COURT OF APPEALS
DECISION
DATED AND FILED

March 15, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-2454-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN A. MAHONEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Jefferson County: WILLIAM F. HUE, Judge. *Affirmed.*

¶1 ROGGENSACK, J.[1] John A. Mahoney appeals his conviction for operating a motor vehicle with a prohibited alcohol concentration (PAC) in

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1999-2000). Additionally, all further references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

violation of WIS. STAT. § 346.63(1)(b). He argues that he was denied his right to a speedy trial and that the circuit court erred in denying his motion to suppress evidence because the arresting officer lacked probable cause to administer a preliminary breath test (PBT) and to arrest him. We conclude that Mahoney was not denied his right to a speedy trial because the delay was attributable largely to his actions and he was not prejudiced as a result. We further conclude that the arresting officer had probable cause to test and to arrest him. Therefore, we affirm the judgment of the circuit court.

BACKGROUND

¶2 This appeal arises out of a fatal automobile accident. Laila Abendroth ran a stop sign, and Mahoney's vehicle collided with hers. After a firefighter noticed an odor of intoxicants on Mahoney's breath, Fort Atkinson police officer John Lewicki spoke with him and administered a PBT. Lewicki then administered field sobriety tests and based on the results of those tests, asked Mahoney to take a second PBT, which showed a blood alcohol concentration of 0.21 percent. A subsequent blood test revealed a blood alcohol concentration of 0.196 percent.

¶3 Because Abendroth died as a result of the accident, Mahoney was charged with homicide by intoxicated use of a motor vehicle and second-degree reckless homicide. The counts were severed for trial at Mahoney's request. A jury trial on homicide by intoxicated use of a motor vehicle resulted in a not guilty verdict on August 19, 1999. Trial on the second-degree reckless homicide was set for January 11, 2000.

¶4 On August 30, 1999, the State filed another complaint charging Mahoney with operating a motor vehicle while intoxicated (OMVWI) and

operating a motor vehicle with a PAC, both as a fourth offense.[2] Mahoney was acquitted of OMVWI but convicted of operating a motor vehicle with a PAC. He appeals the denial of his motion to dismiss for pretrial delay and the denial of his suppression motion.

DISCUSSION

Standard of Review.

¶5 Whether a defendant has been denied the right to a speedy trial is a constitutional question that we review *de novo*. ***State v. Leighton***, 2000 WI App 156, ¶5, 237 Wis. 2d 709, 715, 616 N.W.2d 126, 132-33. However, we will uphold the circuit court's underlying findings of fact unless they are clearly erroneous. ***Id.*** at ¶5. Whether the facts as found constitute probable cause to arrest is a question of law that we review without deference to the circuit court. ***State v. Babbitt***, 188 Wis. 2d 349, 356, 525 N.W.2d 102, 104 (Ct. App. 1994).

Speedy Trial.

¶6 The Sixth Amendment to the U.S. Constitution grants a criminal defendant the right to a speedy trial.[3] U.S. CONST. amend. VI. To determine whether a defendant's right to a speedy trial was violated, we employ a four-part balancing test. ***Leighton***, 2000 WI App 156 at ¶6. First, we consider the length of the delay from when the defendant was formally accused. ***State v. Borhegyi***, 222

[2] On February 18, 2000, the State amended the complaint to charge Mahoney as a third offender.

[3] This requirement is applied to the states through the Fourteenth Amendment. ***Barker v. Wingo***, 407 U.S. 514, 515 (1972). Wisconsin's constitution also grants criminal defendants the right to a speedy trial. WIS. CONST. art. I, § 7.

Wis. 2d 506, 511, 588 N.W.2d 89, 92 (Ct. App. 1998). A post-accusation delay becomes presumptively prejudicial as it approaches one year. ***Id.*** Second, we consider whether the government is to blame for the delay. If the delay was caused to deliberately harm the defendant, this factor weighs heavily against the State; if it was caused by negligence or overcrowded courts, it is still weighed against the State, but less heavily. ***Id.*** at 512, 588 N.W.2d at 93. Third, we consider whether the defendant asserted the right to a speedy trial. ***Id.*** at 514, 588 N.W.2d 93. And fourth, we consider whether the delay resulted in prejudice to the defendant. Three interests must be considered: "(1) preventing oppressive pretrial incarceration; (2) minimizing the accused's anxiety and concern; and (3) limiting the possibility that the defense will be impaired." ***Leighton***, 2000 WI App 156 at ¶22. "If, under the totality of circumstances, the defendant was denied the benefit of his constitutional right to a speedy trial, dismissal of the charges is required." ***Borhegyi***, 222 Wis. 2d at 509-510, 588 N.W.2d at 91.

¶7 Mahoney was arrested on August 18, 1998. The circuit court initially scheduled a jury trial on the homicide by intoxicated use of a motor vehicle charge for January 25, 1999. At Mahoney's request, it was rescheduled for April 19, 1999, then rescheduled again to allow him to petition this court for leave to appeal the denial of his suppression motions. We denied him leave to appeal on June 1, 1999, and his trial was held August 16-19, 1999. The State filed the charges in this case on August 30, 1999, and trial was set for December 2, 1999. Mahoney requested a speedy trial on October 4, 1999, then filed an appeal with this court seeking a writ of prohibition on October 27, 1999. We granted the writ on January 7, 2000. A new judge was assigned on January 17, 2000.

¶8 The circuit court held a hearing on February 21, 2000, to consider Mahoney's motion to dismiss for pretrial delay. The court found that well over a

year had elapsed between Mahoney's arrest and the hearing and that the length of the delay was presumptively prejudicial. The circuit court concluded, however, that Mahoney had not established that the delay resulted in any prejudice to him.

¶9 Applying the four-factor test outlined in ***Leighton***, we conclude that Mahoney's right to a speedy trial was not violated. We agree that the long delay between Mahoney's arrest on August 18, 1998, and his guilty plea on March 15, 2000,[4] is presumptively prejudicial, and we agree that Mahoney requested a speedy trial on October 4, 1999, and again on January 31, 2000. However, we also note that most of the delay in bringing Mahoney to trial was due to his actions, not the actions of the State or the court. He twice requested that the circuit court reschedule the jury trial on the charge of homicide by intoxicated use of a motor vehicle. Once that case was resolved and the State had filed charges of OMVWI and operating a motor vehicle with a PAC, he again delayed resolution of his case by appealing to this court for a writ of prohibition. While he has every right to appeal, he cannot complain that the delay caused by doing so denied him his right to a speedy trial. Furthermore, he has made no showing that the delay prejudiced him in any way. Therefore, we conclude that his right to a speedy trial was not violated.

Probable Cause

¶10 Every 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

[4] Mahoney concedes in his reply brief that we should not consider the period after his March 15, 2000, guilty plea for the purpose of our speedy trial analysis.

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).

¶11 However, the term "probable cause" has a slightly different meaning when used in the context of whether a police officer may request a preliminary breath test from a person suspected of OMVWI. WISCONSIN STAT. § 343.303 states, in relevant part:

> If a law enforcement officer has probable cause to believe that the person is violating or has violated s. 346.63(1) or … where the offense involved the use of a vehicle … the officer, prior to an arrest, may request the person to provide a sample of his or her breath for a preliminary breath screening test using a device approved by the department for this purpose. The result of this preliminary breath screening test may be used by the law enforcement officer for the purpose of deciding whether or not the person shall be arrested for a violation of s. 346.63(1)….

The probable cause required to request a PBT is "a quantum of proof greater than the reasonable suspicion necessary to justify an investigative stop … but less than the level of proof required to establish probable cause for arrest." ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 316, 603 N.W.2d 541, 552 (1999). In ***Renz***, the driver did not smell of intoxicants (although his car did), and he did not have slurred speech. He was able to complete all of the field sobriety tests, although he

exhibited some clues of intoxication. The supreme court concluded, "The officer was faced with exactly the sort of situation in which a PBT proves extremely useful in determining whether there is probable cause for an OWI arrest," and allowed the test results. ***Renz***, 231 Wis. 2d at 317, 603 N.W.2d at 552.

¶12 In this case, testimony presented at the suppression hearing established that a firefighter on the scene told Lewicki that he thought Mahoney had been drinking. Lewicki spoke to Mahoney and noticed a moderate odor of intoxicants and that his eyes were bloodshot and watery. In response to Lewicki's questioning, Mahoney admitted that he had had two beers. Lewicki administered a PBT, then conducted field sobriety tests. Mahoney recited the alphabet but omitted the letter Y. He performed the first segment of the heel-to-toe walk correctly, but he did not correctly place his feet during the last four steps of the second segment. Lewicki then requested that he take a second PBT, which showed a blood alcohol concentration of 0.21 percent. A blood test administered subsequent to arrest revealed a blood alcohol concentration of 0.196 percent.

¶13 Mahoney argues that Lewicki lacked probable cause to require him to submit to the second PBT[5] or to arrest him. In support of this argument, he notes that another officer did not smell intoxicants on his breath, that Lewicki did not smell intoxicants on his breath the first time that he spoke with him, and that both police officers stated that his speech and balance appeared normal. He further contends that his performance on the field sobriety tests was not sufficient to justify Lewicki's request that he submit to a PBT. We disagree.

[5] At the February 21, 2000 suppression hearing, the State conceded that Lewicki lacked probable cause to administer the first PBT.

¶14 Taken alone, each indicator would not rise to the level of probable cause necessary to support Lewicki's decision to ask Mahoney to submit to a PBT. However, viewing the circumstances as a whole, we conclude that Lewicki had probable cause to request a PBT. Both Lewicki and the firefighter noticed an odor of intoxicants. Mahoney's eyes were bloodshot and watery. Mahoney admitted that he had had two beers. Coupled with Mahoney's performance on the field sobriety tests, we conclude that these facts constitute probable cause for Lewicki to suspect that Mahoney had driven while intoxicated. Therefore, we conclude that Lewicki had probable cause to ask Mahoney to submit to the PBT and following the PBT, probable cause to arrest him.

CONCLUSION

¶15 We conclude that Mahoney was not denied his right to a speedy trial because the delay was attributable largely to his actions and he was not prejudiced as a result of the delay. We further conclude that the arresting officer had probable cause to arrest him. Therefore, we affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

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