COURT OF APPEALS
DECISION
DATED AND FILED

September 19, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1118-FT **Cir. Ct. No. 01-TR-6890**

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

LA CROSSE COUNTY,

PLAINTIFF-RESPONDENT,

V.

THOMAS J. BREIDEL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for La Crosse County: JOHN J. PERLICH and MICHAEL J. MULROY, Judges. *Affirmed.*

¶1 ROGGENSACK, J.[1] Thomas J. Breidel appeals the denial of his motion to suppress evidence of his intoxication that he asserts was obtained in

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1999-2000) and is expedited under WIS. STAT. § 809.17 (1999-2000). Additionally, all further references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

violation of his constitutional rights. Because we conclude that Breidel's rights were not violated, we affirm the circuit court.

BACKGROUND

¶2 Thomas Breidel drove to his home in the early morning hours of December 1, 2001, followed by two complainants, who had called the La Crosse County Sheriff's Department because they believed Breidel may have been driving while intoxicated. Based on their call, Deputy Sheriff John Williams proceeded to Breidel's residence. When he arrived, the complainants were still present and told him that the driver had gone inside and shut the door. Williams knocked on the door explaining that he was from the sheriff's department and was there because of a complaint about a driver.

¶3 Breidel responded to the officer's entreaties to come out and talk by swearing at him and telling him to get off his property. Williams repeatedly asked Breidel to open the door and eventually he did so. Williams continued to ask Breidel to step outside so that they could talk about the driver-complaint. At some point during their conversation, Breidel tried to slam the door on Williams, but Williams had his hand and his foot in the door jam so Breidel's efforts were not successful. At approximately that same time, Breidel's family appeared and Breidel stopped his efforts to try to close the door and stepped back about five feet from it. The officer continued to ask him to come outside.

¶4 When Breidel's wife came into the area, she was able to calm Breidel so that he stopped yelling. She told him to go outside and talk to the officer. And after a few minutes, he walked outside.

¶5 Once Breidel was outside, Williams called for backup and those officers stayed with Williams while he asked the complainants if they would sign a complaint detailing what they reported to have seen of Breidel's driving. When they said that they would, he returned and arrested Breidel for driving while under the influence of an intoxicant (OMVWI).

¶6 After he was charged, Breidel moved to suppress the evidence taken after he was outside his home. He argued that his constitutional rights had been violated because the officer had put his foot in the door jam, preventing the door from closing and, therefore, any evidence that was taken after he went outside violated his constitutional rights and should be suppressed. The circuit court denied the motion; Breidel pled to OMVWI first offense and has now appealed the denial of the suppression motion.

DISCUSSION

Standard of Review.

¶7 We accept the factual findings of the circuit court unless they are against the great weight and clear preponderance of the evidence. ***State v. Johnson***, 177 Wis. 2d 224, 230, 501 N.W.2d 876, 878 (Ct. App. 1993). However, we determine independently whether those facts satisfy the Fourth Amendment constitutional requirement of reasonableness. ***State v. Jackson***, 147 Wis. 2d 824, 829, 434 N.W.2d 386, 388 (1989). Furthermore, we determine as a constitutional fact whether the defendant voluntarily consented to speak with a police officer. ***State v. Phillips***, 218 Wis. 2d 180, 195, 577 N.W.2d 794, 801 (1998).

Voluntary Act.[2]

¶8 This case turns on whether Breidel left his residence to come into the yard and talk to Williams voluntarily because no suppressible evidence was obtained prior to the time he came outside.[3] Voluntariness involves a two-step analysis. We first examine the circuit court's finding of historical fact, and unless those findings are contrary to the great weight and clear preponderance of the evidence, we affirm them. ***Phillips***, 218 Wis. 2d at 195, 577 N.W.2d at 801. We next apply constitutional principles to the facts as found to determine whether an act was voluntarily done. ***Id.***

¶9 The circuit court found that after the officer's "foot was withdrawn then the defendant came out." This finding is not against the great weight and clear preponderance of the evidence. Therefore, we affirm it. The record reflects that Breidel spoke with his wife before he decided to come out of his residence, and that she "calmed him down enough" so that he decided to come out and talk with the officer. There is no testimony in the record to support Breidel's assertion

[2] Initially, it appeared that Breidel may have waived his right to contest the circuit court's decision in the suppression motion because this is his first OMVWI offense and therefore, by pleading after the denial of the suppression motion, he would have waived this claimed defect. ***County of Racine v. Smith***, 122 Wis. 2d 431, 437, 362 N.W.2d 439, 442 (Ct. App. 1984). However, in this appeal, both parties agree that it was anticipated that if the suppression motion was not denied, an appeal would follow. Because La Crosse County does not raise waiver and the parties seem to have had an understanding of how this matter would proceed, that is not contrary to law, we do not deal with any potential waiver issue.

[3] The circuit court found, and the record reflects, that even if one were to conclude that Williams's placing his foot in the door jam of the door were an illegal entry under ***State v. Johnson***, 147 Wis. 2d 824, 434 N.W.2d 386 (1989), there was no seizure of any suppressible evidence due to the officer's placing his foot in the doorway. In ***Johnson***, the officer had no knowledge of the cocaine that formed the basis for Johnson's conviction until he illegally entered the residence. In contrast here, the evidence of Breidel's intoxication came from the two complainants, who remained in the street while the interaction between Williams and Breidel occurred.

on appeal that the "deputy pulled him out" of his residence or somehow forced him to speak when he had exercised his right to remain silent. That he initially did not wish to come outside and talk with Williams is clear from the record. However, it is also clear that he came out under his own power, with no physical assistance by the officer, but rather as a response to his wife's entreaty that he go outside and talk with Williams. Accordingly, our independent review of the record shows that Breidel exited his residence and spoke with Williams voluntarily, as a constitutional fact. Therefore, we affirm the circuit court's denial of his suppression motion.

By the Court.—Judgment and order affirmed.

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