COURT OF APPEALS
DECISION
DATED AND FILED

May 8, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2992

Cir. Ct. Nos. 01-TR-10417
01-TR-10418

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

COUNTY OF DANE,

PLAINTIFF-RESPONDENT,

V.

DANIEL P. O'CONNELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: C. WILLIAM FOUST, Judge. *Reversed and cause remanded with directions*.

¶1 LUNDSTEN, J.[1] Daniel P. O'Connell appeals a judgment of the circuit court finding him guilty of one count of operating a motor vehicle while intoxicated as a first offense. O'Connell argues that his motion to suppress

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

evidence should have been granted because the arresting officer did not possess probable cause to believe that O'Connell was driving in an area where drunk driving could have been committed, that is, that he was driving on a "highway" or road held out to the public. While we question why O'Connell focuses on *probable cause* rather than reasonable suspicion, we agree with O'Connell that the officer did not possess sufficient facts to support a belief that O'Connell was driving on a "highway" or road held out to the public and, therefore, we reverse his conviction and remand for further proceedings.

Background

¶2 On June 14, 2001, a police officer responded to a report of a one-vehicle accident on Northshore Bay Drive, portions of which are private. The officer contacted the driver of the vehicle, O'Connell. O'Connell admitted he had been drinking and reported crashing his vehicle into a tree after "he left a friend's house down the road and … swerved to miss a deer." The officer detained O'Connell and administered several field sobriety tests and a preliminary breath test. The officer then arrested O'Connell for driving while under the influence of an intoxicant, and a subsequent chemical test revealed a blood alcohol level of .12%.

¶3 O'Connell moved to suppress the evidence obtained at the scene of the accident and the subsequently obtained blood alcohol evidence on the ground that the police officer did not have probable cause to believe O'Connell was driving in an area in which drunk driving could have been committed.

¶4 The trial court denied O'Connell's motion to suppress evidence. Following a trial on stipulated evidence, the trial court found O'Connell guilty of

operating a motor vehicle while under the influence of an intoxicant as a first offense.

Discussion

¶5 For reasons not apparent on review, O'Connell frames the dispute solely in terms of lack of *probable cause*. However, we find no indication that the initial detention in this case (encompassing the field sobriety tests and the preliminary breath test) needed to be supported by more than reasonable suspicion. Accordingly, if we are to overturn the trial judge with respect to the evidence obtained at the accident scene prior to O'Connell's arrest, we must conclude the officer lacked reasonable suspicion, not that she lacked probable cause. Of course, the chemical test after O'Connell's arrest needed to be supported by probable cause, but O'Connell sought and continues to seek suppression of all evidence obtained after the initial detention.

¶6 O'Connell's decision to argue this matter on appeal solely in terms of probable cause does not cause any practical problem for our analysis. All of his arguments are easily translated into a reasonable suspicion framework. Further, for reasons that will be apparent, our conclusion that the officer lacked reasonable suspicion for the initial detention equally supports the conclusion that the officer lacked probable cause supporting the subsequent arrest and chemical test. Accordingly, we will limit our discussion to whether the officer possessed reasonable suspicion.

¶7 The disputes on appeal do not involve whether the officer possessed reasonable suspicion to believe O'Connell was intoxicated or that he was operating a vehicle. Rather, our attention is directed solely to whether the officer had reasonable suspicion to believe O'Connell was driving on a "highway" or road

held out to the public at the time or shortly prior to the time he swerved off the road and hit a tree.

¶8 Drunk driving laws apply to "highways" and to "all premises held out to the public for use of their motor vehicles." WIS. STAT. § 346.61. The prosecutor has the burden of proving that a suspected drunk driver was driving on a "highway" or on premises held out to the public. *See* ***City of Kenosha v. Phillips***, 142 Wis. 2d 549, 558, 419 N.W.2d 236 (1988). "When we review a motion to suppress evidence, we will uphold the circuit court's findings of fact unless they are clearly erroneous. However, the application of constitutional principles to the facts is a question of law we decide without deference to the circuit court's decision." ***State v. Fields***, 2000 WI App 218, ¶9, 239 Wis. 2d 38, 619 N.W.2d 279 (citations omitted). A law enforcement officer may lawfully conduct an investigatory stop if, based upon the officer's experience, he or she reasonably suspects "'that criminal activity may be afoot.'" ***State v. Williams***, 2001 WI 21, ¶21, 241 Wis. 2d 631, 623 N.W.2d 106 (quoting ***Terry v. Ohio***, 392 U.S. 1, 30 (1968)). Reasonable suspicion is dependent on whether the officer's suspicion was grounded in specific, articulable facts, and reasonable inferences from those facts, that an individual was committing a crime. ***State v. Waldner***, 206 Wis. 2d 51, 55-56, 556 N.W.2d 681 (1996).

¶9 This appeal raises two questions: (1) Did the police officer possess reasonable suspicion to believe that the part of Northshore Bay Drive where the officer first made contact with O'Connell was "held out to the public"? and, if the answer to the first question is no, (2) Did the officer possess reasonable suspicion to believe O'Connell had been driving on a "highway" just prior to his one-car accident?

Whether the Police Officer Possessed Reasonable Suspicion to Believe that the Portion of Northshore Bay Drive Where O'Connell Collided with a Tree was "Held Out to the Public"

¶10 With respect to this issue, the facts are undisputed and thus whether the section of the road involved here was held out to the public is a question of law. *See* ***Phillips***, 142 Wis. 2d at 559 n.2. The relevant facts are as follows. A police officer was summoned to Northshore Bay Drive to investigate a one-car accident. The officer reached the accident site by driving eastbound on the western portion of Northshore Bay Drive. Although the western portion of Northshore Bay Drive is a road open to the public, there is a point at which the road is posted as "Private." As the officer drove east on Northshore Bay Drive toward the site of the accident, she passed a portion of the road with a turn-around. Adjacent to the road that proceeded east past the turn-around is a prominent yellow sign stating:

PRIVATE
ROAD
2ND WARD BEACH
PROP.
OWNERS

Directly below the sign was another prominent sign, stating:

NO
TRESPASSING

The officer observed the turn-around area and both of these signs. Also at this point, there was a sign listing twenty-eight residences. The officer testified that she saw this sign, but did not read it. In keeping with our practice of assuming fact finding supporting the trial judge's decision, we will assume the officer noted that the sign listed approximately twenty-eight residences. The officer proceeded

approximately 500 yards on this road and encountered O'Connell and his damaged car. Up to this point on the road, she saw no residences. O'Connell's car was facing westbound and he told the officer he was coming from a friend's house. Prior to her contact with O'Connell, the officer had never been on Northshore Bay Drive.

¶11 O'Connell argues that, based on the signs posted on Northshore Bay Drive, the officer had no reason to believe that the portion of Northshore Bay Drive where she found O'Connell was a "highway" or a road "held out to the public." We agree.

¶12 The supreme court considered the meaning of "held out to the public" for purposes of WIS. STAT. § 346.61 in ***Phillips***, 142 Wis. 2d 549. The supreme court interpreted the common sense test of "held out to the public" to mean: "Is it the intent of the person or corporation in control of the premises that they be available to the public for the use of their motor vehicles?" ***Id***. at 557. This court in ***City of La Crosse v. Richling***, 178 Wis. 2d 856, 505 N.W.2d 448 (Ct. App. 1993), clarified the test for determining if premises are "held out to the public": "[T]he appropriate test is whether, on any given day, potentially any resident of the community with a driver's license and access to a motor vehicle could use the [premises] in an authorized manner." ***Id***. at 860. In ***Richling***, we concluded that a parking lot, even if it was restricted only to customers, was "held out to the public" under § 346.61. ***Id***. at 859-60.

¶13 At the conclusion of the suppression hearing, the trial court denied O'Connell's suppression motion and provided the following explanation:

> The more interesting question in all of this is whether or not ultimately this is a location where this offense can be committed. That's not the question here

today for me. The question I have is whether or not this officer had probable cause to think an offense had been committed.

She went past a sign saying, "Private Road, 2nd Ward Beach Property Owners." And she says she didn't know if that meant this was a private road or if there was a private road up ahead. There are about 28 property owners out there on Reynolds Avenue, according to the top photograph of Exhibit 5, among them the former sheriff.

She said there were no houses on the part of the road she drove on. She knew there were houses down on Reynolds Avenue. Apparently, she knows or knew that Reynolds Avenue is a public—or, is a highway that is open to the public.

From the map I have, it doesn't look like there is any way to get to Reynolds Avenue except on Northshore Bay Drive—

[Defense Counsel]: She also testified, Your Honor—I'm sorry to interrupt—that she hadn't ever been on Reynolds [Avenue] and didn't know anything about that before, either.

THE COURT: She did testify to that. But, she hasn't [seen] any houses yet, as I understand it. And she went by a sign that tells you somewhere down the road, there are 28 houses.

You may have an issue for trial. But, I think for purposes of probable cause, the officer may not have known exactly what she had. It sure looks like the same kind of road that continues beyond that private road sign. There is notice that there are all those houses down there from the owner—the big sign with all the owners' names. She's told by him while she's there that he was coming from a friend's house. It sounds to me like it's access to a number of houses that's not necessarily exclusive or closed to the public.

For purposes of probable cause, I think that she had reason to think she was in a place where the offense could be committed. So, I'm going to deny the motion to suppress.

We interpret the trial court's explanation as a conclusion that the officer possessed "probable cause" to believe O'Connell was driving on a portion of Northshore Bay Drive that was held out to the public *when he went off the road and collided with the tree*. We disagree, both when the question is viewed in terms of probable cause and when viewed in terms of reasonable suspicion.

¶14 Although the officer had reason to believe the road provided access to a number of private residences, the no trespassing sign and the private road sign would have conveyed to a reasonable officer that she had driven onto a private road, that is, a road not "held out to the public" under the ***Richling*** test. These signs would convey to a reasonable driver that only the residents, authorized persons, and guests were permitted on that portion of Northshore Bay Drive, rather than "potentially any resident of the community with a driver's license." ***Richling***, 178 Wis. 2d at 860.

¶15 The County asks us to compare this case to ***State v. Carter***, 229 Wis. 2d 200, 598 N.W.2d 619 (Ct. App. 1999). In ***Carter***, this court considered whether a closed gas station's parking lot was "held out to the public."[2] This court concluded that the gas station's parking lot was held out to the public, reasoning:

> The premises is bordered by two city streets and abuts an alley in the rear. As such, it is easily accessed by the public. Although there were "No Parking" signs on the premises, there were not any signs prohibiting trespassing or passing through the lot. Nor had the owner taken any steps, such as fencing, to keep the public off the property. Nor was there evidence that the owner had ever towed any

[2] In ***State v. Carter***, 229 Wis. 2d 200, 598 N.W.2d 619 (Ct. App. 1999), the defendant was charged with hit-and-run contrary to WIS. STAT. § 346.67, which applies "upon all premises held out to the public for use of their motor vehicles." WIS. STAT. § 346.66. This court interpreted the phrase "held out to the public" by considering how the ***Phillips*** and ***Richling*** courts had interpreted the same phrase in WIS. STAT. § 346.61. ***Carter***, 229 Wis. 2d at 205-09.

> vehicle from the property. In addition, the owner had posted a "For Sale" sign on the property, making it reasonable to infer that the public was welcomed or invited to enter the premises and inspect the property.

Id. at 208. However, as the County tacitly acknowledges, there is a key distinction. In ***Carter***, there were no signs prohibiting trespassing or passing through the lot. Here, there are clear signs prohibiting exactly that.

¶16 The County argues that "[k]nowing that Northshore Bay Drive connects two public roads, the owner of the premises between these roads did not take any additional steps to exclude the driving public other than posting the no trespassing sign and a listing of residents on Reynolds [Avenue]." The County further contends that "the owners in this case took no step[s] 'such as fencing, to keep the public off the property.'" However, even if we assume that the officer knew that Reynolds Avenue is a public road and that the disputed stretch of Northshore Bay Drive is the only connecting road, it does not follow that members of the general public would reasonably believe they were free to ignore the "Private Road" and "No Trespassing" signs without fear of consequence. Certainly neither the ***Phillips*** test nor the ***Richling*** test requires a private landowner to fence off private premises to demonstrate that they are not held out to the public.

¶17 We agree with the apparent assumption of the trial court and the County that some number of unauthorized people ignore the posted signs, particularly because the sign listing residences included multiple residences. We agree that it would be reasonable for the officer to assume the same thing. But the question here is whether any reasonable person would think the following is a road *held out to the public*: a road that is posted with prominent "Private Road" and "No Trespassing" signs and which is posted at a point just after a turn-around

which provides a convenient turn-around point in the road. We think it apparent that any reasonable person would conclude the road was privately owned and that the owners were proclaiming that uninvited guests should not proceed. Consequently, we reverse the trial court's determination that the officer had probable cause (and its implicit determination that the officer had reasonable suspicion) to believe that O'Connell was on a road held out to the public at the location of his one-car accident.[3]

Whether the Police Officer had a Reasonable Suspicion to Believe that O'Connell had been Driving on a "Highway" Prior to his Accident

¶18 O'Connell contends that the record does not support a conclusion that the arresting officer was aware of facts supplying reasonable suspicion to believe that O'Connell had been driving on a "highway" just prior to his accident. Based on somewhat different reasoning, we agree with O'Connell that the record is insufficient in this regard.

¶19 At some point east of the accident site, Northshore Bay Drive connects with Reynolds Avenue. Reynolds Avenue is accessed only through Northshore Bay Drive. At the suppression hearing, the officer testified that Reynolds Avenue is a "public highway"; that there are no houses on Northshore Bay Drive; that Reynolds Avenue does have houses alongside it; that O'Connell's

[3] Understandably, the County does not argue that the situation here falls under the provision in WIS. STAT. § 346.61 directing that drunk driving laws apply to "all premises provided to tenants of rental housing in buildings of 4 or more units for the use of their motor vehicles, whether such premises are publicly or privately owned and whether or not a fee is charged for the use thereof." Although it can be argued that this provision covers a situation analogous to the one present in this case, by its terms the provision only applies to "rental housing." If the legislature had intended to create a broader exception, it could easily have done so. And, as this case demonstrates, a broadening of this language may be desirable.

car was facing west at the accident scene, suggesting he was coming from the direction of Reynolds Avenue; and, finally, that O'Connell told the officer that O'Connell crashed his vehicle after "he left a friend's house down the road and … he had swerved to miss a deer."

¶20 If we assumed that the officer knew all of these facts at the time she encountered O'Connell, we would have no trouble affirming the trial court. In that event, the officer would have possessed a reasonable suspicion to believe O'Connell had very recently been driving on a public road and was intoxicated at that time. However, because the trial court did not rely on this theory when denying the suppression motion, we examine the record to determine whether there is a reason to assume the court implicitly found that the officer was aware of the status of Reynolds Avenue at the time she encountered O'Connell.[4]

¶21 In the absence of specific fact finding, this court normally assumes facts, reasonably inferable from the record, in a manner that supports the trial court's decision. *See*, *e.g.*, ***State v. Wilks***, 117 Wis. 2d 495, 503, 345 N.W.2d 498 (Ct. App.), *aff'd*, 121 Wis. 2d 93, 358 N.W.2d 273 (1984). Here, there is good reason to doubt that the trial court implicitly found that the officer knew the status of Reynolds Avenue when she encountered O'Connell.

¶22 Although the officer testified on direct examination that there are no houses on Northshore Bay Drive, that Reynolds Avenue connects with Northshore

[4] Indeed, if the trial court had believed that the officer knew Reynolds Avenue was a public road at the time of the arrest, it would have been much simpler for the court to find that probable cause was supplied by the fact that the officer had good reason to believe that O'Connell had just been driving on Reynolds Avenue, rather than grapple with whether there was probable cause to believe the posted "Private" road adjacent to the accident scene was actually open to the public.

Bay Drive, that Reynolds Avenue is a public road, and that Reynolds Avenue has houses alongside it, she did not indicate when she learned this information, and the context of the questions does not suggest she was asserting that she knew this information at the time of O'Connell's arrest.

¶23 On cross-examination, the officer was asked if, prior to her encounter with O'Connell, she had ever been on Reynolds Avenue or Northshore Bay Drive, and she responded "no." The officer was asked if, prior to that time, she had researched whether either Reynolds Avenue or Northshore Bay Drive were public or private roads, and she responded "no." The readily apparent thrust of these questions was to establish that the officer learned information about Reynolds Avenue after the night of the arrest. Neither the officer's responses nor redirect examination provides any suggestion that the officer knew this information during the pertinent time frame. Both on direct and redirect, the prosecutor simply asked whether the officer "believed" the roads in the area were held out to the public. The officer's subjective belief is not relevant for purposes of determining whether the officer possessed a reasonable suspicion. *See* ***State v. Baudhuin***, 141 Wis. 2d 642, 651, 416 N.W.2d 60 (1987) ("As long as there was a proper legal basis to justify the intrusion, the officer's subjective motivation does not require suppression of the evidence or dismissal.").

¶24 We note that, when reviewing a suppression ruling, we are not limited to the record before the circuit court at the time of the suppression ruling. Other information produced before or after the suppression hearing may be used to support the circuit court's decision. *See* ***State v. Gaines***, 197 Wis. 2d 102, 106-07 n.1, 539 N.W.2d 723 (Ct. App. 1995). However, the transcript of the trial is not included in the appellate record, and the County does not direct our attention to any information outside the suppression hearing supporting its position. Our

independent review does not disclose any information indicating that the officer knew the status of Reynolds Avenue at the time of O'Connell's arrest.

¶25 For the above reasons, we decline to conclude that the trial court implicitly found that the officer was aware of the status of Reynolds Avenue at the time of her investigation. Thus, the officer had no reason to suspect that O'Connell had been driving on a "highway" just prior to his one-car accident. Accordingly, the trial court erroneously denied O'Connell's motion to suppress evidence and, therefore, we reverse the judgment, reverse the court's suppression order, and remand for further proceedings consistent with this opinion.

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

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