COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP778-CR **Cir. Ct. No. 2007CT782**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

COREY M. KISSACK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sauk County: PATRICK TAGGART, Judge. *Affirmed.*

¶1 LUNDSTEN, J.[1] Corey Kissack appeals the circuit court's judgment convicting him of operating a motor vehicle while under the influence of

[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.

an intoxicant, as a second offense. Kissack argues that the police lacked reasonable suspicion that he was engaged in unlawful activity at the time he was initially detained. He also argues that the police lacked probable cause to administer a preliminary breath test (PBT) and probable cause to arrest him for operating a motor vehicle while under the influence of an intoxicant. I reject Kissack's arguments and affirm the judgment.

Background

¶2 Kissack was originally charged with drunk driving offenses in 2005. He filed a motion to suppress certain evidence, and the court held an evidentiary hearing on his motion and denied it. The case was later dismissed, without prejudice, at the State's request.

¶3 The State re-filed the charges, and Kissack again filed a motion to suppress. Relying on issue preclusion, the circuit court denied Kissack's motion without further proceedings. The court agreed with the State that "we have the same parties, the same charges, the same motion issues raised, the same Court that heard the prior evidentiary hearing, and the same legal and factual issues previously fully litigated."

¶4 Kissack entered a no contest plea, then appealed his conviction. Additional facts are referenced as needed below.

Discussion

¶5 When reviewing a motion to suppress, this court upholds the circuit court's findings of fact unless they are clearly erroneous. ***State v. Begicevic***, 2004 WI App 57, ¶3, 270 Wis. 2d 675, 678 N.W.2d 293. The application of

constitutional principles to the facts, however, is a question of law for our *de novo* review. ***Id.***

¶6 As an initial matter, the parties dispute whether the circuit court erred by applying issue preclusion to deny Kissack a second suppression hearing. The State argues not only that the circuit court correctly applied issue preclusion, but also that the suppression ruling in this case was a product of issue preclusion and, therefore, Kissack has waived his right to review by pleading no contest. *See* ***State v. Princess Cinema of Milwaukee, Inc.***, 96 Wis. 2d 646, 651, 292 N.W.2d 807 (1980) (stating the general rule that a properly entered no contest plea waives nonjurisdictional defects and defenses, including claims of constitutional rights violations).

¶7 I need not address the issue preclusion disputes because Kissack makes it clear that what he is seeking is appellate review of the suppression hearing that *was* held. His reply brief states: "[Kissack] is merely asking this Court to address the legal merits of this Motion to Suppress by relying on testimony from the evidentiary hearing already held in this matter." Because I give the merits review Kissack requests, and I resolve the merits against him, the parties' disputes regarding issue preclusion do not matter.

¶8 I begin by summarizing the pertinent facts and then explain why I reject each of Kissack's suppression arguments.

Suppression Hearing Testimony

¶9 Two officers were involved in Kissack's detention and arrest, and each testified at the suppression hearing.

¶10 Officer Posewitz testified that, at about 2:40 a.m., he was dispatched to respond to an anonymous complaint of tire squealing on a dead-end street. When he responded to the area, he observed several tire marks and a vehicle at the end of the cul-de-sac. Posewitz also observed other damage to the area, including five "crashes" and some type of wire hanging down from utility poles. In addition, the suspect vehicle was extensively damaged.

¶11 Officer Posewitz made contact with a person on the road who identified himself as Joseph Riley. Riley told Posewitz that he had been inside his house when he heard tires squealing, that he went outside to see what was going on, and that he saw the damaged vehicle in a nearby wooded area. As Officer Posewitz walked around the vehicle, he heard someone running through the woods. Around the same time, Officer Jorgenson arrived on the scene, and Posewitz informed Jorgenson of what he had just heard.

¶12 As Officer Jorgenson gave chase to the person in the woods, Officer Posewitz continued speaking with Riley. Officer Posewitz suspected that Riley had not been honest with him initially because Riley "had to think a lot" about what he was saying. Under further questioning by Officer Posewitz, Riley changed his story and was "quicker to answer." Riley admitted to Posewitz that he had been riding in the damaged vehicle. Riley also informed Posewitz that he and Kissack had been drinking during the course of the evening and that Kissack had dropped Riley off. Riley stated that Kissack then started driving down the street doing "doughnuts" and crashing into things.

¶13 Officer Jorgenson testified that he responded to the scene after hearing over the police radio that Officer Posewitz had been dispatched for the tire squealing complaint. When Officer Jorgenson arrived, he observed the damaged

vehicle. Officer Posewitz informed Jorgenson that he had heard someone running through the woods. Jorgenson also heard the person running, gave chase, and yelled, "Stop, police."

¶14 While in pursuit, Officer Jorgenson observed a male suspect exit a ravine in the woods and run away from him. Jorgenson continued to yell, "Stop, police." The suspect did not at first submit to Jorgenson's order, but eventually stopped running. Jorgenson caught up with him and identified the suspect as Kissack. Officer Jorgenson observed that Kissack's eyes were red or bloodshot. In addition, Jorgenson could smell a strong odor of intoxicants on Kissack's breath.

¶15 Officer Jorgenson escorted Kissack back to Officer Posewitz's location at the cul-de-sac. Jorgenson asked if Kissack remembered what happened there and Kissack said he did not know but also said, "You guys know." Jorgenson asked Kissack if Kissack knew where his vehicle was, and Kissack responded, "You guys know." When asked if Kissack was the driver, Kissack responded, "I guess I was." Kissack said that he ran when he saw police lights because he was scared.

¶16 Officer Jorgenson attempted to administer the horizontal gaze nystagmus (HGN) test to Kissack, instructing Kissack to follow a light with his eyes. Although Kissack said he understood the instructions, he simply looked straight ahead instead of following the light. Jorgenson then administered a PBT that showed Kissack's blood alcohol content to be 0.244. At that point, Jorgenson arrested Kissack.

Reasonable Suspicion

¶17 Kissack argues that the police lacked reasonable suspicion for his initial detention, which Kissack marks as occurring shortly after he emerged from the woods. Kissack argues that the question of reasonable suspicion must be decided based only on the facts personally known to the officer who first detained him, Officer Jorgenson. Kissack asserts that, at the time of the initial detention, Jorgenson knew only that there was a damaged vehicle and a different potential suspect near the vehicle. Kissack acknowledges that Officer Posewitz eventually obtained information from Riley that incriminated Kissack. However, Posewitz did not learn that information until *after* Officer Jorgenson gave chase to Kissack.

¶18 Kissack is mistaken that the only information that may be considered in assessing reasonable suspicion is the information Officer Jorgenson personally knew. The general rule is that, when one of two or more cooperating officers makes an arrest, the officer making the arrest need not personally know all the facts supporting probable cause. *See* ***State v. Mabra***, 61 Wis. 2d 613, 625, 213 N.W.2d 545 (1974) (arresting officer need not have knowledge sufficient to establish probable case; rather, officer may rely on all the "collective information"); ***State v. Wille***, 185 Wis. 2d 673, 683, 518 N.W.2d 325 (Ct. App. 1994) ("[T]he officer may rely on the collective knowledge of the officer's entire department."). Certainly the same goes for reasonable suspicion. Accordingly, I conclude that, under this case law, I may, at a minimum, consider information known to Officer Posewitz at least up to the time that Officer Jorgenson gave chase to Kissack. This information was sufficient to supply reasonable suspicion to detain Kissack. Indeed, Kissack does not develop an argument that reasonable suspicion was lacking even if the information Posewitz knew by the time

Jorgenson gave chase is considered. Still, I choose to briefly explain why this information is sufficient.

¶19 By the time Officer Jorgenson gave chase to Kissack, Officer Posewitz knew that there had been a complaint of tire squealing in the area at approximately 2:40 a.m. When Posewitz arrived on the scene, he observed tire marks, a damaged vehicle, and property damage that Posewitz could reasonably infer was caused by the vehicle. Posewitz also heard someone running through the woods nearby. Given the time of night, Posewitz could reasonably suspect that the person running in the woods was connected with the damaged vehicle and, therefore, involved in tire squealing and/or causing property damage. It was highly unlikely that anyone *not* connected to those activities would have been running through the woods at that time. Thus, the facts known to Officer Posewitz by the time Officer Jorgenson gave chase were sufficient to justify Kissack's initial detention. *See* ***State v. Patton***, 2006 WI App 235, ¶9, 297 Wis. 2d 415, 724 N.W.2d 347 (the standard for reasonable suspicion is less than probable cause and requires no more than a "'particularized and objective basis for *suspecting*'" a person of illegal activity (emphasis added; citation omitted)).

Probable Cause To Administer PBT And Probable Cause To Arrest

¶20 Kissack argues that the police lacked probable cause to administer the PBT and to arrest him for operating a motor vehicle while intoxicated. I disagree.

¶21 WISCONSIN STAT. § 343.303 authorizes an officer to administer a PBT when the officer has "probable cause to believe" that the person taking the PBT is violating or has violated a drunk driving law. In this context, "'probable cause to believe' refers to 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." ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 316, 603 N.W.2d 541 (1999).

¶22 Thus, the standard for "probable cause to believe" under WIS. STAT. § 343.303 is marginally lower than the standard for probable cause to arrest. Probable cause to arrest is commonly defined as the quantum of proof that would lead a reasonable police officer to believe that a person "probably committed" a crime. ***Renz***, 231 Wis. 2d at 302. In either instance, the test is a nontechnical, common-sense one, in which courts consider the totality of the circumstances known to the police at the time. *See* ***County of Dane v. Sharpee***, 154 Wis. 2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990).

¶23 Here, the totality of the circumstances known to the police at the time they administered the PBT shows they had "probable cause to believe" that Kissack had violated a drunk driving law. *See* WIS. STAT. § 343.303. By the time of the PBT, one or both officers were aware of a number of incriminating facts.

¶24 First, Riley admitted that he and Kissack had been drinking together that evening and informed police that Kissack had been driving. It was reasonable to credit Riley's later statements over his initial story, based on the way Riley changed from initially having "to think a lot" about what he said to later being "quicker to answer" questions. Indeed, the circuit court's decision shows the court found Riley's later admissions more credible than his initial story. That finding is not clearly erroneous given the officer's testimony.

¶25 Second, the police had significant evidence of conduct associated with drunk driving, including tire squealing, tire marks, Riley's reports of Kissack

doing "doughnuts" and crashing into things, damage to the vehicle, and damage to surrounding property apparently caused by the vehicle.

¶26 Third, Kissack fled the scene and admitted he had done so because he was scared when he saw the police lights. This conduct suggests a guilty mind.

¶27 Fourth, an officer smelled a strong odor of intoxicants on Kissack's breath and observed that Kissack's eyes were red or bloodshot, a well-known sign of intoxication.

¶28 Fifth, Kissack all but confessed that he had been driving the damaged vehicle found at the scene. In particular, when an officer asked whether Kissack remembered what happened, Kissack said, "You guys know"; when asked if he knew where his vehicle was, Kissack responded, "You guys know"; and when asked if Kissack was the driver, Kissack responded, "I guess I was."

¶29 Finally, when an officer attempted to administer the HGN test to Kissack, Kissack did not follow basic instructions even though he said he understood them. This fact supported an inference that Kissack either was too intoxicated to follow simple directions or was refusing to cooperate in order to hide intoxication.

¶30 Taken together, these circumstances were more than sufficient to provide police with the requisite probable cause to administer a PBT. *Cf.* ***Begicevic***, 270 Wis. 2d 675, ¶¶4, 9-10 (probable cause for PBT where suspect's vehicle was positioned improperly in a turn lane, officer detected a strong odor of intoxicants, suspect's eyes were bloodshot and glassy, and suspect performed inadequately on several field sobriety tests); ***State v. Colstad***, 2003 WI App 25, ¶¶24-26, 260 Wis. 2d 406, 659 N.W.2d 394 (probable cause for PBT where

suspect was involved in accident with suspicious circumstances, officer detected mild odor of intoxicants, and suspect performed "better than most" but questionably on several field sobriety tests).

¶31 Kissack argues that, unlike in ***Begicevic*** and ***Colstad***, the police in his case could not clearly relate the time of operation to the time of intoxication. In Kissack's view, there is nothing to connect Kissack's alleged intoxication with the time he was driving. I disagree.

¶32 Based on the totality of the circumstances, the officers reasonably believed that Kissack had recently been operating the vehicle found at the scene. In particular, there was a report of tire squealing around 2:40 a.m., Riley said that he and Kissack had been drinking that evening and that Kissack had dropped him off and then performed "doughnuts," Kissack fled from the scene at the sight of police, and Kissack essentially confessed to driving and told police, "[y]ou guys know" what happened.

¶33 Kissack also argues that, unlike the defendants in ***Begicevic*** and ***Colstad***, he was given only one of several available field sobriety tests. This argument is not persuasive for at least two reasons. First, Kissack supplies no authority for the proposition that officers are required, no matter the circumstances, to conduct a complete set of field sobriety tests before administering a PBT. Second, the circuit court found that the officer reasonably gave only one test because Kissack was not following instructions. This finding is supported by the evidence, and Kissack does not challenge it as clearly erroneous.

¶34 I turn to Kissack's final argument, which is that police lacked probable cause to arrest him for operating a motor vehicle while intoxicated. Kissack makes no new assertions in support of this argument, and I reject it.

When I consider the circumstances I have already discussed, combined with Kissack's PBT result showing a 0.244 blood alcohol content, I conclude that the police had probable cause to arrest Kissack for operating a motor vehicle while intoxicated.

Conclusion

¶35 For all of the reasons explained above, I affirm the judgment of conviction.

By the Court.—Judgment affirmed.

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