COURT OF APPEALS
DECISION
DATED AND FILED

January 24, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1102-CR **Cir. Ct. No. 00-CT-14**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DENNIS A. DENURE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Iowa County: WILLIAM D. DYKE, Judge. *Reversed and cause remanded with directions*.

¶1 DYKMAN, J.[1] Dennis Denure appeals from a judgment of conviction for operating a motor vehicle with a prohibited blood alcohol

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

concentration. Denure argues that the circuit court erred when it denied his motion to suppress evidence obtained after a subpoena was issued under WIS. STAT. § 968.135. He contends that probable cause does not support the subpoena. We agree and therefore reverse.

Background

¶2 On January 22, 2000, Dennis Denure was traveling southbound on Highway 23 in Iowa County and Larry Roberts was traveling northbound.[2] Denure and Roberts collided with each other around midnight. Roberts was killed and Denure was taken to the Dodgeville hospital with life-threatening injuries.

¶3 Deputy Lin Gunderson arrived at the scene of the accident soon after it occurred. Due to the snow and ice that was packed on the highway, Gunderson was unable to locate any skid marks. Sergeant Steven Michek also came to the scene. Gunderson asked Michek to take statements from witnesses, and then followed Denure to the hospital.

¶4 Michek spoke to Ariel Thomas and Bobbie Turner, who had been driving directly behind Roberts before the accident. Thomas stated that Roberts' car had drifted completely into the lane of oncoming traffic. As Denure's car approached, however, Thomas said that Roberts "appear[ed] to get back in his lane" and Denure's car "was too close to the line or just over the line before impact."

[2] The criminal complaint refers to both January 4 and January 22 as the date of the accident. However, both the State and Denure agreed at the April 3 motion hearing that January 22 was the correct date.

¶5 Turner, who was Thomas' passenger, similarly stated that Roberts had been driving a full car lane to the left of the dividing line, but had "gotten all or partly back in the right lane." However, she also stated that Thomas had slowed down as Denure was approaching, increasing the distance between his car and Roberts' car, so it was difficult to see through the snow where both Roberts' and Denure's cars were upon impact.

¶6 Ed Lanka was driving just behind Thomas and Turner. He also stated that Thomas had been driving in the left lane but then moved back into the right lane. Lanka did not see the impact because it occurred around a curve.

¶7 Michek returned to the scene later that same day to look for signs of the accident. He found a "gouge" in the payment on the southbound lane of traffic and concluded that the gouge mark was caused by Denure's car. Based on this mark, Michek concluded that the accident had occurred in the southbound, or Denure's, lane of traffic.

¶8 At the hospital, Gunderson spoke to the paramedics who had transported Denure. He asked them if they had noticed the smell of alcohol on Denure's breath and they said they had not. Gunderson asked Dr. Everett Lindsay, who had attended Denure, the same question. Dr. Lindsay stated that he had smelled the odor of intoxicants on Denure.

¶9 Based upon this, Gunderson read Denure the informing the accused form pursuant to WIS. STAT. § 343.305 and asked Denure if he would submit to a blood test. Denure "mumbled" yes to Dr. Lindsay. Gunderson then asked Denure "if he remembered anything about the accident" and Denure said he did not. Due to the serious nature of Denure's injuries, hospital staff transported Denure to the University of Wisconsin Hospital in Madison. Before this, Dr. Lindsay drew

blood from Denure and gave a sample to Gunderson. Gunderson never placed Denure under arrest.

¶10 Gunderson sent the blood to the state hygiene lab for testing, and the results indicated that Denure's blood ethanol concentration was 0.231. Blood was also drawn from Roberts. His ethanol concentration was 0.271.

¶11 The State charged Denure with one count each of driving while under the influence of an intoxicant under WIS. STAT. § 346.63(1)(a) and driving with a prohibited alcohol concentration under § 346.63(1)(b). Denure moved to suppress the blood test results, arguing that Gunderson lacked probable cause to request that Denure submit to a blood test under WIS. STAT. § 343.305. At the motion hearing, the State conceded that Denure "would win the motion." Specifically, the district attorney stated:

> I will technically for the record concede that there was no arrest in this case by the law enforcement officer; thus the blood draw done by law enforcement doesn't technically fall within the terms of search incident to arrest and would probably have been thrown out; thus I am going to concede that.

Accordingly, the circuit court granted Denure's motion to suppress, but did not dismiss the case because Peterson stated "I'm not conceding on the probable cause issue." Rather, the court allowed the State to subpoena the hospital records regarding Denure's blood test under WIS. STAT. § 968.135. After the records were obtained, Denure again moved to suppress.[3] He argued that there was no probable

[3] This second motion to suppress is not part of the record, but is referred to in the circuit court's decision and order dated February 1, 2001.

cause to issue the subpoena.[4] The circuit court denied the motion, concluding that "the combined weight of [***City of Muskego v.***] ***Godec***, [***State v.***] ***Jenkins***, [***State v.***] ***Swift***, and [***State v.***] ***Kaisan***, and the statute addressing the admissibility of the blood test weigh sufficiently strong to deny the Defendant's motion to suppress."

¶12 The court found Denure guilty of both WIS. STAT. § 346.63(1)(b) as a second offense and § 346.63(1)(a), but then dismissed the operating under the influence charge. Denure appeals.

Opinion

¶13 Because the State has conceded that the blood draw was unlawful, we address only whether the hospital's records were lawfully obtained through subpoena. WISCONSIN STAT. § 968.135 provides in part: "Upon the request of the attorney general or a district attorney and upon a showing of probable cause under s. 968.12, a court shall issue a subpoena requiring the production of documents, as specified in s. 968.13(2)." WISCONSIN STAT. § 968.12, in turn, provides the standard for issuing search warrants. The sole issue is whether the district attorney made a proper showing of probable cause.

¶14 The standard for upholding an issuing judge's finding of probable cause under WIS. STAT. § 968.12 is the same as the standard under the Fourth Amendment and article I, § 11: the judge must have been apprised of sufficient facts to excite an honest belief in a reasonable mind that the objects sought are

[4] Denure also argued that the State had implicitly conceded that no probable cause existed when it conceded that the motion to suppress should be granted and, therefore, issue preclusion barred the State from relitigating the issue. Denure, however, does not raise this issue on appeal, so we do not address it.

linked with the commission of a crime, and the objects sought will be found in the place to be searched. ***State v. Swift***, 173 Wis. 2d 870, 883, 496 N.W.2d 713, (1993). Our review is not de novo, but rather we accord "great deference" to the issuing judge's determination that probable cause exists. ***Id.***

¶15 The State provides a list of twelve facts included in an affidavit that it contends provided the issuing judge with probable cause to issue a subpoena:

> 1. Denure was involved in a two car head-on collision.
>
> 2. The accident occurred on Tuesday night around midnight.
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> 3. Deputies did not notice any skid marks at the accident scene.
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> 4. The driver of the other car, Mr. Larry Roberts, died.
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> 5. Dr. Lindsey, treating doctor for Denure, told the deputy that Dr. Lindsey smelled an odor of intoxicants on the defendant.
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> 6. Deputy Gunderson had asked medical personnel who transported the defendant the same question and they responded negatively.
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> 7. Deputy Gunderson read Denure the Informing the Accused form, asking if Denure would consent to a blood test. Denure mumbled "yes."
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> 8. Gunderson was then told Denure's injuries were life threatening and Gunderson removed himself as he felt he was in everyone's way. Thus, Deputy Gunderson was unable to have Mr. Denure perform standard field sobriety tests.
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> 9. Witness Ariel Thomas stated that it looked like Mr. Denure's car was "too close to the line or just over the line before impact."
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> 10. Witness Bobbie Turner indicated that "the car in front of her (Mr. Roberts') had gotten all or partly back in the right lane." Turner further indicated that "the cars could have been in the center of the road or all to the right lane."

> 11. Witness Ed Lanka stated that he did not see the accident, but that prior to the accident Mr. Roberts' car moved into the left lane and then back into the right lane.
>
> 12. Deputy Michek ultimately found a gouge mark leading him to believe that the accident took place in the southbound lane, or the lane that Denure was traveling in.

¶16 That the State has provided twelve facts is insignificant. The question is whether the facts demonstrate that probable cause existed. A number of these facts, however, provide no indication that the hospital records would show Denure was driving while intoxicated on the evening of the accident. That the accident was a two-car head-on collision and that Larry Roberts died certainly demonstrate the severity of the crash, but suggest nothing regarding whether Denure was under the influence of alcohol or drugs.

¶17 Also, for the purpose of this analysis, it is of no moment that Denure may have consented to a blood test at the hospital in Dodgeville. The State has never alleged that the blood sample it obtained initially was admissible because Denure gave his consent; the State has therefore abandoned that issue. The only issue here is whether probable cause supports issuance of the subpoena. It is likewise irrelevant that Gunderson may have been unable to perform field sobriety tests due to the seriousness of Denure's condition. Although case law suggests the importance of field sobriety tests to support probable cause, *see* ***State v. Swanson***, 164 Wis. 2d 437, 453-54 n.6, 475 N.W.2d 148 (1991), the State has pointed to no authority indicating that the probable cause standard should be lowered when requiring such tests is impractical.

¶18 Second, some of the facts referred to by the State actually undermine a conclusion that probable cause existed. For instance, the State notes that when Gunderson asked the medical personnel who transported Denure if they smelled

the odor of intoxicants on him, they stated that they had not. Also, statements from several witnesses indicated that Roberts, not Denure, was swerving in and out of his lane. And, the State concedes that Deputy Michek ultimately concluded that the accident occurred in the southbound lane, or the lane that Denure was properly driving in, strongly suggesting that it was Roberts who caused the accident.

¶19 The facts that remain are: (1) the accident occurred on Tuesday night around midnight; (2) Gunderson did not notice any skid marks at the accident scene; (3) the doctor who treated Denure smelled the odor of intoxicants on him; and (4) one witness out of several believed that Denure's car was "too close to the line or just over the line before impact." Two Wisconsin cases hold that these facts are insufficient to support a finding of probable cause.

¶20 In ***State v. Seibel***, 163 Wis. 2d 164, 181-83, 471 N.W.2d 226 (1991), the court examined four factors which the State relied upon to show reasonable suspicion that the defendant was operating a motor vehicle while under the influence of intoxicants. These factors were: (1) the defendant crossed the center line just before a curve in a no-passing zone for no justifiable reason; (2) a strong odor of intoxicants emanating from the defendant's traveling companions; (3) a police chief's belief that he smelled an odor of intoxicants on the defendant; and (4) the defendant's belligerent and unrealistic conduct at the hospital. The supreme court later stated that ***Seibel*** held that these factors "add up to a reasonable suspicion but not probable cause." ***Swanson***, 164 Wis. 2d at 453 n.6

¶21 In ***Swanson***, the supreme court concluded that the combined factors of unexplained erratic driving, the odor of alcohol, and an accident occurring at bar time were insufficient to constitute probable cause to arrest someone for

driving while under the influence of intoxicants. ***Id.*** In the case before us, there is even less evidence that Denure was driving under the influence of an intoxicant than in ***Seibel*** and ***Swanson***.

¶22 Time of night is only of marginal significance. The accident did not occur at bar time. Although it may be that more drunk driving occurs around midnight than at other times, it is far from sufficient to provide a basis for probable cause.[5] There is almost no significance to the lack of skid marks, in light of the snowy conditions. Further, the fact that one witness believed Denure was driving too close to the line does not suggest he was intoxicated. Driving close to the line can hardly be considered "erratic driving," especially when Michek concluded that the accident occurred in Denure's, not Roberts', lane. And there is no rational way to decide whether Denure was driving close to the line, which is legal, or over the line, which is illegal, and may be an indication of intoxication.

¶23 The only fact providing any particularized suspicion was that a doctor smelled alcohol on Denure. But this only suggests that Denure had consumed alcohol, it does not suggest he was intoxicated, particularly considering that the odor was not strong enough that the paramedics noticed it. Even considering all the factors together, as we are required to do, *cf.* ***United States v. Arvizu***, 2002 WL 46773, at *6 (U.S. Jan. 15, 2002) (No. 00-1519) (holding that factors constituting reasonable suspicion may not be viewed in isolation), they do not add up to probable cause.

[5] The State has produced no evidence or statistics showing that midnight is a high incidence time for drunk driving.

¶24 The State ignores ***Swanson*** and cites to ***State v. Kasian***, 207 Wis. 2d 611, 558 N.W.2d 687 (Ct. App. 1996), which it contends supports upholding a finding of probable cause here. Although ***Kasian*** upheld the circuit court's finding of probable cause in that case, ***Kasian*** involved a one-car accident where it was clear that the defendant had caused the crash. ***Id.*** at 622. In the case before us, however, the evidence strongly suggests that it was Roberts who caused the collision.[6]

¶25 Although the State cites only to ***Kasian***, the circuit court also relied on ***State v. Jenkins***, 80 Wis. 2d 426, 259 N.W.2d 109 (1977), and ***City of Muskego v. Godec***, 167 Wis. 2d 536, 482 N.W.2d 79 (1992). In ***Jenkins***, the court concluded that the Fourth Amendment was not implicated where a blood test is taken at the request of a physician, solely for diagnostic purposes. 80 Wis. 2d at 433-34.[7] ***Godec*** held that hospital records were not protected by the patient-doctor privilege under WIS. STAT. §§ 146.82 or 905.04 when they involved tests for intoxication. 167 Wis. 2d at 545-46. Although these cases may suggest that the State is entitled to subpoena hospital records in certain cases without a showing of probable cause, they are not applicable here. In the case before us, the State requested a subpoena under WIS. STAT. § 968.135, which requires a showing of probable cause. In ***Godec*** and ***Jenkins*** the State sought evidence under a different

[6] Even were we to conclude that ***Kaisan*** permits a finding of probable cause in Denure's case, we have already concluded that ***Swanson*** and ***Seibel*** do not. If there is a conflict between a case decided by the supreme court and a case decided by the court of appeals, we must follow the supreme court. ***State v. Veach***, 2001 WI App 143, ¶27, 246 Wis. 2d 395, 630 N.W.2d 256.

[7] The record does not reflect with certainty whether the blood tests were performed by the hospital for diagnostic purposes or if Officer Gunderson directed the hospital to do so.

mechanism and did not rely on § 968.135. The State, recognizing this, does not argue that ***Godec*** and ***Jenkins*** are controlling here.

¶26 In sum, we conclude that there were insufficient facts to support a conclusion that the hospital records would show that Denure had committed a crime. Because WIS. STAT. § 968.135 requires a showing of probable cause, the subpoena could not issue. We therefore reverse, and remand with instructions to grant Denure's motion to suppress the hospital records obtained by the subpoena.

By the Court.—Judgment reversed and cause remanded with directions.

Not recommended for publication in the official reports. *See* WIS. STAT. § 809.23(1)(b)4.