COURT OF APPEALS
DECISION
DATED AND FILED

September 27, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1049 **Cir. Ct. No. 2006TR13014**

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

IN THE MATTER OF THE REFUSAL OF ERCLE MCNEELY, JR.:

COUNTY OF DANE,

PLAINTIFF-RESPONDENT,

V.

ERCLE MCNEELY, JR.

DEFENDANT-APPELLANT.

COUNTY OF DANE,

PLAINTIFF-RESPONDENT,

V.

ERCLE MCNEELY, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: DIANE M. NICKS, Judge. *Affirmed*.

¶1 VERGERONT, J.[1] Ercle McNeely, Jr. appeals his judgment of conviction for operating a motor vehicle while under the influence of an intoxicant (OWI) contrary to WIS. STAT. § 346.63(1)(a). McNeely contends the circuit court erred in denying his motion to suppress evidence because, he asserts, the arresting officer did not have any indication that McNeely operated a vehicle after consuming intoxicants and therefore the officer lacked probable cause to arrest. We conclude there was probable cause to arrest McNeely for OWI. Accordingly, we affirm.

BACKGROUND

¶2 McNeely was arrested for OWI and refused to take a breath intoxilyzer test. He therefore received a notice of intent to revoke his license and he requested a refusal hearing. *See* WIS. STAT. § 343.305(9).

¶3 The officers testified as follows at the refusal hearing. On June 4, 2006, Sheriff Deputies Charles Miller and Garth Blake were dispatched to a truck stop, based on a report of an unresponsive person in a semi-tractor trailer, slumped over the steering wheel. At the truck stop Deputy Blake got out of the squad car and found the individual, who was later identified as McNeely. The deputy told McNeely to shut off the engine and to step down from the vehicle. Deputy Blake could smell the odor of intoxicants coming from the vehicle. Deputy Blake then

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise note.

radioed Deputy Miller, telling Deputy Miller to administer field sobriety tests to McNeely because he had been drinking.

¶4 Deputy Miller observed McNeely exit the driver's side of the vehicle. Deputy Miller approached McNeely and observed that he was slurring his speech and that his eyes were glassy and watery. Deputy Miller asked McNeely some questions. McNeely told Deputy Miller that a few hours ago he drank two or three beers at a motel approximately two miles away from the truck stop. During their conversation, Deputy Miller observed that McNeely appeared to be intoxicated. Based on his training and experience, Deputy Miller thought McNeely consumed more than two or three beers. Deputy Miller asked McNeely to take three field sobriety tests. McNeely failed all three and was subsequently arrested.

¶5 The court determined that the refusal was not reasonable and the arresting officer had probable cause to arrest. The court stated: "I think it's a reasonable inference that the intoxicated person who stepped out of the driver's side of a vehicle did indeed drive that vehicle to the location where it was and that [he was] intoxicated while driving…." The court also noted there was no suggestion or evidence that anyone else drove the vehicle or that McNeely became intoxicated after arriving at the truck stop.

¶6 McNeely filed a motion to suppress evidence asking that the motion be determined based on the transcript of the refusal hearing. He asserted that there were no facts known to the arresting officer from which the officer could reasonably conclude that McNeely had operated any vehicle after consuming intoxicants. The court denied this motion.

¶7 The case was tried to a jury and McNeely was found guilty of OWI.

DISCUSSION

¶8 On appeal McNeely renews his argument that there was not probable cause to arrest him for operating while intoxicated. In particular, he argues the arresting officer, Deputy Miller, never heard the engine running or saw McNeely operate the vehicle while he was intoxicated. Therefore, he asserts, that officer lacked probable cause to believe that he was operating the vehicle.

¶9 In order to be lawful, an arrest must be based on probable cause. ***State v. Secrist***, 224 Wis. 2d 201, ¶19, 589 N.W.2d 387 (1999). Probable cause for arrest exists when 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 probably committed a crime. ***State v. Koch***, 175 Wis. 2d 684, 701, 499 N.W.2d 152 (1993). In determining whether probable cause exists, the court applies an objective standard. *See* ***State v. Riddle***, 192 Wis. 2d 470, 476, 531 N.W.2d 408 (Ct. App. 1995). The court is to consider information available to the officer from the standpoint of one versed in law enforcement, taking the officer's training and experience into account. ***State v. Pozo***, 198 Wis. 2d 705, 712-13, 544 N.W.2d 228 (Ct. App. 1995). The officer's belief may be predicated in part upon hearsay information, and the officer may rely on the collective knowledge of the officer's entire department. ***State v. Cheers***, 102 Wis. 2d 367, 386, 388-89, 306 N.W.2d 676 (1981). When a police officer is confronted with two reasonable competing inferences, one justifying arrest and the other not, the officer is entitled to rely on the reasonable inference justifying arrest. ***State ex rel. McCaffrey v. Shanks***, 124 Wis. 2d 216, 236, 369 N.W.2d 743 (Ct. App. 1985).

¶10 In reviewing an order granting or denying a motion to suppress evidence, we uphold the trial court's findings of fact unless they are clearly erroneous. ***State v. Kutz***, 2003 WI App 205, ¶13, 267 Wis. 2d 531, 671 N.W.2d 660. Whether the evidence satisfies the standard of probable cause is a question of law, which we review de novo. ***Secrist***, 224 Wis. 2d 201, ¶11. Based on our independent review, we agree with the circuit court that Deputy Miller did have probable cause to arrest McNeely.

¶11 In order to operate a motor vehicle, WIS. STAT. § 346.63(3)(b) requires that a person physically manipulate or activate any of the controls of the motor vehicle necessary to put it in motion. ***Village of Cross Plains v. Haanstad***, 2006 WI 16, ¶15, 288 Wis. 2d 573, 709 N.W.2d 447. However, even though a vehicle is parked or standing still, the defendant may nonetheless have had actual physical control of the vehicle. ***County of Milwaukee v. Proegler***, 95 Wis. 2d 614, 627-28, 291 N.W.2d 608 (Ct. App. 1980); *see also* ***State v. Modory***, 204 Wis. 2d 538, 543, 555 N.W.2d 399 (Ct. App. 1996) (section 346.63(3)(b) does not require movement [to establish operation of the vehicle]).

¶12 In ***Haanstad***, the Supreme Court concluded that because no direct or circumstantial evidence suggested that defendant touched any controls of the vehicle necessary to put it in motion while she was intoxicated, she was not operating the motor vehicle. 288 Wis. 2d 573, ¶24. However, the facts in ***Haanstad*** were significantly different than those in this case. Haanstad was found by the police sitting in the driver's seat of a parked vehicle with the engine running, another person was in the car with Haanstad, and this person was the driver. ***Id.***, ¶5. The driver had parked the car, exited the vehicle while leaving the engine running, and went to talk to the driver of another vehicle. ***Id.***, ¶4. As this was going on, Haanstad slid over from the passenger's seat into the driver's seat.

Id. The driver then re-entered the vehicle on the passenger's side. ***Id***. It was undisputed that Haanstad never physically manipulated or activated any of the vehicle's controls; she did not turn on or turn off the ignition of the car; she did not touch the ignition key, the gas pedal, the brake, or any other controls of the vehicle. ***Id.***, ¶16.

¶13 In this case, in contrast, Deputy Miller, observed McNeely exit on the driver's side of the vehicle and McNeely told the deputy he had been drinking at a motel two miles away. It was therefore reasonable for Deputy Miller to infer that McNeely had driven to this location. The issue then becomes whether McNeely was intoxicated while he was driving.

¶14 McNeely told Deputy Miller that he consumed two or three beers a few hours ago at the motel. However, given the signs of intoxication that Deputy Miller observed and the fact that McNeely failed three field sobriety tests, it was reasonable for Deputy Miller to infer that McNeely drank more recently than several hours ago and was intoxicated when he drove from the motel to the truck stop. There may be other reasonable inferences that are more favorable to McNeely. However, Deputy Miller was not required to draw the inference consistent with innocence when there was a reasonable inference consistent with culpability, *see* ***Shanks***, 124 Wis. 2d at 236.

¶15 We conclude that, at the time Deputy Miller arrested McNeely, the totality of the circumstances known to him, together with reasonable inferences from that information, was such that a reasonable officer could conclude that McNeely had probably operated the vehicle while under the influence of an intoxicant. Because of this conclusion, it is unnecessary to decide whether Deputy

Blake's observation that the ignition was running could be among the totality of circumstances considered in deciding if there is probable cause.[2]

By the Court.—Judgment affirmed.

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

[2] Deputy Miller testified that after McNeely was arrested, Deputy Blake told him the engine was running. However, Deputy Blake testified that, when Deputy Miller first got out of his squad car, he told Deputy Miller the engine was running and he made McNeely turn the engine off. The court did not resolve this factual discrepancy.