COURT OF APPEALS
DECISION
DATED AND FILED

March 17, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1553-CR **Cir. Ct. No. 2008CF555**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ARTHUR J. CAIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Monroe County: MICHAEL J. MCALPINE, Judge. *Affirmed*.

Before Vergeront, P.J., Sherman and Blanchard, JJ.

¶1 PER CURIAM. Arthur Cain appeals judgments convicting him of two counts of disorderly conduct, one count of operating a motor vehicle after revocation (OAR), and fifth offense operating a motor vehicle while intoxicated (OWI). Cain contends that: (1) police lacked probable cause to arrest him for

disorderly conduct in his residence, requiring suppression of the evidence obtained following his arrest; and (2) the victim's in-court identification of Cain was inadmissible because it was tainted by the victim's inadmissible prior out-of-court identification. The State responds that: (1) police had probable cause to arrest Cain for OWI, hit-and-run, or disorderly conduct, any one of which validates the arrest, and also had reasonable suspicion to support a subsequent blood draw; and (2) the in-court identification was sufficiently independent of the out-of-court identification to allow admission of the former. We conclude that police had probable cause to arrest Cain for hit-and-run, and thus the arrest was valid; that police had reasonable suspicion for the blood draw; and that the in-court identification had a sufficiently established independent source to warrant admission. We affirm.

Background

¶2 On December 20, 2008, police received a report of a hit-and-run in a store parking lot just outside Sparta, Wisconsin. One officer responded to the scene of the accident and spoke with the victim. Based on information provided to dispatch, including the description of the offending driver and vehicle and the vehicle's license plate number, two other officers proceeded to Cain's residence. Police located a vehicle matching the description of and bearing the reported license plate number of the offending vehicle in Cain's garage, and noted the vehicle's hood was warm to the touch and damaged. There was fresh snow on the vehicle and there were tire tracks in the newly fallen snow leading to the garage.

¶3 Police then knocked on Cain's front door. When Cain answered the door, the police obtained permission to enter the home, and then questioned Cain about the accident. At first, Cain was cooperative, and stated he had not driven his

car that day. When police continued to question Cain, Cain began yelling and using profanities. The police then arrested Cain, telling him he was arrested for disorderly conduct. Cain continued to use profanities and engaged in disruptive behavior at the jail and throughout an ensuing blood draw at a hospital.

¶4 Four days later, the hit-and-run victim went to the police station and participated in a photograph lineup identification. He was shown a layout of five or six photographs of African-American males, which included a photograph of Cain. The victim identified Cain as the driver.

¶5 The State charged Cain with disorderly conduct, OWI, operating a motor vehicle with a prohibited alcohol concentration, OAR, and hit-and-run. Cain moved to suppress the evidence obtained following his arrest, including the evidence obtained through the blood draw, arguing police lacked probable cause for the arrest. He also moved to suppress the victim's photograph identification and any subsequent in-court identification of Cain, arguing that the photograph identification was unconstitutional. The circuit court denied Cain's motion to suppress evidence obtained as a result of the arrest, and found that while the photograph identification procedure was impermissibly suggestive, the victim's identification of Cain was sufficiently reliable to allow identification at trial. Following a jury trial, Cain was convicted of disorderly conduct, OWI, and OAR. Cain appeals.

Standard of Review

¶6 Whether police have probable cause for an arrest or reasonable suspicion for a blood draw are questions of constitutional fact. *See* ***State v. Secrist***, 224 Wis. 2d 201, 208, 589 N.W.2d 387 (1999); ***State v. Daggett***, 2002 WI App 32, ¶7, 250 Wis. 2d 112, 640 N.W.2d 546. Whether an in-court identification

is admissible despite an inadmissible out-of-court identification is also a question of constitutional fact. *See* ***State v. McMorris***, 213 Wis. 2d 156, 164-65, 570 N.W.2d 384 (1997); *see also* ***State v. Nawrocki***, 2008 WI App 23, ¶17, 308 Wis. 2d 227, 746 N.W.2d 509. We review questions of constitutional fact under a two-part test: we review a circuit court's findings of historical fact under the clearly erroneous standard, but we review whether those facts meet constitutional principles de novo. ***McMorris***, 213 Wis. 2d at 165.

Discussion

¶7 Cain argues first that police lacked probable cause to arrest him for disorderly conduct inside his home because there were no facts indicating a possibility that Cain's conduct would cause a disturbance to the public. *See* WIS. STAT. § 947.01 (2009-10);[1] *see also* ***State v. Schwebke***, 2002 WI 55, ¶30, 253 Wis. 2d 1, 644 N.W.2d 666. Thus, he contends, all evidence obtained as a result of his arrest must be suppressed under the Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution. The State contends that police had probable cause to arrest Cain for disorderly conduct based on his conduct in his home, and also had probable cause to arrest Cain for OWI and hit-and-run, and that probable cause for any of these offenses supports the arrest. We conclude that police had probable cause to arrest Cain for hit-and-run, supporting the arrest, and that we therefore need not reach Cain's argument that police lacked probable cause to arrest for disorderly conduct.

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶8 Police have probable cause to arrest when the facts establish that police objectively possess "that quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed a crime." ***State v. Koch***, 175 Wis. 2d 684, 701, 499 N.W.2d 152 (1993) (citation omitted). If police have probable cause to arrest for any crime, it is irrelevant whether they properly articulate the crime for which the defendant is lawfully arrested. *See* ***State v. Repenshek***, 2004 WI App 229, ¶¶10-12, 277 Wis. 2d 780, 691 N.W.2d 369.

¶9 The question, then, is whether the facts known to the police at the time of Cain's arrest established probable cause to arrest for any crime, not whether the facts supported probable cause to arrest for the crime articulated by the police. We agree with the State that the facts established probable cause to arrest for hit-and-run.

¶10 Under WIS. STAT. § 346.67(1)(a), "[t]he operator of any vehicle involved in an accident resulting in … damage to a vehicle which is … attended by any person … shall remain at the scene of the accident until the operator has [provided identifying information] to the … person attending any vehicle collided with." Failure to comply with § 346.67(1) is a misdemeanor punishable by up to six months' imprisonment. *See* WIS. STAT. § 346.74(5)(a).

¶11 Here, the following facts were provided at the motion hearing. On December 20, 2008, in the early afternoon, police responded to a report of a hit-and-run accident in a store parking lot just outside Sparta, Wisconsin. Dispatch provided the officers with a description of the offending vehicle as a gold Chrysler with the license plate AJCAIN, driven by an African-American male. The police

were familiar with the vehicle and knew that it was registered to Cain, who is African-American, and knew Cain to drive the vehicle.

¶12 Police then proceeded to Cain's residence, located the described vehicle in the garage, and noted the vehicle's hood was warm and had some damage. Police also noted there was fresh snow on the vehicle as well as tire tracks in the newly fallen snow in the driveway leading to the garage. Police made contact with Cain and questioned him about the accident inside his residence. Cain stated his vehicle had not left his home that day, and nobody else would have driven it.[2] After Cain began yelling and using profanities, police placed Cain under arrest.

¶13 Cain asserts that these facts did not establish a basis for police to conclude that Cain had been the driver of his vehicle, and thus the police lacked probable cause to arrest him for hit-and-run. We are not persuaded. While police could have inferred that someone else had driven Cain's vehicle, an equally reasonable inference was that Cain himself had been the driver of the vehicle. "When a police officer is confronted with two reasonable competing inferences, one justifying arrest and the other not, the officer is entitled to rely on the reasonable inference justifying arrest." ***State v. Kutz***, 2003 WI App 205, ¶12, 267 Wis. 2d 531, 671 N.W.2d 660. We agree with the State that the facts set forth at the motion hearing were sufficient to support a reasonable belief that Cain had probably violated WIS. STAT. § 346.67(1).

[2] One officer testified that at one point Cain said something along the lines of "I'm not saying the car didn't leave," and then continued to assert he had not gone anywhere.

¶14 We also agree with the State that the facts at the motion hearing established the requisite reasonable suspicion to support a warrantless blood draw following Cain's arrest. *See* ***Repenshek***, 277 Wis. 2d 780, ¶¶15-17 ("[B]lood may be drawn in a search incident to a lawful arrest for a non-drunk-driving offense if the police reasonably suspect that the defendant's blood contains evidence of a crime."). As we have explained, Cain was validly arrested for hit-and-run. The following facts at the motion hearing established reasonable suspicion that Cain's blood contained evidence of OWI. Police made contact with Cain at his residence several minutes after receiving the report of the hit-and-run involving Cain's automobile; the automobile involved in the accident was parked in Cain's garage, and there were fresh tire tracks in the snow leading to the garage; and police detected a strong odor of intoxicants on Cain, noting his speech was extremely slurred and he was stumbling back and forth during their conversation.[3] Thus, we perceive no basis to suppress the evidence obtained through the blood draw.

¶15 Next, Cain contends that the circuit court erred in admitting the victim's in-court identification of Cain without establishing that the in-court identification was untainted by the inadmissible out-of-court identification. The

[3] Cain does not argue separately that police lacked reasonable suspicion for the blood draw following a valid arrest for hit-and-run. Rather, he contends that police did not have probable cause to arrest Cain for any offense because they lacked a basis to identify Cain as the driver of his vehicle, and for the same reason lacked reasonable suspicion for a blood draw. As explained, we reject this contention. Cain does not raise any other argument to suppress the evidence obtained in the blood draw, such as an objection to the procedures employed.

State argues that the in-court identification was admissible despite the inadmissible photograph identification.[4]

¶16 "The admissibility of an in-court identification following an inadmissible out-of-court identification depends on whether [the in-court identification was discovered] by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." ***Nawrocki***, 308 Wis. 2d 227, ¶30 (citation omitted). Our focus is whether "the in-court identification ... rest[s] on an independent recollection of the witness's initial encounter with the suspect." ***Id.*** (citation omitted). The State has the burden to prove "by clear and convincing evidence that the in-court identification was not tainted by the inadmissible out-of-court identification." ***Id.*** We consider the following seven factors, adopted from ***United States v. Wade***, 388 U.S. 218, 241 (1967):

[4] The State also contends that the out-of-court identification was admissible because, even though the photograph identification procedure was impermissibly suggestive, the photograph line-up was otherwise reliable under the totality of the circumstances. *See* ***State v. Drew***, 2007 WI App 213, ¶13, 305 Wis. 2d 641, 740 N.W.2d 404. The State asserts that Cain's characterization of the court's ruling on his motion to suppress as excluding the out-of-court identification is questionable. It points out that the court said that the photograph lineup was impermissibly suggestive, but that the victim identification was "otherwise reliable under the totality of the circumstances," so that the victim would be allowed to identify Cain "during the course of the trial." The State also points to the following from trial: Cain elicited testimony from the victim regarding his photograph identification and questioned the detective who administered the photograph lineup regarding the procedure; and, when the State subsequently elicited testimony about the photograph lineup, Cain did not object.

However, Cain does not argue in his briefs that the out-of-court identification was impermissibly used at trial. In Cain's initial brief, he argues only that the in-court identification was not sufficiently distinguishable from the excluded out-of-court identification; in his reply brief, he disputes the State's argument that the out-of-court identification was admissible, without contending that the State impermissibly introduced the out-of-court statement at trial. Because Cain's substantive argument is that the in-court identification was inadmissible, and Cain does not argue that the out-of-court identification was impermissibly admitted at trial, we address only the admissibility of the in-court identification.

> (1) the prior opportunity the witness had to observe the alleged criminal activity; (2) the existence of any discrepancy between any pre-lineup description and the accused's actual description; (3) any identification of another person prior to the lineup; (4) any identification by picture of the accused prior to the lineup; (5) failure to identify the accused on a prior occasion; (6) the lapse of time between the alleged crime and the lineup identification; and (7) the facts disclosed [to the reviewing court] concerning the conduct of the lineup.

Nawrocki, 308 Wis. 2d 227, ¶38 (citation omitted).

¶17 Cain contends that the court erred by allowing the in-court identification, based on its determination that the identification was reliable under the totality of the circumstances despite the inadmissible out-of-court identification, rather than applying the proper test of whether the inadmissible out-of-court identification tainted the in-court identification. He argues that the circuit court did not consider the issue of "taint" or the seven factors set forth in ***Nawrocki***, requiring a remand to allow the circuit court to make the proper determination. However, we review de novo whether the facts as found by the circuit court establish that the in-court identification had an independent source from the inadmissible out-of-court identification. *See* ***McMorris***, 213 Wis. 2d at 164-66. Because the circuit court here made factual findings sufficient for our analysis, we need not remand for further proceedings in the circuit court. *See* ***Nawrocki***, 308 Wis. 2d 227, ¶38.

¶18 Following the suppression hearing, the circuit court made the following findings of fact regarding the victim identification.[5] The victim was in a

[5] Cain does not argue that any of the circuit court's factual findings were clearly erroneous.

business parking lot when his vehicle was struck by another vehicle. It was daylight and lightly snowing. Both drivers exited their vehicles, and they were about twenty feet apart. The victim, who needs glasses only for reading, had good visibility of the other driver. The drivers exchanged a few words, and the victim observed the other driver for about thirty seconds. The driver of the striking vehicle then left. The victim described the driver of the other vehicle as an African-American male with a full white beard, bald, and not wearing a hat or bulky coat. Four days later, the victim participated in a photograph lineup identification at the police station. The victim was shown a layout of five or six photographs of African-American males, including a photograph of Cain. Cain's photograph was the only one of an individual with a white beard. The victim immediately identified Cain as the driver.

¶19 On these facts, we conclude that the victim's in-court identification of Cain was sufficiently purged of the taint of the inadmissible out-of-court identification. *See* ***id.***, ¶30. In their totality, the seven ***Wade*** factors support admissibility: (1) Prior to the photograph lineup identification, the victim had a sufficient opportunity to observe the offender, viewing him clearly for thirty seconds at a distance of about twenty feet; (2) there were no discrepancies between the victim's pre-lineup identification and Cain's actual description; (3) the victim did not identify any other person prior to the lineup; (4) the photograph lineup was the victim's first picture identification of Cain; (5) the victim had not previously failed to identify Cain as the offender; (6) there were only four days between the incident and the photograph lineup; and (7) the facts of the photograph lineup indicated that the lineup was impermissibly suggestive because Cain was the only pictured individual with a white beard. *See* ***id.***, ¶38 (citing ***Wade***, 388 U.S. at 241).

¶20 We are satisfied that the victim's in-court identification "rest[ed] on an independent recollection of [his] initial encounter with the suspect." ***Id.***, ¶30. Thus, the State has "carrie[d] the burden of showing by clear and convincing evidence that the in-court identification[] [was] based upon observations of the suspect other than the out-of-court identification." *See* ***id.***, ¶32 (citation omitted). Accordingly, we have no basis to disturb the circuit court's decision to allow the in-court identification. We affirm.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.