back seat of her squad car, where he remained for several minutes.

¶6 While Torok was in the back seat of her squad car, King noticed a strong odor of intoxicants coming from his breath. King then removed Torok's handcuffs and asked him to perform field sobriety tests. He refused. Torok was handcuffed again and placed under arrest. After searching Torok's vehicle, King issued Torok a citation for OWI, second offense.² After being read the "Informing the Accused" form, Torok refused to submit to a chemical test. He was then taken to the hospital where his blood was forcibly drawn. Torok's blood alcohol concentration was .127 percent.

¶7 Torok was charged with OWI, second offense, contrary to WIS. STAT. § 346.63(1)(a), operating with a prohibited alcohol concentration, contrary to § 346.63(1)(b), and possession of THC, contrary to § 961.43(3g)(e).

¶8 On November 16, 2004, Torok filed a motion requesting that all evidence derived from the OWI arrest be suppressed. Torok argued that King did not have probable cause to arrest him for OWI. The circuit court found that Torok's blood could properly be tested for THC in light of the fact that he was found with marijuana in his mouth. The court further concluded that reasonable suspicion that a person's blood contains evidence of a crime, not probable cause, was the proper standard for determining whether a blood draw may be taken under *State v. Seibel*, 163 Wis. 2d 164, 471 N.W.2d 226 (1991). The court then found

² Before Torok was asked to perform field sobriety tests, King was notified that Torok had a prior OWI.

that King had a reasonable suspicion that Torok's blood contained evidence of operating while intoxicated.

¶9 Torok later entered a plea of no contest to the OWI, second offense. The charges for possession of THC and operating with prohibited alcohol concentration were dismissed. Torok appeals the conviction.

Discussion

¶10 On appeal, Torok argues that there was no probable cause to arrest him for OWI and that probable cause is required to justify a blood draw under the Fourth Amendment. Torok further argues that the Wisconsin Supreme Court's holding in *Seibel* should be revisited and that the facts in this case are otherwise distinguishable from *Seibel*.

Probable Cause

¶11 Probable cause exists where the totality of the circumstances within the arresting officer's knowledge at the time of arrest would lead a reasonable officer to believe that the defendant has committed a crime. *State v. Nordness*, 128 Wis. 2d 15, 35, 381 N.W.2d 300 (1986). Where the circuit court has not made findings of fact regarding probable cause, this court reviews the record to determine whether probable cause existed. *Id.* at 36.

¶12 Torok asserts that King first developed a "hunch" that Torok was intoxicated when she learned that he had a prior OWI conviction. Torok argues that King only detected alcohol on Torok's breath after she learned of his prior OWI, implying that King fabricated her observation. Torok further argues that detecting an odor of alcohol on Torok's breath does not amount to probable cause.

This court rejects Torok's arguments and concludes that King had probable cause to arrest Torok for OWI.

¶13 Torok's arguments do not apply the standard for determining whether probable cause exists. Torok focuses on individual facts, ignoring the totality of the circumstances. While some of the facts, taken alone, might not amount to probable cause, the following facts, when considered together, do: (1) Torok ran two red lights and otherwise drove erratically at around 2 a.m.; (2) he failed to respond to King's emergency lights and siren within a reasonable time; (3) he was found ingesting marijuana; (4) his breath smelled of alcohol; and (5) he refused to take field sobriety tests. The totality of these circumstances would lead a reasonable officer to believe Torok was driving while under the influence of an intoxicant. These circumstances would also give a reasonable officer probable cause to believe Torok's blood contained evidence of a crime.

¶14 Torok's argument that King did not detect alcohol on his breath until after she became aware of his prior OWI does not change the analysis. It was Torok, not King, who determined this sequence of events. When King initially interacted with Torok, she noticed a strong odor of "raw marijuana" because Torok had marijuana in his mouth. Had Torok not put the marijuana in his mouth, King could have detected the odor of alcohol earlier.

State v. Seibel

¶15 In *Seibel*, the Wisconsin Supreme Court held that blood may be drawn incident to an arrest if the police reasonably suspect that the defendant's blood contains evidence of a crime. *Seibel*, 163 Wis. 2d at 166. The court rejected the stricter standard of probable cause for blood draws. *Id.* at 179.

¶16 Torok argues that the holding in *Seibel* should be revisited and that probable cause should be required for blood draws. However, this court cannot upset a decision of the Wisconsin Supreme Court. See *Cook v. Cook*, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). Also, revisiting *Seibel* would not affect Torok's conviction. Given that there was probable cause to arrest Torok for OWI and to believe that his blood contained evidence of a crime, Torok would gain nothing if the standard were changed to probable cause.

¶17 Torok also argues that his case is otherwise distinguishable from the facts in *Seibel*. He asserts that, unlike *Seibel*, there was no nexus between the crime for which Torok was arrested and the reason to draw blood. In *Seibel*, the defendant, Michael Seibel, caused an accident that resulted in two people's deaths. *Seibel*, 163 Wis. 2d at 167. Seibel was injured and taken to the hospital. *Id.* The officer in charge of the accident scene ordered the dispatcher to send another officer to the hospital to arrest Seibel for homicide by negligent use of a motor vehicle and to obtain a blood sample. *Id.* at 168. That other officer went to the hospital and mistakenly arrested Seibel for operating while intoxicated. *Id.* at 169. Seibel then gave a blood sample under the implied consent law. *Id.*

¶18 The State conceded there was no probable cause to believe Seibel's blood contained evidence of a crime. *Id.* at 172. The Wisconsin Supreme Court then held that only reasonable suspicion that a defendant's blood contained evidence of a crime was required. *Id.*

¶19 Torok argues that there was a nexus between the crime for which Seibel was charged and the reason for the blood draw. He states that the presence of alcohol in Seibel's blood was relevant to whether Seibel was negligent. By contrast, Torok argues that there was no nexus between the crime for which he

was arrested, possession of THC, and the blood draw. This court rejects Torok's argument.

¶20 As stated above, King had probable cause to arrest Torok for operating while intoxicated. Therefore, Torok's argument is not supported by the facts; there is clearly a nexus between an OWI arrest and a blood draw.³

By the Court.—Judgment and order affirmed.

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

³ Also, given that Torok seemingly was attempting to dispose of the marijuana by eating it, there would also be a nexus between possession of THC and evidence to be attained from a blood draw. A blood test indicating the presence of THC would corroborate King's assertion that Torok possessed marijuana and also that he attempted to obstruct the officer by eating it.

