COURT OF APPEALS
DECISION
DATED AND FILED

June 21, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP3109-CR **Cir. Ct. No. 2009CT4480**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

OMAR F. OFARRIL-VALEZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: ELLEN R. BOSTROM, Judge. *Affirmed*.

¶1 BRENNAN, J.[1] Omar F. Ofarril-Valez appeals a judgment entered after the circuit court denied his suppression motion, arguing that the police officer lacked probable cause to arrest him for operating under the influence of an

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

intoxicant and that therefore the blood test performed incident to arrest must be suppressed. We conclude that the police officer had probable cause for the arrest and affirm.

BACKGROUND

¶2 Officer Tyler Jaeger testified at the suppression hearing that at approximately 2:30 a.m., on Saturday, September 19, 2009, he was on a routine patrol when he saw a blue Ford Escort driving on South 76th Street going three or four miles an hour over the speed limit. Officer Jaeger, driving a marked squad car, followed the Escort, pacing its speed and checking on the registration of the vehicle's plates. The check revealed that the driver's license of the vehicle's listed owner had been revoked. Officer Jaeger determined that the sex and age of the owner listed on the registration matched the driver. Officer Jaeger then stopped the driver, Ofarril-Valez.

¶3 Officer Jaeger noticed that Ofarril-Valez smelled of a "light odor of intoxicants," which even the french fries Ofarril-Valez was eating did not mask. Officer Jaeger testified that he also observed that Ofarril-Valez's eyes were glassy. Ofarril-Valez at first told Officer Jaeger that he had not been drinking but then said that he had one beer earlier in the evening. Believing Ofarril-Valez to be impaired, Officer Jaeger asked him to step out of his vehicle. Officer Jaeger had to ask Ofarril-Valez three times to get out of his vehicle before he complied.

¶4 Officer Jaeger explained to Ofarril-Valez that he wanted him to perform a series of tests. Officer Jaeger testified that he had been trained and certified in the administration of field sobriety tests. On the walk and turn test, before Officer Jaeger could finish explaining the test, Ofarril-Valez started walking. Officer Jaeger testified that in his experience an inability to follow directions

indicated a subject was impaired. He acknowledged that Ofarril-Valez completed that test without other errors.

¶5 On the one-legged stand test, during which the subject must stand on one leg for thirty seconds, Officer Jaeger reported that Ofarril-Valez put his foot down at the five second mark, then completed the test without further incident.

¶6 On the horizontal gaze nystagmus ("HGN") test, during which the subject is instructed to follow the officer's pen with his eyes and the officer observes the subject's pupils for bouncing or jerkiness, Officer Jaeger saw six of six indicators of impairment. Ofarril-Valez exhibited a lack of smooth pursuit in both the left and right pupils; he presented with nystagmus at maximum deviation of both the left and right pupils; and he presented with the onset of nystagmus prior to forty-five degrees in both the left and right pupils.

¶7 Officer Jaeger then asked Ofarril-Valez to perform a preliminary breath test ("PBT"). Ofarril-Valez blew faintly into the tube but did not seal his lips around the tube. The sample was insufficient for a reading, further indicating to Officer Jaeger that Ofarril-Valez was impaired.

¶8 Officer Jaeger testified that he then placed Ofarril-Valez under arrest for operating a motor vehicle while under the influence of an intoxicant ("OWI"). Ofarril-Valez was conveyed to a hospital and blood was drawn showing an alcohol concentration of 0.134%. He was then charged with OWI 2nd.

¶9 Ofarril-Valez provided his account of the incident during his testimony at the suppression hearing. Ofarril-Valez testified that the officer was speaking too fast for him to understand and that he is still learning English, explaining why he did not immediately get out of the vehicle when the police officer

asked him to and why he started the walk and turn test too early. Ofarril-Valez also testified that he dropped his foot during the one-legged stand test because of an old leg tendon injury.

¶10 Ofarril-Valez also testified that he told the officer that he drank one beer but that he never told Officer Jaeger that he had not been drinking. However, at the suppression hearing, Ofarril-Valez admitted that he had actually consumed three beers between 1:00 a.m. and 1:50 a.m. As to the PBT, Ofarril-Valez testified that he told Officer Jaeger that he was asthmatic and could not breathe from his nose, which made it difficult to breathe into the tube. He said that when he told Officer Jaeger that he had this same problem when taking a PBT on a prior occasion, Officer Jaeger got mad and threw the plastic container on the floor and told him he was under arrest.

¶11 The circuit court denied Ofarril-Valez's suppression motion and his motion for reconsideration. Ofarril-Valez pled guilty to OWI 2nd and was sentenced to forty days at the House of Correction with Huber privileges. The court imposed the mandatory minimum fine, driver's license revocation and ignition interlock. The circuit court then stayed his jail sentence pending appeal.

STANDARD OF REVIEW

¶12 We review a denial of a motion to suppress by first upholding the circuit court's findings of fact "unless they are against the great weight and clear preponderance of the evidence." ***State v. Jackson***, 147 Wis. 2d 824, 829, 434 N.W.2d 386 (1989). However, we review the circuit court's application of constitutional principles to the findings of fact *e novo*. ***State v. Vorburger***, 2002 WI 105, ¶32, 255 Wis. 2d 537, 648 N.W.2d 829.

DISCUSSION

¶13 Ofarril-Valez contends that the police officer did not have probable cause to arrest him and therefore the blood test results must be suppressed. We disagree.

¶14 The State bears the burden of proving that the police officer had probable cause to arrest. *ee* ***State v. Lange***, 2009 WI 49, ¶19, 317 Wis. 2d 383, 766 N.W.2d 551. Observing that a warrantless arrest is not lawful except when supported by probable cause, the Wisconsin Supreme Court defined probable cause to arrest for operating under the influence as "that quantum of evidence within the arresting officer's knowledge at the time of the arrest that would lead a reasonable law enforcement officer to believe that the defendant was operating a motor vehicle while under the influence of an intoxicant." ***Id.*** The court noted that probable cause is determined by examining the totality of the circumstances on a case-by-case basis. ***Id.***, ¶20. It is an objective standard and a "'flexible, common-sense measure of the plausibility of particular conclusions about human behavior.'" ***Id.*** (footnote and citation omitted). The quantum of evidence necessary has been described by the court as "'less than that for guilt but is more than bare suspicion.'" ***State v. Dunn***, 121 Wis. 2d 389, 396, 359 N.W.2d 151 (1984) (citation omitted).

¶15 The Wisconsin Supreme Court held in ***Lange*** that the law enforcement officer had probable cause to believe that the defendant was operating a motor vehicle while under the influence of an intoxicant. ***Id.***, 317 Wis. 2d 383, ¶5. While the facts in ***Lange*** differ from the facts here, the case guides our decision.

¶16 In ***Lange***, the police observed Lange driving unlawfully and ultimately crashing his vehicle. ***Id.***, ¶9. Lange was found unconscious and injured and was conveyed to a hospital. ***Id.***, ¶¶11, 14. While he was still unconscious and

at the hospital, the police learned that Lange had a previous conviction for operating under the influence. ***Id.***, ¶16. Lange's blood was drawn and he was arrested. ***Id.***, ¶17.

¶17 Lange argued that the blood test results should be suppressed because there were none of the usual indicia of intoxication, such as an admission of drinking by the driver, no odors of intoxicants, no slurred speech or difficulty balancing, and no suggestive sobriety tests. ***Id.***, ¶21. Nonetheless, the Wisconsin Supreme Court found that under the totality of the circumstances, a reasonable police officer would believe Lange was driving under the influence, citing five factors: (1) the dangerousness of his driving; (2) the experience of the police officer; (3) the time of morning, 3:00 a.m.; (4) the fact of Lange's prior OWI conviction; and (5) the police officers' inability to otherwise investigate due to the circumstances of the crash. ***Id.***, ¶¶23-35.

¶18 Like Ofarril-Valez does here, Lange argued that the omission of facts typically found in other cases meant that the police lacked probable cause for his arrest. However, the supreme court specifically noted that "[a]lthough evidence of intoxicant usage—such as odors, an admission, or containers—ordinarily exists in drunk driving cases and strengthens the existence of probable cause, such evidence is not required. The totality of the circumstances is the test." ***Id.***, ¶37.

¶19 Similarly here, and contrary to Ofarril-Valez's assertion, the omission of some factors typically present in OWI cases is not dispositive. The quantum of evidence needed to support probable cause to arrest is less than that for conviction but more than a mere possibility. *ee* ***Dunn***, 121 Wis. 2d at 396. That is what is present here.

¶20 We conclude that the following nine indicia of impairment demonstrate that, under the totality of the evidence, a reasonable police officer would believe that Ofarril-Valez was operating under the influence of an intoxicant.

¶21 First, the time of the driving and stop, 2:30 a.m. on a Saturday morning, is a relevant factor that a reasonable police officer would consider in making the probable cause determination. As the Wisconsin Supreme Court found in ***Lange***, the time of the driving, 3:00 a.m., bar-time on a weekend, was relevant: "It is a matter of common knowledge that people tend to drink during the weekend when they do not have to go to work the following morning." ***Id.***, 317 Wis. 2d 383, ¶32.

¶22 Second, when Officer Jaeger was driving his marked squad car behind Ofarril-Valez, pacing his speed, he observed that Ofarril-Valez was driving three to four miles an hour over the posted speed limit. A reasonable police officer could find that a driver was impaired from the fact that the driver failed to keep his speed under the posted limit while being followed by a police officer in a marked squad car. Common sense indicates that most drivers are on their very best behavior when knowingly being followed by a police officer.

¶23 Third, once he stopped Ofarril-Valez, Officer Jaeger smelled intoxicants, and although he described it as a "light odor," he noted that the french fries Ofarril-Valez was eating did not mask the odor.

¶24 Fourth, Ofarril-Valez admitted to Officer Jaeger at the scene that he had consumed one beer earlier. At the suppression hearing, Ofarril-Valez admitted he had actually consumed three beers shortly before the stop. Regardless, Ofarril-Valez's admission to drinking the night of the arrest confirmed Officer Jaeger's suspicion that he smelled alcohol. The acknowledgment that the odor was

alcohol, coupled with the strength of the odor over the odor of french fries, was another relevant factor in Officer Jaeger's probable cause analysis.

¶25 Fifth, the officer testified that Ofarril-Valez's eyes were glassy.

¶26 Sixth, Officer Jaeger had to ask Ofarril-Valez three times to get out of the vehicle before he complied. Although Ofarril-Valez testified at the suppression hearing that his delay was due to English language difficulties and that he told the police officer to talk slower, a reasonable police officer would have found the delay relevant and given it some weight in assessing the totality of the circumstances.

¶27 Seventh, Officer Jaeger testified that in his experience Ofarril-Valez's early start on the walk and turn test was unusual in sober individuals, but he had seen it before with impaired individuals. Furthermore, Officer Jaeger testified that Ofarril-Valez's one foot drop on the one-legged stand test was an indication of impairment. Although Ofarril-Valez testified that the reason he dropped his foot on the one-legged stand test was because of an old tendon injury, he admitted he never told the police officer about his injury. From a reasonable police officer's perspective, both test results reasonably indicated impairment.

¶28 Eighth, it is undisputed that Ofarril-Valez failed all six indicators on the HGN test. He lacked smooth pursuit in both the left and right pupils; presented with nystagmus at maximum deviation of both the left and right pupils; and presented with the onset of nystagmus prior to forty-five degrees in both the left and right pupils. Officer Jaeger reasonably relied on these indicators of probable cause to arrest for operating under the influence of an intoxicant.

¶29 Ninth, the insufficient sample on the PBT was an indication that Ofarril-Valez either intentionally subverted the test, or again, could not follow

directions. Ofarril-Valez's statement that he had failed the test on a prior occasion indicated that he had been suspected of operating under the influence before and that he knew of the importance of giving a proper air sample and the consequence of failing to do so—all relevant factors in the officer's determination of probable cause.

¶30 Ofarril-Valez argues on appeal that it was not reasonable for Officer Jaeger to conclude that the above nine observations added up to probable cause of impairment when faced with Ofarril-Valez's language difficulties, tendon injury and asthma. Essentially, this is an argument as to the weight to be ascribed to these factors. He argues that the factors present nothing more than a possibility of impairment, which is insufficient for probable cause to arrest. Ofarril-Valez argues that comparing the facts here to those in ***County of Jefferson v. Renz***, 222 Wis. 2d 424, 588 N.W.2d 267 (Ct. App. 1998) ("***Renz I***"), *ove le y* ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 603 N.W.2d 541 (1999) ("***Renz II***"), and ***State v. McDonald***, No. 2010AP1045-CR, 2010 WL 4643723 (Ct. App. Nov. 18, 2010) (unpublished), show that Officer Jaeger lacked probable cause to arrest.

¶31 Ofarril-Valez's reliance on ***Renz I*** is misplaced because even if we assume, without deciding, that ***Renz I*** is still "good law," it is distinguishable from the facts here.[2]

[2] In ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 603 N.W.2d 541 (1999) ("***Renz II***"), the Wisconsin Supreme Court reversed the court of appeals' decision in ***County of Jefferson v. Renz***, 222 Wis. 2d 424, 588 N.W.2d 267 (Ct. App. 1998) ("***Renz I***"), which Ofarril-Valez relies on, and remanded ***Renz I*** for re-entry of the judgment of conviction. *See* ***Renz II***, 231 Wis. 2d at 317. We decline to address whether Ofarril-Valez is correct that the court of appeals' holding in ***Renz I*** as to the insufficiency of the probable cause for arrest still has precedential value. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (An appellate court should decide cases on the narrowest possible grounds.); *see also* ***Blum v. 1st Auto & Cas. Ins. Co.***, 2010 WI 78, ¶¶42, 44, 326 Wis. 2d 729, 786 N.W.2d 78 ("when the supreme court overrules a court of appeals decision, the court of appeals decision no longer possesses any precedential value, unless [the supreme] court expressly states otherwise").

¶32 In ***Renz I***, this court reversed an OWI conviction, concluding that: (1) WIS. STAT. § 343.303 required probable cause to arrest before a defendant could be asked to take a PBT; and (2) the officer lacked probable cause to arrest Renz. ***Renz I***, 222 Wis. 2d at 427. However, the Wisconsin Supreme Court reversed, holding that the statute did not require probable cause to arrest before administration of a PBT. ***Renz II***, 231 Wis. 2d at 317. The sole issue on appeal to the supreme court in ***Renz II*** was the issue of the quantum of evidence necessary for the PBT, not arrest. ***Id.*** at 295.

¶33 The facts that the court of appeals found insufficient for probable cause to arrest in ***Renz I*** were a strong odor of intoxicants, an admission to drinking three beers earlier in the evening, an inability to hold his foot up for thirty seconds on the one-legged stand test, unsteadiness in the heel-to-toe test, and an inability to touch the tip of his nose with his left finger during the finger-to-nose test. ***Id.***, 222 Wis. 2d at 428, 444-47.

¶34 Here, there are more and stronger indicia of impairment than existed in ***Renz I***. First, in addition to some of the same factors observed in ***Renz I***, (odor of alcohol, admission of drinking and failure to perform the one-legged test without incident) there were the following indicia of impairment here: (1) Ofarril-Valez's persistence in driving over the speed limit, albeit three to four miles over, when being followed by a marked squad car; (2) the fact that it was 2:30 a.m on a Saturday morning; (3) Ofarril-Valez's glassy eyes; (4) Ofarril-Valez's refusal or inability to follow directions on three occasions to exit the vehicle; (5) Ofarril-Valez's complete failure on the HGN test; and (6) Ofarril-Valez's failure to provide a proper breath sample on the PBT.

¶35 Next, Ofarril-Valez's reliance on ***McDonald*** is misplaced because, first, ***McDonald*** is an unpublished decision and lacks precedential value. *ee* WIS. STAT. § 809.23(3) (unpublished opinions issued after July 1, 2009, have no precedential value, although they may be cited as persuasive authority). Second, the holding in ***McDonald*** was that the officer had probable cause to ask McDonald to take the PBT. ***Id.***, No. 2010AP1045-CR, 2010 WL 4643723, ¶1. Ofarril-Valez seeks to elevate dicta in this unpublished case to precedent for the quantum of evidence needed for arrest. We will not do so. Additionally, we note that the indicia of probable cause here exceed those in ***McDonald***. *ee* ***id.***, ¶¶2-5.

¶36 Even if Ofarril-Valez's delay in getting out of the car and his false start on the walk and turn test were explained by language difficulties, a reasonable officer had ample other indicia of impairment to conclude Ofarril-Valez was impaired. As the Wisconsin Supreme Court stated in ***Lange***, the evidence need

> not conclusively prove that the defendant was intoxicated. But although probable cause must amount to "more than a possibility or suspicion that the defendant committed an offense," the evidence required to establish probable cause "need not reach the level of proof beyond a reasonable doubt or even that guilt is more likely than not."

Id., 317 Wis. 2d 383, ¶38 (footnote and citation omitted). That is the case here.

By the Court.—Judgment affirmed.

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