COURT OF APPEALS
DECISION
DATED AND FILED

March 29, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-3067-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEREMY S. DUCKART,

DEFENDANT-APPELLANT.

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

¶1 ROGGENSACK, J.[1] Jeremy S. Duckart appeals his conviction for operating a motor vehicle while intoxicated (OMVWI) as a second offense. He

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

claims that the circuit court erred in denying his motion to suppress the results of his blood test because the police officer lacked probable cause to administer a preliminary breath test (PBT) and because the blood test, itself, occurred as the result of an illegal search and seizure. We conclude that the officer had probable cause to administer the PBT. We further conclude that administration of the blood test was not an illegal search and seizure. Therefore, we affirm the judgment of the circuit court.

BACKGROUND

¶2 At 1:02 a.m. on Saturday, December 23, 1999, Officer Jill Dubbelde[2] of the City of Sun Prairie Police Department was operating a stationary radar unit when she observed Duckart driving his car at a speed eleven miles over the posted speed limit. Dubbelde stopped Duckart's car and asked him whether he had been drinking, and Duckart answered, "No." Dubbelde determined that Duckart's license had expired and that he appeared to have two previous OMVWI convictions.[3] Dubbelde asked him to get out of his car and performed a pat-down search, at which point she noticed a strong odor of intoxicants. She asked him to perform three field sobriety tests and, based on the results, administered a PBT. When the PBT disclosed a blood alcohol concentration of 0.16 percent, Dubbelde arrested Duckart for OMVWI and operating with a prohibited alcohol content (PAC).

[2] Between the time of the stop and the preliminary hearing, Dubbelde married and took her husband's last name of Koll. For the sake of convenience, we shall refer to her as Dubbelde throughout this opinion.

[3] It was later determined that he had one prior conviction.

¶3 Dubbelde then told Duckart that the Sun Prairie Police Department's policy required a blood test for anyone who had two or more previous drunk-driving convictions if they were again arrested for OMVWI or operating with a PAC. Duckart repeatedly informed her that he had only one previous conviction, but Dubbelde drove him to the hospital for a blood test anyway. At the hospital, Duckart stated that he would not consent to a blood draw. Dubbelde told him that she would force a blood draw if necessary, and Duckart allowed a hospital technician to draw blood.

¶4 Duckart moved to suppress the results of the blood draw, arguing that Dubbelde lacked probable cause to administer a PBT and that the warrantless blood draw was an unreasonable search and seizure. The circuit court denied the motion. Duckart pled no contest to OMVWI as a second offense. He appeals the denial of the suppression motion.

DISCUSSION

Standard of Review.

¶5 When we review a motion to suppress evidence, we will uphold a circuit court's findings of fact unless they are clearly erroneous. ***State v. Eckert***, 203 Wis. 2d 497, 518, 553 N.W.2d 539, 547 (Ct. App. 1996). Whether the facts as found constitute probable cause to administer a PBT and to arrest are questions 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); *see* ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 304, 603 N.W.2d 541, 546 (1999).

Probable Cause.

¶6 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 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).

¶7 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." ***Renz***, 231 Wis. 2d at 316, 603 N.W.2d at 552. 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. ***Id.*** at 317, 603 N.W.2d at 552.

¶8 In this case, the circuit court found, based on testimony presented at the suppression hearing, that Dubbelde stopped Duckart's car after her radar showed that he had been driving at a speed of thirty-six miles per hour in an area zoned for twenty-five miles per hour. Duckart's license was expired, and Dubbelde noticed that he had bloodshot eyes. Duckart initially told Dubbelde that he had not drunk any alcohol. After she smelled alcohol on his breath and asked him again, however, Duckart said that he had had six beers. Dubbelde then administered field sobriety tests. Duckart failed the horizontal gaze nystagmus test but performed satisfactorily on the walk-and-turn and one-legged-stand tests. Dubbelde then administered a PBT, which showed a blood alcohol concentration of 0.16 percent.

¶9 Duckart argues that Dubbelde lacked probable cause to require him to submit to the PBT or to arrest him. In support of this argument, he notes that, other than speeding, he was driving appropriately, that he did not slur his speech, and that he performed satisfactorily on two of the three field sobriety tests that Dubbelde administered. We disagree.

¶10 Taken alone, each indicator may not rise to the level of probable cause necessary to support Dubbelde's decision to ask Duckart to submit to a PBT. However, viewing the circumstances as a whole, we conclude that Dubbelde had probable cause to request a PBT. Duckart violated a traffic law by driving eleven miles per hour faster than the posted speed limit. His eyes were bloodshot. Although he initially denied drinking alcoholic beverages, he smelled strongly of intoxicants and subsequently admitted to having drunk six beers that evening. Furthermore, those facts, together with the PBT and his performance on the horizontal gaze nystagmus test, are sufficient to constitute probable cause for Dubbelde to suspect that Duckart had been driving while intoxicated. Therefore, we conclude that Dubbelde had probable cause to ask Duckart to submit to the PBT and probable cause to arrest him.

Blood Test.

¶11 Next, Duckart claims that the seizure of his blood violated his right to be free from unreasonable search and seizure because it was conducted contrary to the Sun Prairie Police Department's policy of requiring a blood test only when the suspect had two or more previous OMVWI convictions and because he expressed a reasonable objection to the blood test. We disagree.

¶12 Taking a blood test from a suspected drunk driver constitutes a search and seizure under the United States and Wisconsin constitutions. ***Schmerber v. California***, 384 U.S. 757, 767 (1966); *see also* ***Milwaukee County v. Proegler***, 95 Wis. 2d 614, 623, 291 N.W.2d 608, 612 (Ct. App. 1980). The Fourth Amendment prohibits unreasonable searches and seizures. U.S. CONST.

amend. IV.[4] Although most warrantless searches are considered *per se* unreasonable under the Fourth Amendment, an exception exists for a search performed incident to a lawful arrest. ***State v. Bohling***, 173 Wis. 2d 529, 537, 494 N.W.2d 399, 401 (1993). In ***Bohling***, the supreme court held:

> [A] warrantless blood sample taken at the direction of a law enforcement officer is permissible under the following circumstances: (1) the blood draw is taken to obtain evidence of intoxication from a person lawfully arrested for a drunk-driving related violation or crime, (2) there is a clear indication that the blood draw will produce evidence of intoxication, (3) the method used to take the blood sample is a reasonable one and performed in a reasonable manner, and (4) the arrestee presents no reasonable objection to the blood draw.

173 Wis. 2d at 533-34, 494 N.W.2d at 400 (footnote omitted).

¶13 Here, Duckart had been arrested on probable cause to believe he had violated WIS. STAT. § 346.63(1)(a) and (b). The Sun Prairie Police Department's policy is to require a blood test if a driver suspected of OMVWI or operating with a PAC has two or more previous drunk driving convictions. Although this was Duckart's second offense, Dubbelde believed it to be his third and informed him he would have to submit to a blood test because the arrest was his third offense. At the preliminary hearing, Dubbelde testified that Duckart stated that he would not submit to the blood test but cooperated with the test once she informed the lab technician that she would force a blood draw if necessary. On appeal Duckart argues that he had declined to submit to the test for two reasons: he was afraid of needles and he believed that the policy requiring a blood draw did not apply to

[4] Article I, § 11 of the Wisconsin Constitution and the Fourth Amendment of the United States Constitution are substantially the same, so Wisconsin courts look to the United States Supreme Court's interpretation of the Fourth Amendment for guidance in construing the state constitution. ***State v. McCray***, 220 Wis. 2d 705, 709, 583 N.W.2d 668, 670 (Ct. App. 1998).

him because it was his second offense. However, neither Duckart nor Dubbelde testified that Duckart ever mentioned a fear of needles.

¶14 Assuming without deciding that Duckart did not consent to the blood draw, we nevertheless determine that the ***Bohling*** requirements for a warrantless blood draw were met. First, Duckart had been arrested on suspicion of OMVWI before his blood was taken. Second, based on the PBT reading of 0.16, the arresting officer had a reasonable suspicion that the blood draw would produce evidence of intoxication. Third, Duckart's blood test was performed in a hospital by a medical technician and therefore was done by a reasonable method and in a reasonable manner. Finally, Duckart objected to the blood draw based only on his belief that the police department's policy did not apply to him. This is not a sufficient objection. The police department could have had a policy that required a blood draw for the first OMVWI arrest. *See* ***State v. Thorstad***, 2000 WI App 199, ¶17, 238 Wis. 2d 666, 675, 618 N.W.2d 240, 245. Therefore, we conclude that the circuit court correctly denied Duckart's motion to suppress the results of the blood test.

CONCLUSION

¶15 Because we conclude that the officer had probable cause to administer the PBT and to arrest Duckart and that that administration of the blood test was not an illegal search and seizure, 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.