COURT OF APPEALS
DECISION
DATED AND FILED

July 17, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2727 **Cir. Ct. No. 01-TR-2585**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EMMETT J. WIMMER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the court for Adams County: RICHARD O. WRIGHT, Judge. *Affirmed*.

¶1 DYKMAN, J.[1] Emmett Wimmer appeals from a judgment convicting him of operating a motor vehicle while intoxicated, in violation of WIS. STAT. 346.63(1)(a). Wimmer moved to suppress the results of a blood test and the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

statements he made at the scene of an accident, asserting that a police officer did not have probable cause to arrest him and that his statements were not given voluntarily. The court denied the motion and Wimmer pleaded no contest. The issues on appeal are whether probable cause to arrest Wimmer existed and whether the statements made by Wimmer at the scene of the accident were given voluntarily. Because we conclude that probable cause existed and the statements were voluntary, we affirm.

BACKGROUND

¶2 On November 21, 2001, at about 4:00 a.m., State Trooper Andrew Rau responded to a dispatch call regarding a single vehicle crash. The call stated that the driver of the vehicle, later identified as Emmett Wimmer, was injured and unconscious. Upon arriving at the scene, Rau found that the front end of Wimmer's car was angled out into the roadway, blocking the lane, with its headlights off. It appeared to Rau that Wimmer had driven off the road and hit the embankment, causing the front end of the car to spin all the way around. Rau walked to the vehicle and saw Wimmer slumped over asleep in the car with his feet in the driver compartment and his head on the passenger side of the car. Rau was unable to wake Wimmer immediately, but after he knocked on the passenger's side window of the car, Wimmer woke up.

¶3 When Rau opened the car door, he immediately smelled a strong odor of intoxicants coming from inside. He also saw some loose, unopened cans of beer in the car. Rau noticed that Wimmer was bleeding from his head around his eyebrow and alerted Wimmer to the bleeding. Wimmer denied that he was bleeding even after being assured a second time that he was. Rau then asked what had happened and Wimmer replied that he had drunk too much.

¶4 A few minutes later an ambulance arrived to transport Wimmer to the hospital. Rau spent about half an hour at the scene while the ambulance prepared to take Wimmer to the hospital, but did not continue to interact with or ask Wimmer any further questions.

¶5 Rau followed the ambulance to the hospital. Once there, Rau went to Wimmer's examining room to ask him more questions about the accident. When Rau entered the room, he could again smell a strong odor of intoxicants. Wimmer was strapped to a backboard and unable to get up. Rau asked Wimmer if he had been drinking that night and Wimmer replied that he had had six drinks since 10:00 p.m. Rau also asked what time the accident occurred to which Wimmer replied around 2:00 a.m. During their conversation Rau detected a strong odor of intoxicants coming from Wimmer's breath. Rau placed Wimmer under arrest for operating under the influence and instructed hospital personnel to draw blood for a blood alcohol test.

DISCUSSION

¶6 When reviewing a trial court's determination regarding constitutional principles we use two standards of review. First, the trial court's findings of fact must be evaluated, and will be upheld unless they are clearly erroneous. ***State v. Richardson***, 156 Wis. 2d 128, 137, 456 N.W.2d 830 (1990). Second, if we determine that the trial court's findings of fact are not clearly erroneous, the application of constitutional principles to those facts must be independently reviewed by the appellate court. ***State v. Hoyt***, 21 Wis. 2d 284, 305-06, 128 N.W.2d 645 (1964). In this case, the trial court's findings of fact are not clearly erroneous, therefore it is only necessary to consider whether those facts

satisfy the constitutional standards at issue, whether probable cause to arrest Wimmer existed and whether Wimmer's statements were given voluntarily.

¶7 We will first address the issue of whether Wimmer's statements at the scene of the accident were involuntary. A statement is considered involuntary if it is not "the product of rational intellect and free will." ***Blackburn v. Alabama***, 361 U.S. 199, 208 (1960). Any use of a defendant's involuntary statement during a criminal trial is a denial of due process of law even though there is ample evidence aside from the confession to support conviction. ***Mincey v. Arizona***, 437 U.S. 385, 398 (1978).

¶8 Wimmer argues that his statements at the scene of the accident were involuntary because they were given while he was still confused and in a daze, evidenced by his denial of the injuries he had sustained. To support his argument, Wimmer relies on ***Mincey***, claiming that the defendant's statements in ***Mincey*** were held to be involuntary because they were obtained while the defendant was still receiving treatment for serious injuries caused by an auto accident. ***Mincey***, 437 U.S. at 399-401. This interpretation, however, is incorrect. The statements in ***Mincey*** were held to be involuntary because it was clear that the defendant wished to not answer the questions, but due to the officer's improper conduct (taking advantage of the defendant's serious pain and isolation) the officer eventually broke the defendant's will and got him to answer the questions. ***Id.*** at 401. Courts have continuously pointed out the need for the existence of some sort of police coercion in order for a statement to be considered involuntary. *See, e.g.*, ***Colorado v. Connelly***, 479 U.S. 157, 167 (1986). The mere existence of pain and/or intoxication is insufficient to render a statement involuntary. ***State v. Clappes***, 136 Wis. 2d 222, 240, 401 N.W.2d 759 (1987). Without police conduct reflecting

an attempt to use some form of physical or psychological pressure during questioning, a statement cannot be considered involuntary. ***Id.*** at 225.

¶9 Rau did not engage in coercion of any type. Rau simply asked Wimmer if he was all right, pointed out he was bleeding from the head, and finally, asked what had happened. No further questioning occurred at the scene other than Rau's obtaining Wimmer's identification. The interaction was brief. Asking Wimmer if he was all right, followed by a simple inquiry as to what had happened, cannot be considered improper or a form of police coercion. Therefore, Wimmer's statements were given voluntarily.

¶10 We now turn to the question of whether Rau had probable cause to arrest Wimmer for driving while intoxicated. Under both the United States and Wisconsin Constitutions, a legal arrest must be supported by probable cause. ***State v. Riddle***, 192 Wis. 2d 470, 475-76, 531 N.W.2d 408 (Ct. App. 1995). In determining whether probable cause exists, the totality of the circumstances must be analyzed to determine whether the arresting officer's knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant was operating a motor vehicle while under the influence of an intoxicant. ***State v. Babbitt***, 188 Wis. 2d 349, 356, 525 N.W.2d 102 (Ct. App. 1994). The conclusion must be based on more than a suspicion that the defendant committed the crime, but the evidence need not reach the level that guilt is more likely than not. ***State v. Mitchell***, 167 Wis. 2d 672, 681-82, 482 N.W.2d 364 (1992).

¶11 Wimmer relies on a frequently cited footnote in ***State v. Swanson,*** 164 Wis. 2d 437, 453 n.6, 475 N.W.2d 148 (1991), to support his claim that Rau did not have probable cause to arrest him. The footnote states that the circumstances in both ***Swanson*** and ***State v. Seibel***, 163 Wis. 2d 164, 180-183,

471 N.W. 2d 226 (1991), gave rise to a reasonable suspicion, but did not constitute probable cause to arrest someone for driving under the influence because field sobriety tests were not administered. ***Swanson***, 164 Wis. 2d at 453 n.6. In ***Swanson***, those circumstances included unexplained erratic driving, the odor of alcohol on defendant's breath, and the time of the accident. ***Id.*** at 454 n.6. In ***Seibel***, the circumstances included unexplained erratic driving, the odor of intoxicants coming from the defendant and the passengers in his car, and the belligerence of the defendant. ***Seibel***, 163 Wis. 2d at 180-183. Wimmer argues that this case presents similar factors to those in ***Swanson*** and ***Seibel***, therefore, since Rau did not administer field sobriety tests, there was not probable cause for the arrest.

¶12 However, the information that constitutes probable cause is measured by the facts of each particular case. ***Mitchell***, 167 Wis. 2d at 682. We have previously explained that the language of the ***Swanson*** footnote is not as broad as Wimmer contends. "The ***Swanson*** footnote does not mean that under all circumstances the officer must first perform a field sobriety test, before deciding whether to arrest for operating a motor vehicle while under the influence of an intoxicant." ***State v. Wille***, 185 Wis. 2d 673, 684, 518 N.W.2d 325 (Ct. App. 1994). "In some cases, the field sobriety tests may be necessary to establish probable cause; in other cases, they may not." ***State v. Kasian***, 207 Wis. 2d 611, 622, 558 N.W.2d 687 (Ct. App. 1996). Wimmer exhibited enough indicia of intoxication to give rise to probable cause without the administration of a field sobriety test. The facts of the present case are much stronger than those in ***Swanson*** and ***Seibel***: Wimmer had apparently veered off the road at 2:00 a.m., he was unconscious when Rau arrived, his breath smelled of alcohol, he had

unopened cans of beer in his car, admitted to having had too much to drink, and stated that he had had six drinks in the four hours leading up to the accident.

¶13 Under the totality of the circumstances, we conclude that a reasonable police officer would believe that Wimmer was operating a motor vehicle while intoxicated. Therefore, Rau had probable cause to arrest Wimmer. Because we hold that Wimmer's statements were voluntary and probable cause to arrest Wimmer existed, the trial court correctly denied Wimmer's motion to suppress.

By the Court.—Judgment affirmed.

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