COURT OF APPEALS
DECISION
DATED AND FILED

April 26, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1146-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

AUGUSTIN A. PINEDA,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Jefferson County: JOHN M. ULLSVIK, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Roggensack, JJ.

¶1 ROGGENSACK, J. Augustin A. Pineda appeals a judgment of conviction for possession of cocaine with intent to deliver within 1,000 feet of a county park. He argues that the circuit court erred in denying his motion to suppress evidence obtained during a police officer's warrantless search of his

automobile before he was placed under arrest. Because the officer had probable cause to arrest Pineda for operating a motor vehicle while intoxicated (OMVWI) at the time of the search, we conclude that the evidence of possession of cocaine with intent to deliver was obtained during a lawful search incident to arrest. Therefore, we affirm the judgment of the circuit court.

BACKGROUND

¶2 According to his testimony at the suppression hearing, City of Jefferson police officer Jon Kerr was alerted by a motorist that the operator of the white car, that was within sight of the officer and the motorist, appeared to be intoxicated because he had been speeding and driving erratically. Kerr followed the white car and stopped it near the Jefferson County Fairgrounds after he saw it drift over the center line. When he walked up to the car, he noticed the smell of intoxicants coming from the driver, and he saw four cans of beer in the back seat. Kerr asked the driver for his license, but the driver claimed not to speak any English, and Kerr spoke only a few words of Spanish. The driver got out of the car, staggering as he did so, and went through his wallet but could not find a driver's license. Partially in Spanish, Kerr asked him how many beers he had drunk, and the driver responded, "Dos." Kerr then asked him his name, which he said. Kerr wrote "Armando" in his notebook, but as he did not understand the last name Pineda gave, he asked him to write it next to "Armando." Pineda wrote "Palaciss," adding what appeared to be a backwards "e" after the double s.

¶3 Kerr next spoke to the car's passenger, who told him that the driver owned the car. Kerr checked the vehicle registration and determined that it was registered to "Augustin Pineda." Kerr asked Pineda to accompany him to the sidewalk, which he did. Kerr then mimed several field sobriety tests, but Pineda

did not attempt to perform them. Kerr asked for Pineda's wallet, planning to look for identification. Instead of giving the wallet to Kerr, Pineda opened it and began throwing the business cards it contained onto the ground. He then handed Kerr his wallet; Kerr went through it and did not find any identification. Another officer tried to call several Spanish-language interpreters, but none was available. To verify identification of the driver, Kerr looked through the car. Although he initially found no identification, in the front-seat armrest he noticed a plastic baggie containing a white powdery substance that eventually was determined to be cocaine.

¶4 Kerr returned to Pineda and succeeded in getting him to attempt the finger-to-nose field sobriety test, which he failed. Kerr administered a preliminary breath test, which showed a blood alcohol concentration of 0.10 percent. Kerr then placed Pineda under arrest for OMVWI. Pineda was subsequently charged with possession of cocaine with intent to deliver within 1,000 feet of a county park and with obstruction for giving a false name. He moved to suppress the evidence of cocaine possession and intent to deliver, arguing that it was found during an unlawful search of his car. The circuit court denied the motion, and a jury convicted Pineda on both counts. He appeals the denial of his suppression motion.

DISCUSSION

Standard of Review.

¶5 When we review a motion to suppress evidence, we will uphold the circuit court's findings of historic fact unless they are clearly erroneous. ***State v. Eckert***, 203 Wis. 2d 497, 518, 553 N.W.2d 539, 547 (Ct. App. 1996). However, whether the facts as found constitute probable cause to believe a crime has been committed is a question of constitutional fact, which we review independently.

State v. Secrist, 224 Wis. 2d 201, 208, 589 N.W.2d 387, 390, *cert. denied*, 526 U.S. 1140 (1999).

Search Incident to Arrest.

¶6 Under the Fourth and Fourteenth Amendments,[1] a search conducted without a warrant issued upon probable cause is "per se unreasonable ... subject only to a few specifically established and well-delineated exceptions." ***Katz v. United States***, 389 U.S. 347, 357 (1967). One such exception is a search incident to arrest. When a law enforcement officer makes a "lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." ***State v. Fry***, 131 Wis. 2d 153, 168, 388 N.W.2d 565, 571 (1986), *quoting* ***New York v. Belton***, 453 U.S. 454, 460 (1981). In the course of such a search, the officer may also examine the contents of any containers or packages found in the automobile's passenger compartment, whether they are open or closed, locked or unlocked, and regardless of the level of expectation of privacy associated with any particular container. ***Fry***, 131 Wis. 2d at 177-178, 388 N.W.2d at 575-76. The search of a vehicle will be considered "contemporaneous" with the arrest of a recent occupant of the vehicle when "the search begins immediately after the arrest and the defendant remains at the scene." ***Id.*** at 180, 388 N.W.2d at 577.

¶7 However, it is not always necessary that a search incident to arrest occur after the arrest. In ***State v. Swanson***, the supreme court reasoned: "[W]here the formal arrest immediately follows the challenged search, it is irrelevant that

[1] Wisconsin courts have conformed the interpretations of Wisconsin statutory and constitutional search and seizure provisions to the United States Supreme Court's Fourth Amendment jurisprudence. ***State v. Fry***, 131 Wis. 2d 153, 172, 388 N.W.2d 565, 573 (1986).

the search preceded the arrest rather than vice versa, so long as the fruits of the search were not necessary to support probable cause to arrest." 164 Wis. 2d 437, 450-51, 475 N.W.2d 148, 154 (1991). When asserting this exception, the State bears the burden of establishing that probable cause to arrest existed before the search began. ***State v. Mata***, 230 Wis. 2d 567, 574, 602 N.W.2d 158, 161 (Ct. App. 1999) (citing ***Rawlings v. Kentucky***, 448 U.S. 98, 111 (1980)).

¶8 Every lawful, warrantless arrest must be supported by probable cause. ***Molina v. State***, 53 Wis. 2d 662, 670, 193 N.W.2d 874, 878 (1972); U.S. CONST. amend. IV; WIS. CONST. art. I, § 11. A police officer has probable cause to arrest when the totality of the circumstances within that officer's knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant probably committed a crime. ***State v. Koch***, 175 Wis. 2d 684, 701, 499 N.W.2d 152, 161 (1993). This is a practical test based on "'considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" ***State v. Drogsvold***, 104 Wis. 2d 247, 254, 311 N.W.2d 243, 247 (Ct. App. 1981) (citation omitted). The objective facts before the police officer need only lead to the conclusion that guilt is more than a possibility. ***State v. Richardson***, 156 Wis. 2d 128, 148, 456 N.W.2d 830, 838 (1990).

¶9 Here, the totality of the circumstances supports probable cause to arrest Pineda for OMVWI prior to Kerr's looking in the car for identification. Those circumstances include another motorist telling Kerr that Pineda appeared to be intoxicated because he was speeding and driving erratically. Kerr, himself, thought Pineda was exceeding the speed limit, and he saw Pineda's car drift over the center line. After the stop when he walked to Pineda's car, he smelled the odor of intoxicants coming from Pineda. He saw cans of beer in the back seat, as well as an open container of beer in the front seat. Pineda admitted that he had

consumed two beers and staggered while exiting the car. While attempting to write the name he had given to Kerr, he spelled "Palacisse" with a backwards "e," and when Kerr asked to examine his wallet, Pineda engaged in the bizarre behavior of throwing all the business cards it contained onto the street.

¶10 Accordingly, we conclude that the facts of this case would lead a reasonable police officer to believe there was more than a possibility that Pineda was driving while under the influence of an intoxicant. Therefore, because Kerr had probable cause to arrest Pineda for OMVWI without the fruits of the challenged search, and because the formal arrest closely followed the search, the search was incident to Pineda's arrest for OMVWI, even though the arrest took place subsequently.

CONCLUSION

¶11 Because the officer had probable cause to arrest Pineda for OMVWI before the search, we conclude that the evidence of possession of cocaine with intent to deliver was obtained during a lawful search incident to arrest. Therefore, we affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

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