COURT OF APPEALS
DECISION
DATED AND FILED

December 28, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-1546-CR **Cir. Ct. No. 03-CT-110**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ADAM J. NELSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Washburn County: EUGENE D. HARRINGTON, Judge. *Affirmed.*

¶1 CANE, C.J.[1] Adam Nelson appeals a judgment finding him guilty of operating a motor vehicle while intoxicated, third offense. He also appeals an order denying his motion to suppress evidence resulting from a blood draw. He

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

argues the officer did not have probable cause to arrest him. He also argues that no arrest actually occurred, and that arrest is a prerequisite to requiring him to give a blood sample under the implied consent law. We conclude the officer had probable cause to arrest Nelson. We further conclude Nelson was under arrest at the time the officer asked him to submit to the blood test. Therefore, we affirm the judgment and the order.

BACKGROUND

¶2 At 8:13 a.m. on August 16, 2003, deputy Nick Helstern of the Washburn County Sheriff's Department, was dispatched to the scene of an accident involving a train colliding with a vehicle. When Helstern arrived, Nelson was sitting outside the vehicle involved. He told Helstern he was driving and had not seen the train. Nelson stated he looked left but not right, failed to stop at a stop sign, and stopped on the tracks. The train came from the right and struck him broadside.

¶3 Helstern testified that he smelled an oder of intoxicants coming from Nelson's breath. He asked Nelson if he had been drinking. Nelson admitted he had but stated that his last drink was about three hours earlier. Helstern did not administer field sobriety tests nor did he arrest Nelson at that time. Nelson was transported by ambulance to a nearby hospital in Sawyer County. Helstern requested that an officer from Sawyer County go to the hospital to do a blood draw.

¶4 Helstern later arrived at the hospital and spoke to a Sawyer County officer. Although the record is unclear as to what transpired before Helstern arrived at the hospital, it appears the Sawyer County deputy initially asked Nelson for a urine sample because Sawyer County was out of blood kits. Nelson refused

the urine test. When Helstern arrived he had a blood kit with him. At that time, Helstern read Nelson the Informing the Accused form and Nelson submitted to a blood test. The test showed Nelson had a blood alcohol content of .102%. Nelson was charged with operating a motor vehicle while under the influence of an intoxicant (OWI) and operating a motor vehicle with a prohibited alcohol concentration (PAC), both as a third offense.

¶5 Nelson filed a motion to suppress evidence resulting from the blood draw. He argued that there was no probable cause to arrest him and, at any rate, he was not arrested. He maintained that because he was not arrested, he was not obligated to give a sample of his blood. The court determined there was probable cause, and that he was effectively arrested at the time Helstern read Nelson the Informing the Accused form. Nelson subsequently pled no contest to the OWI charge, the court found him guilty, and the PAC charge was dismissed.

DISCUSSION

¶6 Upon review of a motion to suppress, we will sustain the trial court's historical findings of fact unless those findings are clearly erroneous. ***State v. Amos***, 220 Wis. 2d 793, 797, 584 N.W.2d 170 (Ct. App. 1998). However, whether those facts satisfy the constitutional requirement of reasonableness presents a question of law that we review de novo. ***Id.*** at 797-98.

¶7 We first address whether Helstern had probable cause to arrest Nelson. In OWI cases, probable cause will be found "where the totality of the circumstances within the arresting officer's knowledge at the time of the arrest would lead a reasonable police officer to believe … the defendant was operating a motor vehicle while under the influence of an intoxicant." ***State v. Nordness***, 128 Wis. 2d 15, 35, 381 N.W.2d 300 (1986). This is a commonsense test, based on

probabilities. *See* ***County of Dane v. Sharpee***, 154 Wis. 2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990). The facts need only be sufficient to lead a reasonable police officer to believe that guilt is more than a possibility. ***Id.***

¶8 Here, there are several factors that led Helstern to believe Nelson was driving while intoxicated. Helstern noticed an oder of intoxicants coming from Nelson and Nelson admitted he had been drinking. Helstern knew that Nelson had failed to stop at a stop sign, looked only left but not right at the railroad tracks, and stopped on the tracks. From these circumstances, Helstern could reasonably conclude Nelson was driving while intoxicated.

¶9 However, Nelson argues he was not arrested before Helstern arrived at the hospital and read Nelson the Informing the Accused form. Nelson points to WIS. STAT. § 343.305(3)(a), which provides that "upon arrest" of a person for operating a motor vehicle while under the influence of an intoxicant, the officer may request the driver to submit to chemical testing. Additionally, the Informing the Accused form states, in relevant part, "You have … been arrested for an offense that involved driving or operating a motor vehicle while under the influence of alcohol or drugs, or both …." Nelson argues the phrases "upon arrest" and "you have been arrested" indicate he needed to be arrested before he was read the Informing the Accused Form. Nelson maintains that he was not arrested before Helstern read him the form and therefore he was not obligated to submit to chemical testing.

¶10 The State argues Nelson was arrested at the time Helstern read Nelson the form. The State contends that the phrase "you have been arrested" made it clear to Nelson that he was under arrest. The court agreed with the State's argument, as do we. Nelson is correct that the "upon arrest" language of WIS.

STAT. § 343.305(3)(a) requires that a person be arrested for OWI prior to a request for a chemical test sample. However, we conclude that the phrase "you have been arrested" on the Informing the Accused form specifically advised Nelson that he was under arrest. This statement, provided prior to the request for the blood sample, was sufficient to meet the arrest requirement of § 343.305(3)(a).

¶11 Furthermore, under the totality of the circumstances, Nelson should have assumed he was under arrest for OWI. An arrest occurs when, given the degree of restraint, a reasonable person in the defendant's position would have considered him or herself to be in custody. ***State v. Swanson***, 164 Wis. 2d 437, 446-47, 475 N.W.2d 148 (1991). To make this determination, we look at the totality of the circumstances. ***Id.*** at 446. Because each case must be examined under its own facts, we are not bound by hard and fast rules. ***State v. Wilkens***, 159 Wis. 2d 618, 626, 465 N.W.2d 206 (Ct. App. 1990).

¶12 Here, Nelson told Helstern at the scene of the accident that he had been drinking. He admitted to failing to stop at a stop sign, that he looked left but not right at the railroad tracks, and came to a stop on the tracks. Afterwards, at the hospital, the Sawyer County deputy asked Nelson for a urine sample. Then, when Helstern arrived, he read Nelson the Informing the Accused form, which stated, "you have been arrested." Finally, Helstern requested and Nelson agreed to submit to a blood test. From these circumstances, a reasonable person in Nelson's position should have inferred he was under arrest.[2]

[2] Although it was not argued to the trial court or this court, there is an alternate ground upon which we can affirm. Even if Nelson was not arrested, Helstern had the authority to obtain a warrantless blood draw. In ***State v. Bohling***, 173 Wis. 2d 529, 533-34, 494 N.W.2d 399 (1993), the supreme court stated:

(continued)

By the Court.—Judgment and order affirmed.

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

> [A] warrantless blood sample taken at the direction of a law enforcement officer is permissible under the following circumstances: (1) the blood draw is taken to obtain evidence of intoxication from a person lawfully arrested for a drunk-driving related violation or crime, (2) there is a clear indication that the blood draw will produce evidence of intoxication, (3) the method used to take the blood sample is a reasonable one and performed in a reasonable manner, and (4) the arrestee presents no reasonable objection to the blood draw.

Regarding the first prong, the court added in a footnote that probable cause to arrest substitutes for the predicate act of lawful arrest. ***Id.*** at 534 n.1 (citing ***State v. Bentley***, 92 Wis. 2d 860, 863-64, 286 N.W.2d 153 (Ct. App. 1979) (footnote omitted)).

Because we have concluded there was probable cause to arrest here, the first prong is satisfied. Second, Nelson admitted he had been drinking so there was a clear indication the blood draw would produce evidence of intoxication. Third, the blood draw was done at a hospital, so the method used presumably was reasonable and performed in a reasonable manner. Finally, Nelson agreed to give the blood sample, so he presented no objection, reasonable or otherwise. Thus, Helstern had authority to obtain a warrantless blood sample from Nelson.