COURT OF APPEALS DECISION DATED AND FILED

April 15, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP2977-CR

Cir. Ct. No. 2008CT293

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CRAIG S. LIESENER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County: MICHAEL S. GIBBS, Judge. *Affirmed*.

¶1 BROWN, C.J.[1] Craig S. Liesener appeals from a judgment convicting him of operating a motor vehicle while intoxicated. The circuit court

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

issued the judgment, upon a guilty plea, after denying his motion to suppress all of the evidence. Liesener alleges that the arresting officer did not have the authority to arrest him because the arresting officer was outside his jurisdiction, and the other officer "simply notified" the arresting officer of the stop, as opposed to requesting assistance. Liesener also asserts that the arresting officer did not have sufficient evidence to establish probable cause to arrest. We reject both arguments. We conclude that the other officer did impliedly request the arresting officer's assistance, and the arresting officer had sufficient evidence to establish probable cause based on knowledge obtained from the eyewitness, the other officer and his own personal observation of Liesener. Therefore we affirm.

BACKGROUND

¶2 On April 10, 2008, at approximately 6:30 p.m., a caller informed the Walworth county dispatch center of a hit-and-run accident on Interstate 43 northbound at Highway 11 in Walworth county. A Walworth county sheriff's deputy responded to the dispatch report and met with the caller. The caller said that a black pick-up truck, Chevy or GMC, had just sideswiped him and kept driving on. The caller also told the deputy that the driver of the pick-up truck was male and alone. He explained that the driver had crossed over the centerline and struck his vehicle, and appeared to raise up in his seat and look back over his shoulder in the rear window. Then the driver took off at a high rate of speed. The caller initially pursued the pick-up truck, but when the pick-up truck reached speeds in excess of ninety miles per hour, the caller abandoned the pursuit because of the road conditions. So he pulled off and called the Walworth county dispatch center. Dispatch sent a Walworth county sheriff's deputy to meet the caller. The caller told the deputy what had occurred and gave the deputy his driver's license and vehicle information.

¶3 The Walworth deputy then headed north on I-43 in an attempt to catch up with the driver. In the mean time, the Walworth county sheriff's department called the Waukesha county sheriff's department for assistance because the driver had crossed into Waukesha county.

¶4 A deputy from the Waukesha county sheriff's department was in the area and saw a pick-up truck matching the description, so he started following it. When the Waukesha deputy activated his lights and siren, the driver continued northbound on I-43 at approximately eighty-five miles per hour for about two miles before pulling over. By that time, they had entered Milwaukee county. The Waukesha deputy then notified the dispatch center of the stop, and the dispatch center contacted Walworth county to advise them that Waukesha county sheriff's department had the vehicle they requested if they wanted to come to the traffic stop site to investigate further.

¶5 When the Walworth deputy caught up to the stop site, he spoke with the Waukesha deputy. The Waukesha deputy explained that the vehicle was damaged on the passenger side and he detected a strong odor of intoxicants from the driver as well as bloodshot and glassy eyes when he spoke to the driver. The Waukesha deputy had also identified the driver as Liesener.

¶6 The deputies then decided to take Liesener to a Waukesha county sheriff's department substation due to the rain and wind. The weather would not allow the deputies to conduct fair and proper field tests at the scene. So, the Waukesha deputy transported Liesener to the substation in the back of his squad car. The Walworth deputy followed. Liesener was not under arrest or cuffed at that time.

¶7 Once at the Waukesha county sheriff's department substation, the investigation was turned over to the Walworth deputy. The Walworth deputy saw Liesener's glassy eyes and smelled alcohol on Liesener's breath. He also noticed that Liesener was asking repetitive questions that they had previously answered. When the Walworth deputy asked Liesener to perform field sobriety tests, Liesener refused. So, the Walworth deputy told Liesener that if he did not submit to the field sobriety testing, he would be placed under arrest for operating while intoxicated. Liesener still refused, and the Walworth deputy placed him under arrest for hit-and-run and operating a motor vehicle while intoxicated.

¶8 Before the circuit court, Liesener moved to suppress all evidence obtained on grounds that the arresting Walworth deputy was outside his jurisdiction when the arrest was made and because there was no probable cause to arrest. The circuit court denied the motion and Liesener then pled guilty to operating while under the influence (third offense). Liesener now appeals the guilty judgment and asserts the same arguments on appeal that he did in the circuit court.

DISCUSSION

1. The Walworth County Deputy's Jurisdiction

¶9 First we will address Liesener's argument that the Walworth deputy lacked jurisdiction to arrest him. It is true that the Walworth deputy arrested Liesener in Waukesha county, which is outside his jurisdiction. It is also true, that as a general proposition, a police officer acting outside his or her jurisdiction does not have any official power to arrest. ***State v. Slawek***, 114 Wis. 2d 332, 335, 338 N.W.2d 120 (Ct. App. 1983). However, WIS. STAT. § 66.0313 provides an exception to this general rule when there is a request for assistance. ***United States***

v. Mattes, 687 F.2d 1039, 1041 (7th Cir. 1982) (applying Wisconsin law). Section 66.0313 provides, in relevant part:

> **(2)** Upon the request of any law enforcement agency, including county law enforcement agencies as provided in s. 59.28 (2), the law enforcement personnel of any other law enforcement agency may assist the requesting agency within the latter's jurisdiction, notwithstanding any other jurisdictional provision. For purposes of ss. 895.35 and 895.46, law enforcement personnel, while acting in response to a request for assistance, shall be deemed employees of the requesting agency.

¶10 This argument requires us to apply WIS. STAT. § 66.0313 to a set of undisputed facts. The application of a statute to a particular set of facts is a question we review without deference to the circuit court's reasoning. ***City of Brookfield v. Collar***, 148 Wis. 2d 839, 841, 436 N.W.2d 911 (Ct. App. 1989).

¶11 Liesener asserts that WIS. STAT. § 66.0313 does not apply because the Waukesha county deputy did not request assistance from anyone, nor did he require it. Liesener also argues that it was the Walworth county deputy who requested assistance from Waukesha county, not the other way around. Liesener contends that, when the chase ended, the Waukesha deputy "simply notified" the Walworth deputy of the stop, but did not request assistance from the Walworth county deputy.

¶12 While Liesener is correct that the Walworth deputy first requested assistance, we disagree that the Waukesha deputy did not also request assistance. A request for assistance may be implicit. ***Mattes***, 687 F.2d at 1041. For example, a request for assistance is implied when two officers meet, plan a strategy for dealing with a potential violation, and accompany one another in carrying out that plan. *See* ***id.*** Here the Waukesha deputy notified the dispatch center and asked the center to advise the Walworth county sheriff's department that he had the

vehicle they "requested if they wanted to come [to the traffic stop site] to investigate further." From this statement, we glean the obvious implication—that the Walworth deputy's assistance was necessary in order to continue and conclude the investigation. Thus, this was simply a commonsense plan for the Waukesha and Walworth deputies to work together to carry out the traffic stop to its logical conclusion.

¶13 The implication is borne out by the continuing events after the two deputies met up. At the scene, the Waukesha deputy recounted what had happened and the Walworth deputy eyeballed the scene for himself. They then together decided to take Liesener back to a substation to investigate the potential violation because the windy, rainy weather conditions made continued investigation at the scene hazardous. The Walworth deputy then accompanied the Waukesha deputy and Liesener back to the substation and took over as the primary investigator of the situation with the Waukesha deputy acting as a "cover officer." So, we reject Liesener's assertion that the Waukesha deputy "simply notified" the Walworth deputy of the stop without also requesting assistance. While the Waukesha deputy did not "expressly" request assistance, it certainly was "implicit."

¶14 Liesener also appears to argue that mutual assistance is limited to situations where the responding officer acts as back-up and the requesting officer remains the lead investigator. We disagree. The statute requires only that the officer be "acting in response to a request for assistance." *See* WIS. STAT. § 66.0313. Nothing in the language of the statute or case law suggests that the responding officer cannot be the lead investigator, so long as the responding officer is acting in response to the request. The Walworth deputy therefore had jurisdiction to arrest Liesener.

2. *Probable Cause to Arrest*

¶15 Liesener's other argument is that the Walworth deputy lacked probable cause to arrest. We uphold the trial court's findings of fact unless they are clearly erroneous. ***County of Jefferson v. Renz,*** 231 Wis. 2d 293, 316, 603 N.W.2d 541 (1999). However, we review de novo whether those facts satisfy the statutory standard of probable cause. ***Id***. 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 probably committed a crime. ***State v. Koch***, 175 Wis. 2d 684, 701, 499 N.W.2d 152 (1993). Probable cause is a commonsense concept we judge by the factual and practical considerations of everyday life on which reasonable and prudent persons, not legal technicians, act. ***State v. Truax***, 151 Wis. 2d 354, 360, 444 N.W.2d 432 (Ct. App. 1989).

¶16 Liesener contends the Walworth deputy lacked probable cause because under ***State v. Swanson***, 164 Wis. 2d 437, 453 & n.6, 475 N.W.2d 148 (1991), *abrogated on other grounds by* ***State v. Sykes***, 2005 WI 48, 279 Wis. 2d 742, 695 N.W.2d 277, unexplained erratic driving, an odor of alcohol and the coincidental time of the incident do not, in the absence of any other evidence, rise to the level of probable cause. Liesener appears to assert that because the Walworth deputy never saw the accident, the fleeing, and the driving in excess of the speed limit, all he had was his observation of alcohol on Liesener's breath.

¶17 We respond in two ways. First, the proposition from ***Swanson*** that Liesener wants us to use is from a footnote that really had nothing whatsoever to do with the issues in the case itself. *See* ***Swanson***, 164 Wis. 2d at 453 n.6. In fact, a careful reading of ***Swanson*** shows that the supreme court specifically stated it

was not addressing whether there was probable cause to arrest for operating under the influence: "[W]e need not address whether probable cause existed to arrest Swanson for any of the other offenses [aside from possession of a controlled substance]." ***Id.*** at 453. The footnote was *obiter dictum* and we decline to follow it. Also, later cases establish that the totality of the circumstances test is the correct analysis for deciding whether probable cause to arrest existed. *See* ***Koch***, 175 Wis. 2d at 701.

¶18 Second, the Walworth deputy had far more information than simply his observation of Leisner's smelling of alcohol. Of particular importance, the Walworth deputy had information from a citizen informant which was corroborated by himself and the Waukesha deputy. The caller told the Walworth deputy that a black pick-up truck, Chevy or GMC, with a lone male driver had just crossed over the centerline, sideswiping him, and fled in excess of ninety miles per hour. The Walworth deputy was entitled to rely on this information because the caller was the victim and saw the crime first-hand. The caller was what the law describes as a "citizen informant." *See* ***State v. Kolk***, 2006 WI App 261, ¶12, 298 Wis. 2d 99, 726 N.W.2d 337. We recognize that information given to police officers that the officer does not see for himself or herself rises or falls on the basis of reliability. *See* ***State v. Rutzinski***, 2001 WI 22, ¶17, 241 Wis. 2d 729, 623 N.W.2d 516. However, such information, like a "tip," is firmly within the reliability spectrum where, as here, a tipster provides his or her name and relays an eyewitness account. ***State v. Sisk***, 2001 WI App 182, ¶¶3, 8-11, 247 Wis. 2d 443, 634 N.W.2d 877.

¶19 Further, the Walworth deputy corroborated that information based on the facts he received from the Waukesha deputy. The Waukesha deputy told him that shortly after the attempt to locate was sent, he saw a vehicle matching the

description headed northbound on I-43 at about eighty-five miles per hour, driven by a male without any passengers, and that the driver failed to immediately pull over after he activated the siren and lights. The Waukesha deputy also told the Walworth deputy that once he pulled Liesener over, he noticed that the vehicle had damage to the right side which, the Walworth deputy could easily deduce, would fit the description of a left-lane driver who side-swiped a slow-lane vehicle. The Waukesha deputy also informed the Walworth deputy that he detected a strong odor of intoxicants from Liesener and glassy and bloodshot eyes.

¶20 Finally, the Walworth deputy made his own personal observations before making the arrest. The Walworth deputy inspected the pick-up truck at the scene. In doing so, he obviously would have observed the damage to the right side of the vehicle. The Walworth deputy smelled alcohol on Liesener and noticed that he had glassy eyes and was asking repetitive questions. Liesener also admitted he had two beers earlier and thought it was 3:00 or 3:30 p.m. when it was actually 7:40 p.m.

¶21 All of this evidence could be considered by the Walworth deputy when concluding that Liesener was under the influence of intoxicants and was the driver in the hit-and-run accident. This is especially so since we may consider an investigative officer's conclusions based upon his investigative experience. ***State v. Wille***, 185 Wis. 2d 673, 683, 518 N.W.2d 325 (Ct. App. 1994).

¶22 As one final complaint, Leisener thinks it important that no field sobriety tests were run. But case law is to the effect that probable cause to arrest may exist even in the absence of such tests. *See*, *e.g.*, ***State v. Kasian***, 207 Wis. 2d 611, 622, 558 N.W.2d 687 (Ct. App. 1996). We are satisfied that the plethora of evidence in the Walworth deputy's possession at the time of the arrest was more

than sufficient to show probable cause to arrest Liesener both for hit-and-run and operating a motor vehicle while intoxicated.

By the Court.—Judgment affirmed.

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