COURT OF APPEALS
DECISION
DATED AND FILED

April 25, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-0609 **Cir. Ct. No. 00-TR-2607**

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

IN THE MATTER OF THE REFUSAL OF LEANDRO ARECHEDERRA III:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LEANDRO ARECHEDERRA III,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: PATRICK J. FIEDLER, Judge. *Affirmed.*

¶1 LUNDSTEN, J.[1] Leandro Arechederra III appeals an order revoking his driving privileges for one year for refusal to submit to a breath test. Arechederra was arrested for operating a motor vehicle while under the influence of an intoxicant, contrary to WIS. STAT. § 346.63(1)(a) (1997-98). He refused to submit to a chemical test of his breath, in violation of WIS. STAT. § 343.305(2), and was issued a notice of intent to revoke his operating privileges. A refusal hearing was requested and held. The trial court resolved all issues against Arechederra. For the reasons that follow, we affirm.

FACTS

¶2 With one exception, Arechederra stipulated that the trial court could consider the police report as accurate for purposes of the refusal hearing. That exception is Officer Sweeney's assertion that Arechederra's speech was slurred, and we will ignore that assertion.

¶3 The report reveals that on February 5, 2000, at approximately 2:47 a.m., Officer Jason Sweeney was dispatched to a Taco Bell located at 5001 University Avenue in Madison, Wisconsin. The dispatcher told the officer that a Taco Bell employee named Loretta called and stated that "a drunk guy in a black car" had twice run into a car in front of it in the drive-thru and that the driver of the car appeared to be falling asleep. Loretta then told the dispatcher that employees at the Taco Bell would not give this individual his food until police

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

arrived to prevent him from driving. She also described the black car as a Mercedes-type vehicle.

¶4 When Officer Sweeney arrived at the Taco Bell, he observed a black BMW waiting at the drive-thru window. At this time, the Taco Bell employee in the drive-thru window pointed at a black BMW in the drive-thru line, and then handed the driver of the BMW his food. The officer followed this car as it left the drive-thru area. The officer observed the car speed through the parking lot of Taco Bell and come to a complete stop before leaving the lot.

¶5 The car turned onto Whitney Way and the officer saw it over-turn and head toward a curb. The car then straightened itself out and proceeded to the intersection of Whitney Way and University Avenue. The officer noted that as the car turned right onto University Avenue, it again veered toward a curb before recovering. At this time, 2:54 a.m., the officer activated his emergency lights and stopped the car on University Avenue at an overpass for Old Middleton Road.

¶6 The officer approached the black BMW and, through the photo on his driver's license, identified the driver as Leandro Arechederra III. Arechederra was eating a burrito in the car, but the officer, nonetheless, noticed an odor of intoxicants coming from inside the car. The officer observed that Arechederra's eyes were "extremely glossed over and bloodshot," and that Arechederra's eyelids were very heavy. When the officer asked Arechederra if he had been drinking that evening, Arechederra replied that he had not, but when asked again, he replied that he had drunk "one beer much earlier at [his] girlfriend's house."

¶7 The officer asked Arechederra to step out of his car. When Arechederra placed both feet on the ground and stood up, he "stumbled" out of the

car. Arechederra grabbed the hood of the car as he was walking around to the back of the car.

¶8 Once Arechederra was behind his car, the officer explained to him that because it was windy and snowing outside, and because the part of the road they were on was a steep incline with no shoulder, the officer "was going to ask him to sit in the back seat of my squad" in order to drive to a better location to perform field sobriety tests. Arechederra replied to this statement by saying "I don't want to do those tests." The officer then explained that if Arechederra refused to perform the field sobriety tests, the officer would have to place him under arrest for operating a motor vehicle while intoxicated based on the many factors that indicated his intoxication level. The officer then asked Arechederra once more if he would perform the field sobriety tests. Arechederra again replied that he would not perform the tests. At that point, approximately 3:00 a.m., the officer informed Arechederra that he was under arrest and placed him in handcuffs in the back seat of the squad car.

¶9 The officer conveyed Arechederra to the City-County Building and arrived at 3:24 a.m. The officer issued Arechederra a citation for operating a motor vehicle while intoxicated. At 3:42 a.m., the officer read an informing the accused form to Arechederra and asked if Arechederra would submit to a chemical test of his breath. Arechederra refused. The officer then issued Arechederra a Notice of Intent to Revoke Operating Privilege form before taking him to the Dane County Jail, where Arechederra once again refused to submit to a chemical test of his breath.

¶10 In addition to the police report, the parties stipulated to the fact that the officer did not confiscate Arechederra's driver's license. The parties also

stipulated to certain things Arechederra would say if he testified. The trial court also had before it a copy of the notice of intent to revoke form, which stated: "A hearing may be requested on the revocation of your operating privilege by mailing or delivering a written request within 10 days of the date of this notice to the following court." The notice, however, did not supply the name or address of the court.

¶11 After reviewing the evidence and hearing argument from the parties, the trial court held that the officer's failure to take Arechederra's license was a technical error, that the omission of the court name on the notice of intent to revoke form was also a technical error, and that Arechederra suffered no prejudice because of these two errors. The trial court found that Arechederra had declined to give a sample of his breath, and that he had the physical capability at the time he refused to submit to the test. The trial court then imposed a mandatory one-year revocation period, and Arechederra appealed.

DISCUSSION

¶12 On appeal, Arechederra presents the following four issues: (1) the errors on the notice of intent to revoke form and the officer's failure to confiscate Arechederra's driver's license were errors sufficient to deprive the trial court of personal jurisdiction; (2) even if these defects were mere technical errors, the State failed to prove that Arechederra was not prejudiced by the errors; (3) the officer did not have reasonable suspicion to stop Arechederra; and (4) the officer did not have probable cause to arrest Arechederra. We consider each argument in turn and affirm the trial court.

1. Errors in the Notice Given to Arechederra and the Failure to Confiscate Arechederra's Driver's License

¶13 Arechederra first argues that the officer's failure to confiscate Arechederra's license and the failure to include the name and address of the court where Arechederra could request a revocation hearing both constituted fundamental notice defects which deprived the trial court of personal jurisdiction. Arechederra also argues that when these errors are combined with the notice of intent to revoke form's failure to inform him that he could contest probable cause and the lawfulness of his arrest at the revocation hearing, the sum of these errors constituted a fundamental defect, depriving the trial court of personal jurisdiction. We disagree that any of these alleged errors, either individually or in the aggregate, deprived the court of personal jurisdiction.

¶14 WISCONSIN STAT. § 343.305(9)(a) states: "If a person refuses to take a test under sub. (3)(a), the law enforcement officer shall immediately take possession of the person's license and prepare a notice of intent to revoke, by court order under sub. (10), the person's operating privilege." Arechederra claims that the requirement in the statute that his license be confiscated immediately constitutes part of the notice requirement.

¶15 After reviewing WIS. STAT. § 343.305(9), and a case Arechederra relies on, ***State v. Rydeski***, 214 Wis. 2d 101, 571 N.W.2d 417 (Ct. App. 1997), we find no reason to conclude that confiscation of a person's driver's license is part of the notification process. The issues presented in ***Rydeski*** were whether Rydeski in fact refused to submit to a test and whether his subsequent willingness to take a test cured his initial refusal. There is no suggestion in either the statute or in ***Rydeski*** that gaining possession of the accused's license is a component of the

notification process. It is the "notice" specified in § 343.305(9)(a) that gives jurisdiction. *See* § 343.305(9)(b).

¶16 Arechederra correctly says that in ***State v. Moline***, 170 Wis. 2d 531, 489 N.W.2d 667 (Ct. App. 1992), the State asserted that the statute in question here requires that an "officer must immediately take possession of a person's license." ***Id.*** at 535-36. But Arechederra wrongly suggests that this assertion by the State in ***Moline*** constitutes a declaration that immediately taking possession of a person's license is a necessary component of the notification process. Nowhere does the ***Moline*** court suggest that the State ties confiscation of a license to the notice requirement. More to the point, Arechederra provides, and we discern, no reason to think that confiscation of a driver's license is part of the notification process.

¶17 Arechederra next claims that the omission on the notice form of the name of the court where he could request a revocation hearing was a fundamental defect. We disagree.

¶18 Defects found in notices to defendants are either "fundamental" or "technical." *See* ***Am. Family Mut. Ins. Co. v. Royal Ins. Co. of Am.***, 167 Wis. 2d 524, 533, 481 N.W.2d 629 (1992). A fundamental defect in the notification process automatically deprives a court of personal jurisdiction over a defendant, but a technical defect does not deprive the court of personal jurisdiction when the complainant can show that the defendant suffered no prejudice because of the defect. ***Id.*** Deciding whether a defect in the notice sent to a defendant is fundamental or technical is a question of statutory interpretation which this court reviews *de novo*. *See* ***Burnett v. Hill***, 207 Wis. 2d 110, 118, 557 N.W.2d 800 (1997).

¶19 In order to determine whether a defect in the notice was fundamental or technical, it is necessary to look at the purpose of the statute that controls the content and form of the notice. *See* ***State v. Gautschi***, 2000 WI App 274, ¶11, 240 Wis. 2d 83, 622 N.W.2d 24. "'If the purpose of the [statute] was fulfilled, the defect was not fundamental but technical.'" ***Id.***, quoting ***Jadair Inc. v. United States Fire Ins. Co.***, 209 Wis. 2d 187, 208, 562 N.W.2d 401 (1997).

¶20 The purpose of the statutory notice requirement is addressed in ***State v. Polinski***, 96 Wis. 2d 43, 291 N.W.2d 465 (1980): "The essence of this provision is the preparation of the notice of intent to revoke the person's operating privilege and the immediate service of a copy of that notice upon the arrested person. It is the giving of the notice to the person charged that satisfies due process." ***Id.*** at 46. "The clear intent of the legislature is to provide notice and a meaningful opportunity to be heard." ***Moline***, 170 Wis. 2d at 542.

¶21 In this case, Arechederra received both notice and a meaningful opportunity to be heard. The form told Arechederra that he could request a hearing on the revocation of his operating privilege by mailing or delivering a written request within ten days of the date of the notice "to the following court." The blank for the name and address of the court was not filled in. Arechederra was a resident of Madison at the time of his arrest. The stop occurred well within the city limits of Madison. The form tells Arechederra that the arresting officer was a City of Madison police officer. Under these facts, we conclude that the omission of the court name and address was not a fundamental defect. Arechederra knew he needed to file his request with a court within ten days. He could not, however, tell from the form which court should receive his request. While this might have seemed an irritant to Arechederra, it is readily apparent it was no stumbling block to submitting his request. Regardless of Arechederra's

legal training, it would have been obvious to him that he could learn where to submit his request by calling the Madison Police Department. Among other sources would have been the Madison City Attorney's Office and the Dane County District Attorney's Office. Only the unwillingness to make a few phone calls would have prevented Arechederra from learning the missing court name and address.

¶22 Finally, Arechederra asserts that when the omitted court information is added to the failure to inform him that probable cause and the lawfulness of his arrest are both issues that he could raise at the revocation hearing, the net result of these three errors is a fundamental defect.[2] Once again we disagree.

¶23 This court in ***Gautschi*** held that a form's failure to inform a defendant that he could contest probable cause and the lawfulness of his arrest at the revocation hearing was only a technical defect. *See* ***Gautschi***, 2000 WI App 274 at ¶¶4-14. If anything, the defect in the present case is less significant than either defect in ***Gautschi***. The combination of the three does not somehow transform three technical defects into one fundamental defect.

2. Prejudice Caused by the Technical Defects on the Notice of Intent to Revoke Form

¶24 Arechederra argues that even if the errors in the notice of intent to revoke form he received are only technical errors, the State failed to prove that he was not prejudiced by the defects.

[2] We have already determined that the officer's failure to confiscate Arechederra's license was not a notice defect.

¶25 The burden of proving prejudice is on the State. ***Am. Family Mut. Ins. Co.***, 167 Wis. 2d at 533. In determining whether a technical error has prejudiced a defendant, we disregard defects which do not affect the substantial rights of the adverse party. WIS. STAT. § 805.18(1).[3]

¶26 It is readily apparent that Arechederra suffered no prejudice. Five days after his arrest, Arechederra's attorney filed a demand for a hearing. *Cf.* ***Gautschi***, 2000 WI App 274 at ¶15 (no prejudice where defendant "filed a timely request for a hearing and was given the opportunity to have one").

¶27 Arechederra counters this argument with the parties' stipulation that, had he testified, Arechederra would have told the court:

> He is a third-year law student who thought he would be able to handle his case without the assistance of counsel, until he looked at the form and realized he did not have the knowledge to represent himself, given the omission of the court information. Therefore, he had to hire a specialized attorney to help him in this matter.
>
> ….
>
> He looked at the slip and thought there was no way he could handle it on his own – he needed a specialized attorney. He felt people should have the option to handle these cases on their own.

The trial court rejected this assertion of prejudice and we agree that rejection was the proper course.

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[3] WISCONSIN STAT. § 805.18(1) states:

> **Mistakes and omissions; harmless error. (1)** The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party.

¶28 We have already concluded that a non-law student/non-lawyer would have known to call the police department or other local government office to learn the name and address of the court. Arechederra's status as a third-year law student does not make it less likely that he would know he could make this obvious inquiry. Furthermore, no reasonable person, much less a third-year law student, would conclude that he could represent himself, if only he had been given court information on the notice form.

3. Reasonable Suspicion to Stop Arechederra

¶29 Arechederra next argues that the officer did not have reasonable suspicion to conduct an investigatory stop. Arechederra claims the information the officer received was "nothing but uncorroborated hearsay" and that without the tip, the officer did not have enough information to support the stop.

¶30 Even though the trial judge ruled that the officer had reasonable suspicion to stop Arechederra, we find no place in the record where Arechederra contested reasonable suspicion for purposes of his refusal hearing. We note there is passing reference to "reasonable suspicion" in a letter dated December 19, 2000, that Arechederra's attorney sent to the court. However, this single reference to the phrase "reasonable suspicion" is insufficient to preserve the issue. Thus, the issue is waived for purposes of this appeal. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980). However, even if we were to decide the issue, we would still find that the officer had reasonable suspicion to stop Arechederra.

¶31 Arechederra claims the observations the officer made personally were insufficient to support reasonable suspicion. He says the information the officer received via dispatch from the Taco Bell employee was uncorroborated hearsay upon which the officer could not rely.

¶32 Arechederra's assertion that the officer could not rely on information from the caller is simply wrong. This is not a situation in which the police received an anonymous call requiring substantial corroboration. Rather, the situation here is akin to that in ***State v. Sisk***, 2001 WI App 182, 247 Wis. 2d 443, 634 N.W.2d 877. In ***Sisk***, we concluded that when a caller provides self-identifying information that places his or her anonymity at risk, the caller is no longer anonymous. Because a non-anonymous tipster subjects himself or herself to the threat of potential arrest should he or she provide false information, such non-anonymity weighs in favor of the tipster's reliability. ***Id.*** at ¶¶8-11. *See also* ***Adams v. Williams***, 407 U.S. 143, 146-47 (1972). Applying these principles in ***Sisk***, we held that information from a caller could be used to establish reasonable suspicion to stop the defendants because (1) the caller gave information about the suspects and their location, which the police verified before stopping the defendants, and (2) the caller provided sufficient information about himself to destroy his anonymity. ***Sisk***, 2001 WI App 182 at ¶¶10-11.

¶33 Similarly, in this case the caller identified herself and provided information that the officer corroborated prior to the stop. The caller said she was a Taco Bell employee, gave the location of her store, and identified herself as Loretta. She said a person in a black Mercedes-type vehicle appeared to be drunk. She said that the driver was waiting in the Taco Bell drive-thru and that the employees would not give him his food until an officer arrived. Upon arrival at the Taco Bell, the officer observed a black BMW at the drive-thru window. A Taco Bell employee saw the police car and gestured toward the black car and then handed the driver his food.

¶34 This amount of identifying information and corroboration easily satisfies the standard used in ***Sisk***. Arechederra does not assert that police lacked

reasonable suspicion if the call from the Taco Bell employee was sufficiently corroborated. *See* Arechederra's reply brief at 8. This implicit concession is appropriate. When the information provided by the caller, including the assertion that the driver of the black car twice ran into the car in front of him, is added to the observations of the police officer, there was plainly sufficient reasonable suspicion to support the stop.

4. Probable Cause to Arrest Arechederra

¶35 Finally, Arechederra apparently asserts that testimony about his behavior after his arrest should have been suppressed because the arrest was not supported by probable cause.

¶36 We will sustain a circuit court's findings of fact unless they are clearly erroneous. ***State v. Roberts***, 196 Wis. 2d 445, 452, 538 N.W.2d 825 (Ct. App. 1995). Whether undisputed facts constitute probable cause to arrest is a question of law that we review without deference to the trial court. ***State v. Babbitt***, 188 Wis. 2d 349, 356, 525 N.W.2d 102 (Ct. App. 1994).

¶37 The test for probable cause is a common sense test. ***County of Dane v. Sharpee***, 154 Wis. 2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990). An 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 had committed or was committing an offense. ***State v. Koch***, 175 Wis. 2d 684, 701, 499 N.W.2d 152 (1993). Probable cause requires only that the totality of the evidence would lead a reasonable officer to believe that guilt is more than a possibility. ***State v. Paszek***, 50 Wis. 2d 619, 625, 184 N.W.2d 836 (1971).

¶38 Arechederra argues there was no probable cause to arrest him at the point in time when the officer told him that if he did not agree to perform field sobriety tests, Arechederra would be placed under arrest. We assume for purposes of our discussion that Arechederra was arrested at this point. It is unclear, however, whether Arechederra asserts that the officer lacked probable cause, even if the information provided by the Taco Bell employee is considered. His discussion seems to assume that this information cannot be considered. That assumption, as previously discussed, is wrong.

¶39 Once the observations provided by the Taco Bell employee are added to the undisputed observations of the police officer, there is no doubt that the officer possessed probable cause to arrest Arechederra when the officer told him that if he did not agree to perform field sobriety tests, he would be placed under arrest. At that time, the officer knew that Arechederra had twice run into a car ahead of him in the Taco Bell drive-thru; that he appeared to be falling asleep while in the drive-thru line; that he sped through the parking lot; that he twice over-turned and needed to correct the path of his car to avoid hitting curbs; that there was an odor of intoxicants coming from inside his car; that his eyes were glossed over and bloodshot; and that he exhibited poor balance by stumbling out of his vehicle and then grabbing the hood of his car as he moved to the back of his car. These factors easily support a finding of probable cause to believe that Arechederra was operating his vehicle while under the influence of an intoxicant.

By the Court.—Order affirmed.

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