COURT OF APPEALS
DECISION
DATED AND FILED

June 29, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP1953-CR **Cir. Ct. No. 2003CT3246**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH G. SCALISSI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: STEVEN D. EBERT, Judge. *Affirmed*.

¶1 HIGGINBOTHAM, J.[1] Joseph G. Scalissi appeals from a judgment convicting him of operating a motor vehicle while under the influence of an intoxicant (OWI), second offense, contrary to WIS. STAT. § 346.63(1)(a), and from an order denying him postconviction relief. On appeal, Scalissi challenges the circuit court's denial of his motion to suppress evidence on grounds that the officer did not have probable cause to arrest him. Scalissi also seeks to suppress evidence because his due process rights were violated under ***Brady v. Maryland***, 373 U.S. 83 (1963). We affirm.

¶2 Scalissi was arrested for OWI, second offense, as he drove home from work. Scalissi moved to suppress the result of his blood draw and/or dismiss the case for lack of probable cause to arrest him.

¶3 At the evidentiary hearing, City of Monona Police Officer Sara Waltrud[2] testified that police dispatch received a call from a citizen calling from his car observing that another driver was "all over the road, weaving left and right and driving erratically." Waltrud was dispatched to the area, located the suspect vehicle, and began following it. Waltrud observed the vehicle make a left-hand turn, proceed into the oncoming traffic lane of the two-lane road and travel in that lane for approximately fifty feet before returning to the correct lane. Waltrud activated her squad lights and, after the vehicle continued half a block without pulling over, she activated her siren and pulled the vehicle over.

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

[2] The arresting officer's surname was Waltrud at the time of arrest. She has since married and is now known as Sara Deuman. We will refer to her as Waltrud since the parties refer to her by that name in their briefs.

¶4 The driver, identified as Scalissi at the hearing by Waltrud, got out of his vehicle but got back inside after being ordered to do so by Waltrud. On direct examination by the State, Waltrud testified that she noticed a strong odor of intoxicants on Scalissi's breath, slightly slurred speech, and "glassy," bloodshot eyes. Scalissi told Waltrud that he knew someone was following him but thought it was someone stalking him. The court recalled granting Scalissi a restraining order against a woman for harassing him.

¶5 While Waltrud was returning to her squad car, the citizen who called police dispatch about Scalissi's driving behavior approached her. The following is a summary of the statement the citizen gave to Waltrud: he was traveling northbound on Monona Drive approaching Cottage Grove Road when he saw Scalissi's vehicle traveling in the southbound lane; he observed Scalissi's vehicle strike the cement median in the road and saw sparks fly from the vehicle; he turned his car around and followed Scalissi; while traveling southbound, he saw Scalissi's vehicle cross the center line of a four-lane road and travel south in the northbound lanes of traffic for three to four-tenths of a mile; he further observed Scalissi's vehicle return to the correct lane but move back and forth between the two southbound lanes; and, as he continued to follow Scalissi, the vehicle continued to weave left and right.

¶6 After taking the citizen's statement, Waltrud returned to Scalissi's vehicle. In response to questioning, Scalissi stated he had had two drinks that night and that he had also been taking numerous different cold medications. He showed Waltrud a bag containing the medications. Waltrud testified that she then asked Scalissi to step out of his vehicle and perform field sobriety tests, but Scalissi refused on the basis that the cold medications he had been taking would affect his balance. Waltrud then arrested Scalissi.

¶7 A video recording from Waltrud's squad car was introduced, which showed Scalissi's vehicle cross into the oncoming traffic lane. The recording equipment was not functioning properly and did not recover audio of the events. On cross-examination Waltrud admitted that Scalissi used his turn signal to signal his turns and that she never observed him violate the speed limit. Waltrud also testified that although she had initially testified that she noticed a strong odor of intoxicants on Scalissi's breath, her alcohol influence report submitted shortly after the incident stated she observed a "moderate odor," and the report did not mention slurred speech.

¶8 Scalissi provided the following testimony at the motion hearing. He admitted striking the concrete median but asserted that he was forced to because a car entered his lane, forcing him to swerve. Scalissi noticed the car following him, but he thought it was his stalker. He testified that he called 911 regarding the car following him and that he was not aware of his car deviating from its path while he tried to feel for his cellular phone. Scalissi also testified that after he was pulled over, he was not asked to perform field sobriety tests but rather was asked to "take a breathalyzer," which he refused because of the various cold medications he had been taking.

¶9 The court took up the dispute over whether Waltrud requested field sobriety tests or a preliminary breath test (PBT) and decided that it would not make a credibility determination regarding this issue. The court concluded that even without evidence of Scalissi refusing field sobriety tests or a PBT, probable cause to arrest existed based on Waltrud's observations and knowledge of the citizen caller's observations. Scalissi then pled no contest and was convicted and sentenced.

¶10 Scalissi filed a postconviction motion to withdraw his plea, in part arguing that there was newly discovered evidence that Officer Waltrud did not properly maintain the audiovisual equipment in her squad car, and that the lack of audio on the recording would lead to a new suppression or dismissal motion for destruction of evidence. The court denied the motion, and Scalissi appeals this ruling as well as the denial of his motion to suppress.

DISCUSSION

Probable Cause

¶11 In reviewing a circuit court's order granting or denying a motion to suppress evidence, we will uphold a circuit court's findings of fact unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2). But whether a given set of facts constitutes probable cause to arrest presents a question of law this court reviews independently of the circuit court. ***State v. Kasian***, 207 Wis. 2d 611, 621, 558 N.W.2d 687 (Ct. App. 1996). We apply the following standard in determining whether there was probable cause for Officer Waltrud to arrest Scalissi:

> Probable cause to arrest is the quantum of evidence within the arresting officer's knowledge at the time of the arrest which would lead a reasonable police officer to believe that the defendant probably committed or was committing a crime. There must be more than a possibility or suspicion that the defendant committed an offense, but the evidence need not reach the level of proof beyond a reasonable doubt or even that guilt is more likely than not. Whether probable cause exists in a particular case must be judged by the facts of that case.

State v. Secrist, 224 Wis. 2d 201, ¶19, 589 N.W.2d 387 (citing in part WIS. STAT. § 968.07(1)(d) ("A law enforcement officer may arrest a person when … [t]here are reasonable grounds to believe that the person is committing or has committed a crime.").

¶12 Here, as in past OWI cases, "probable cause exists 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 that 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 common sense test, based on probabilities. *See* ***County of Dane v. Sharpee***, 154 Wis. 2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990).

¶13 The circuit court concluded that probable cause existed to arrest Scalissi based on the citizen caller's statements made to Waltrud at the scene of the arrest, as well as Waltrud's own observations of Scalissi's erratic driving; his glassy, bloodshot eyes; his slightly slurred speech; and the odor of intoxicants emanating from Scalissi. The court concluded there was probable cause to arrest without considering the credibility of Waltrud or Scalissi on the question of whether Waltrud told Scalissi to submit to field sobriety tests or a PBT.

¶14 We agree with the circuit court and conclude that, even without taking into account the dispute over whether Scalissi refused to take field sobriety tests or a PBT, there was probable cause to arrest him for OWI. Officer Waltrud testified that she based her decision to arrest Scalissi on the citizen caller's statements and on her personal observations of Scalissi's driving; the odor of intoxicants emanating from him; his glassy, bloodshot eyes and slightly slurred speech; and his unwillingness to perform the field sobriety tests. Waltrud also considered Scalissi's admissions that he had consumed two to three drinks that evening and that he had been taking numerous cold medications. We conclude that these facts would lead a reasonable police officer to believe that the defendant was operating a motor vehicle while under the influence of an intoxicant.

¶15 Scalissi relies on two cases in which field sobriety tests were not given, ***State v. Seibel***, 163 Wis. 2d 164, 471 N.W.2d 226 (1991), and ***State v. Swanson***, 164 Wis. 2d 437, 475 N.W.2d 148 (1991). He argues that in both cases the facts were sufficient to establish reasonable suspicion but not probable cause to arrest, and that similarly the facts here do not support a finding of probable cause to arrest. His reliance on both cases is misplaced.

¶16 The two issues before the court in ***Seibel*** were "whether the standard for drawing a blood sample in a search incident to an arrest is 'reasonable suspicion' or 'probable cause' that the defendant's blood contains evidence of a crime," and "whether the police reasonably suspected that the defendant's blood contained evidence of a crime." ***Seibel***, 163 Wis. 2d at 166. While the court in ***Seibel*** concluded that there was reasonable suspicion under the facts presented to take a blood sample from the defendant, ***id.*** at 180-84, the court never addressed the question of whether the facts supported a finding of probable cause to arrest.

¶17 As for ***Swanson***, citing to footnote 6 of that opinion, Scalissi asserts the supreme court "held" that the facts in that case did not constitute probable cause to arrest Swanson. The facts in ***Swanson*** are that the defendant, at about bar closing time, drove erratically, bore the odor of intoxicants, but had no difficulty standing and did not exhibit any slurred or impaired speech. ***Swanson***, 164 Wis. 2d at 442. The relevant language in footnote six applicable to Scalissi's argument is:

> Clearly, the officers here did possess a reasonable suspicion that Swanson had committed a criminal act, either operating under the influence or reckless endangerment, but arguably lacked probable cause to arrest Swanson at the time of the search. The first indicia of criminal conduct included Swanson's unexplained erratic driving. The second indicia included the odor of intoxicants emanating from Swanson as he spoke. The third indicia included the

> approximate time of the incident, which occurred at about the time that bars close in the state of Wisconsin. Taken together, these indicia form a basis for a reasonable suspicion that Swanson was driving while intoxicated. *See* ***State v. Seibel***, 163 Wis. 2d 164, 183, 471 N.W.2d 226 (1991), where we held that similar factors add up to a reasonable suspicion but not probable cause.

Id. at 453 n.6.

¶18 We acknowledge that this language may reasonably be read to support Scalissi's position. However, we consider this language to be dicta. The issue before the ***Swanson*** court was whether the defendant had actually been arrested, ***Swanson***, 164 Wis. 2d at 448, not whether there was probable cause to arrest him. Indeed, the court expressly acknowledged that it was not necessary to determine whether probable cause existed to arrest Swanson for OWI or reckless driving. ***Id.*** at 453. In short, ***Swanson*** gives no guidance here as to whether there was probable cause to arrest Scalissi under the facts at the time of his arrest.

¶19 Scalissi argues that he offered benign reasons to Waltrud explaining his erratic driving and physical symptoms, such as his belief that his stalker was following him and his call to 911 emergency dispatch that coincided with his vehicle crossing over the dividing line. He also explained that his bloodshot eyes were caused by the smoky environment in which he worked and by the cold he was suffering from. However, innocent explanations do not rule out probable cause, given that Waltrud's conclusions are reasonable. *See* 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 3.2(e), at 78 (4th ed. 2004); *see also* ***U.S. v. Funches***, 327 F.3d 582, 587 (7th Cir. 2003) ("the mere existence of innocent explanations does not necessarily negate probable cause"). We conclude there was probable cause to arrest Scalissi for OWI, second offense.

Due Process Violation Under ***Brady v. Maryland*** *and* ***Arizona v. Youngblood***

¶20 Scalissi next seeks to have evidence of his blood test suppressed because his due process rights were violated under ***Brady v. Maryland***. This contention is based on a claim that Waltrud destroyed exculpatory evidence by disregarding the Monona Police Department's "In-Car Audiovisual Recording System" policy, which requires officers to examine the audiovisual recording equipment in their squad cars prior to the start of their shift to insure the equipment is working properly. It is undisputed that the audio equipment in Waltrud's squad car was inoperable at the time she arrested Scalissi.[3] Scalissi argues that because Waltrud did not follow the departmental policy to ensure the audiovisual equipment worked properly, there was no audio recording of Scalissi's stop and arrest. In short, according to Scalissi, material and favorable evidence was "destroyed," thereby depriving Scalissi of an additional ground to suppress his blood test results.

¶21 Scalissi argues, alternatively, that even if the evidence that was destroyed was not exculpatory, the evidence was potentially exculpatory as explained in ***Arizona v. Youngblood***, 488 U.S. 51 (1988), and that he has shown that Waltrud acted in bad faith by "destroying" the evidence. More specifically, Scalissi contends Waltrud's failure to follow the department's audiovisual equipment policy constituted bad faith. We reject both arguments on the basis of waiver.

[3] The regulations state in part: "Prior to the start of their shift officers shall determine whether the [audiovisual recording] equipment is working properly and shall bring any problems to the attention of the supervisor. Officers should make sure the video recorder is positioned properly and adjusted to record events." As we state above, at the evidentiary hearing, the video recording of the incident was introduced and there was no audio recording on the tape.

¶22 Two grounds for waiver exist. First, by knowingly and voluntarily entering a plea of no contest to the charge of OWI, second offense, Scalissi waived all nonjurisdictional defects and objections, including alleged constitutional violations occurring prior to the plea. ***State v. Aniton***, 183 Wis. 2d 125, 129, 515 N.W.2d 302 (Ct. App. 1994). Scalissi did not raise any due process violations under either ***Brady*** or ***Youngblood*** prior to entering his plea of no contest. Therefore, by entering his plea he has waived any violations of his constitutional right to due process under either case.

¶23 The second ground for waiver is that he raises a new issue on appeal, namely the contention that his due process rights were violated by the alleged destruction of audio evidence surrounding his stop and arrest. Scalissi had raised the alleged due process violation before the circuit court only in the context of a motion to withdraw his plea based on newly discovered evidence. That evidence was the police department's policy on inspecting the audiovisual equipment in the squad cars prior to starting a shift. The circuit court concluded the policy was not newly discovered evidence and that Scalissi failed to demonstrate that any violation of that policy affected his due process rights.

¶24 On appeal, however, Scalissi does not seek to reverse the circuit court's ruling denying his motion to withdraw his plea. Rather, Scalissi simply argues that the "destruction" of the audio portion of the videotape of his arrest violates his due process rights under ***Brady*** and ***Youngblood*** and that, therefore, evidence of his blood test results should be suppressed. As we discussed above, Scalissi did move to suppress the blood test results, but not on the ground that his due process rights were violated. Thus, the circuit court never had that issue before it. In short, Scalissi raises a new issue on appeal. We generally do not

review an issue raised for the first time on appeal. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980).

By the Court.—Judgment and order affirmed.

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