COURT OF APPEALS
DECISION
DATED AND FILED

February 3, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-2584-CR **Cir. Ct. No. 03CT000404**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES D. RYAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Columbia County: DANIEL GEORGE, Judge. *Affirmed*.

¶1 VERGERONT, J.[1] James D. Ryan appeals the judgment of conviction for operating a motor vehicle while intoxicated (OWI) in violation of WIS. STAT. § 346.63(1)(a), second offense, and the court's order revoking his operating privileges for twenty-four months based upon a determination that he

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

improperly refused to submit to the blood test requested by the officer under WIS. STAT. § 343.305(3). Ryan contends the circuit court erred by: (1) concluding that the arresting officer had the requisite reasonable suspicion to stop his vehicle; (2) determining he had refused to submit to the blood test; and (3) declining to dismiss the refusal order after he pleaded guilty to the OWI charge. We conclude the circuit court did not err on any of these points and we therefore affirm.

BACKGROUND

¶2 Timothy Larson, a State Patrol Trooper, arrested Ryan on October 25, 2003, for OWI. The officer also issued Ryan a notice of intent to revoke his operating privileges under WIS. STAT. § 343.305(9) on the ground that Ryan had refused to submit to an evidentiary chemical test of his blood. Ryan was charged with both OWI and driving with a prohibited blood alcohol concentration (PAC) in violation of WIS. STAT. § 346.63(1)(b), second offense. He moved to suppress evidence on the ground that the officer lacked reasonable suspicion that he was under the influence of an intoxicant or violating any traffic law when the officer stopped his vehicle. Ryan also requested a hearing to challenge the refusal revocation. The suppression motion and the refusal revocation challenge were heard together.

¶3 The officer testified as follows regarding the stop of Ryan's vehicle. At 11:30 p.m. he was driving eastbound on Interstate 39/94 in Columbia County when he observed a vehicle pulled over on the shoulder of the road on the westbound side of the highway at milepost 110. He proceeded to the next crossover, which was at milepost 111, and turned around. As he was turning around he saw the vehicle pull away and continue westbound on the highway. The officer caught up to the vehicle and followed it. He observed that it was

driving about fifty or fifty-five miles an hour, approximately ten or fifteen miles under the posted speed limit, and was weaving within its own lane of traffic. There were no weather conditions that would explain the slow speed and the traffic was light. The weaving consisted of drifting from the dotted line to the fog line, and the vehicle did this for a couple of miles. The officer followed the vehicle as it took the ramp for I-39 north. He observed the vehicle drift over into the left lane and, when the officer moved over into the left lane, the vehicle moved back into the right lane. At that point the officer moved over behind the vehicle and pulled it over.[2] In the officer's experience mechanical problems, tiredness, medical problems, and intoxication have all been causes of the type of driving he observed.

¶4 The officer testified as follows regarding the blood test. After he arrested Ryan, he told Ryan he was taking him to the hospital for a blood test. Ryan responded that there was a supreme court ruling stating that since he had submitted to a breath test, he did not have to submit to a blood test. The officer, aware that this was a second offense, responded that this was a crime and there would therefore be a blood test. At the hospital, the officer read an Informing the Accused form to Ryan and asked the question contained on the form, "will you submit to an evidentiary chemical test of your blood?" Ryan said "no," and the

[2] The officer also testified that the vehicle did not signal when it exited onto the I-39 ramp and did not signal when it later moved from the right lane to the left lane and then back into the right lane. On cross-examination, the officer acknowledged that the vehicle's failure to put on the turn signal when it exited on the I-39 ramp did not interfere with the operation of the officer's car and that a turn signal must be used only when changing lanes would affect other traffic. The parties dispute whether the failure to signal in these circumstances is a proper factor to take into account in assessing whether the officer had the requisite reasonable suspicion for the stop. It is not necessary to resolve this dispute and therefore we do not further discuss the absence of signaling.

officer checked the "no" box on the form next to the question. The officer told Ryan they would be taking his blood because it was evidence of a crime and asked Ryan if he would cooperate with the hospital staff while they completed the task. Ryan said he would, and he did cooperate in having his blood drawn.

¶5 Ryan also testified with respect to the blood test. He denied that he told the officer "no" in response to the question whether he would submit to the blood test and testified that he said nothing. He was silent in response to the question because he "didn't want to refuse, but [he] didn't agree with it." On other points, Ryan's testimony was consistent with the officer's testimony. He agreed that the officer said he was going to take the test anyway and asked if Ryan would cooperate and Ryan said he would cooperate and he did. Ryan also agreed that he did tell the officer about a supreme court opinion under which he did not have to submit to another test after having taken one. According to Ryan, he did not intend to refuse; he wanted to preserve his right to challenge the blood test.

¶6 Ryan submitted into evidence the officer's videotape of the stop and of his vehicle while the officer was following it; he also submitted an audiotape of the officer's conversation on the way to the hospital and at the hospital. On the audio tape, when the officer tells Ryan he is taking him to the hospital for a blood draw, Ryan says "I don't want, I don't want to submit to a blood draw" and then tells the officer about the supreme court opinion. When the officer repeats that he is taking Ryan for a blood test, Ryan again says "[W]ell I don't have to submit to a blood test…." After telling the officer again about the supreme court case, Ryan states "and I will not agree to a blood test. You may force me to take it, but I'm not going to submit to it."

¶7 On the audiotape at the hospital there is no audible response when the officer asks Ryan the question "will you submit to an evidentiary chemical test of your blood?" The officer can be heard asking Ryan the questions on the "Alcohol Influence Report," which was also an exhibit, but there is no audible response from Ryan to those questions, either. The officer testified that Ryan did respond to the questions on the "Alcohol Influence Report" and he wrote in Ryan's answers on the report. The officer explained that the only microphone was a small one attached to his shirt. Ryan agreed that he did respond to the questions the officer asked from the "Alcohol Influence Report," even though his responses could not be heard on the tape. He answered all the other questions asked him, he testified, except the one on whether he would take a blood test.

¶8 Based on this evidence, the court ruled that the officer had the requisite reasonable suspicion to stop Ryan's vehicle and therefore denied the suppression motion. With respect to the issue of refusal, the court credited the officer's testimony that Ryan answered "no" to the question would he submit to a blood test. The court explained that it was obvious from the tape, coupled with the testimony that the only microphone was on the officer, that Ryan was responding to the questions asked even though no responses could be heard. The court also inferred from the officer's question following the question whether Ryan would submit to a blood test that Ryan had answered "no." According to the tape, the officer said: "Alright, James, because it's a second offense, we're going to be taking your blood anyway.… Are you going to cooperate with the nurse…?" The court reasoned that, had Ryan said nothing, it would have been more logical for the officer to follow up that silence by inquiring what Ryan's response was. The court therefore determined that Ryan had improperly refused to submit to a blood test and ordered that his license be revoked for twenty-four months.

¶9 Approximately four and one-half months later, Ryan entered a plea of guilty to the OWI, second offense, charge.[3] At the same time, Ryan moved to vacate the order finding that he had refused to submit to a blood test and the twenty-four-month revocation of his driver's license imposed as a result. He argued that under ***State v. Brooks***, 113 Wis. 2d 347, 335 N.W.2d 354 (1983), the purpose of the sanctions for a refusal had been accomplished with the entry of the plea, that his blood alcohol level was in this case only .09, and "his driving was not aggravated."

¶10 The court denied the motion. The court stated that it had the discretion under ***Brooks*** to grant the relief requested, but concluded that it was not appropriate in this case to do so. The court explained that the fact that Ryan had opted to bring a suppression motion had nothing to do with its decision. Rather, the court said, it was influenced by the fact that Ryan had contested the refusal "rather than immediately coming in and accepting responsibility" for his behavior. The court agreed with the State's argument that after having chosen to contest the refusal and lost, Ryan should not be able to now have that decision vacated. The court distinguished this situation from one where a court might vacate a determination of refusal where the defendant had missed the deadline for filing for a hearing to challenge the refusal revocation or had allowed a default but then entered a plea to the OWI charge.

[3] When Ryan entered his plea, the court dismissed the PAC charge.

DISCUSSION

I. Reasonable Suspicion for the Stop

¶11 In order to justify an investigatory seizure under the Fourth Amendment, the police must "have a reasonable suspicion, grounded in specific articulable facts and reasonable inferences from those facts, that an individual is [or was] violating the law." ***State v. Colstad***, 2003 WI App 25, ¶8, 260 Wis. 2d 406, 659 N.W.2d 394. The question of what constitutes reasonable suspicion is a common sense test: under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience. ***Id.***, ¶8. We measure reasonableness against an objective standard, taking into consideration the totality of the circumstances. ***State v. Richardson***, 156 Wis. 2d 128, 139, 456 N.W.2d 830 (1990). When considering whether reasonable suspicion exists, an officer is not required to rule out the possibility of innocent behavior. ***State v. Anderson***, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990).

¶12 When we review a circuit court's decision on a motion to suppress evidence, we accept the circuit court's findings of fact unless they are clearly erroneous, but whether the facts fulfill the constitutional standard is a question of law, which we review de novo. ***State v. Fields***, 2000 WI App 218, ¶9, 239 Wis. 2d 38, 619 N.W.2d 279.

¶13 Ryan contends the circuit court applied an incorrect legal standard in concluding the officer had reasonable suspicion to stop him. Ryan asserts that the officer must have either reasonable suspicion to believe he was engaged in

unlawful activity or the prerequisites for the community caretaker exception must apply, and the court erroneously combined those two standards.[4] The State expressly disavows reliance on the community caretaker exception and therefore we do not address it. We therefore focus solely on Ryan's contention that the officer lacked reasonable suspicion to believe he was driving under the influence of an intoxicant.

¶14 In arguing that the court employed an incorrect legal standard, Ryan relies on the following statement: "It's not necessary that [the officer] had reasonable suspicion to believe [Ryan] was under the influence at the time he pulled him over, but merely that there was reasonable suspicion that there may be impairment of some kind irrespective of the specific cause." This does appear to be a misstatement of the law, in that, if the community caretaker exception did not apply (and the court did not mention this exception), the officer did need to have a reasonable suspicion that an apparent impairment was related to unlawful conduct. However, because we review de novo whether the facts as found by the circuit court and the undisputed facts fulfill the correct legal standard, Ryan is not entitled to a reversal based on this misstatement of the law.

¶15 Applying the correct legal standard to the facts, we conclude the officer did have reasonable suspicion to believe Ryan was driving while under the

[4] Under the community caretaker doctrine, a law enforcement officer may, consistent with the Fourth Amendment, detain a person without having a reasonable suspicion to believe an unlawful activity has or is occurring. The prerequisites for the application of this doctrine are that the officer was engaged in a bona fide community caretaker function, which is a function wholly unrelated to the detection, investigation, or acquisition of evidence connected to a violation of criminal law and that the public benefits of the police intervention outweigh the degree of intrusion into individual privacy. ***State v. Horngren***, 2000 WI App 177, ¶9, 238 Wis. 2d 347, 617 N.W.2d 508.

influence of an intoxicant. The circuit court credited the officer's testimony on his observations before stopping the vehicle and also found that the tape showed "considerable drift to this vehicle back and forth." It is reasonable to infer from the fact that a vehicle is stopped on the shoulder of the interstate at 11:30 p.m. that the driver is having some kind of difficulty. It is reasonable to infer both from the swerving back and forth within a lane and from the "drifting" from one lane to another and back again that the driver was having difficulty controlling the vehicle. The fact that the vehicle was driving considerably below the speed limit, together with the absence of weather or traffic conditions that would explain the speed, gives rise to a reasonable inference that the driver was impaired in some way. There may be innocent explanations for the impairment, such as being tired or ill, but an officer need not draw the inferences consistent with innocent behavior. ***Anderson***, 155 Wis. 2d at 84. The officer may reasonably rely on his experience that one of the causes for the impairment is intoxication.

II. Refusal Determination

¶16 WISCONSIN STAT. § 343.305(2) provides that all persons operating a motor vehicle on the public highways are "deemed to have given consent to one or more tests of his or her breath, blood or urine, for the purpose of determining the presence or quantity in his or her blood or breath, of alcohol … when requested to do so by a law enforcement officer under sub. (3)(a)…."

¶17 Upon an arrest for OWI, an officer may request the person arrested to provide one or more samples of blood, breath, or urine for testing. WIS. STAT. § 343.305(3)(a). If the person refuses to submit to such testing, after having been read a form containing the information required by § 343.305(4), the officer is to provide the person with a notice of intent to revoke operating privileges. Section

343.305(9)(a). The person may request a hearing, as Ryan did, to challenge the revocation. ***Id.***

¶18 The Wisconsin Legislature enacted the implied consent statute to combat drunk driving. ***State v. Reitter***, 227 Wis. 2d 213, 223, 595 N.W.2d 646 (1999). The statute is designed to facilitate the collection of evidence and to secure convictions. ***Id.*** at 224.

¶19 Ryan contends that even if he answered "no" to the question whether he would submit to a blood test, as the court found, he did not hinder or delay the officer in gathering evidence. Thus, he contends, the court erred in determining that he refused to submit to the test. According to Ryan, he acted reasonably by indicating that he would cooperate in taking the test and by cooperating, while at the same time making clear that he would submit "under protest, so to not waive what he believed was his right to challenge the test."[5]

¶20 Resolution of this issue requires that we apply the implied consent statute, WIS. STAT. § 343.305(2), to the facts as found by the circuit court. We accept the factual findings of the circuit court unless they are clearly erroneous. WIS. STAT. § 805.17(2); *see also* ***Gerth v. Gerth***, 159 Wis. 2d 678, 682, 465 N.W.2d 507 (Ct. App. 1990). The application of the implied consent statute to the

[5] We do not understand Ryan to argue that the court erred in determining that he answered "no" as opposed to simply remaining silent. If he does intend to make this argument in the alternative, we reject it. It is the role of the circuit court sitting as finder of fact to make credibility determinations and resolve conflicts in the testimony. ***Rivera v. Eisenberg***, 95 Wis. 2d 384, 388, 290 N.W.2d 539 (1980). We therefore accept in our discussion the circuit court's finding that Ryan said "no" in response to the officer's question whether he would submit to a blood test.

facts found by the circuit court is a question of law, which we review de novo. ***State v. Rydeski***, 214 Wis. 2d 101, 106, 571 N.W.2d 417 (Ct. App. 1997).

¶21 Ryan does not provide case law authority for the proposition that even if he answered "no" to the officer's question, his response to the officer's next question, indicating that he would cooperate in having the test taken, makes the "no" answer not a refusal. It is well established that once a person has been properly informed of the implied consent statute, as Ryan was here, the person

> must promptly submit or refuse to submit to the requested test, and … upon a refusal, the officer may "immediately" gain possession of the accused's license and fill out the Notice of Intent to Revoke form. A person's refusal is thus conclusive and is not dependent upon such factors as whether the accused recants within a "reasonable time" ….

Id. at 109.

¶22 We see no significant difference between a "no" followed by a recantation and a "no" followed by a stated willingness to cooperate because the accused is told the test is going to be taken regardless of the "no" answer. The point in both situations is that the person cannot escape the consequences of a "no" answer by subsequent conduct.

¶23 Ryan also appears to be arguing that, because he was simply trying to preserve his rights, even though he now acknowledges his view of the law was mistaken, his "no" answer should not be treated as a refusal, or at least, not an unreasonable refusal. We disagree. The Informing the Accused form that the officer read to Ryan informed him that the agency wanted to test "one or more samples of his … breath, blood or urine" for alcohol and explained the consequences of his refusal: that his operating privileges would be revoked, he would be subject to other penalties, and the fact of refusal could be used against

him in court. Ryan's mistaken view of the law does not transform his "no" answer into a "yes," nor does it make his "no" answer reasonable. In addition, Ryan cites no authority that makes relevant any reason for a "no" answer other than the reason of physical inability expressly authorized by WIS. STAT. § 343.305(9)(a)5.c and (d).

¶24 Finally, we reject Ryan's argument that the purpose of the implied consent law was served because he did cooperate after all. The purpose of facilitating the collection of evidence is best served by requiring persons to promptly agree to submit to the tests if they want to avoid negative consequences. That is the principle underlying ***Rydeski***, 214 Wis. 2d at 108-09.

III. Decision Not to Vacate Refusal Order

¶25 Ryan contends the court erroneously exercised its discretion in denying his motion to vacate the refusal order after he entered a guilty plea to the OWI charge. According to Ryan the policies articulated in ***State v. Brooks***, 113 Wis. 2d 347, 335 N.W.2d 354 (1983), require vacation of the order.

¶26 When we review a decision that is committed to the discretion of the circuit court, we affirm if the court applied the correct law to the relevant facts of record and reached a reasonable result. ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981).

¶27 In ***Brooks***, the court considered whether a circuit court had erroneously exercised its discretion in dismissing a refusal proceeding. There, when the accused appeared for the hearing to challenge the revocation for refusal to submit to a test, he had already entered a guilty plea to the OWI charge. ***Id.*** at 349-51. The circuit court reasoned that there had been no frustration in the

prosecution of the OWI case because of the refusal and it was therefore appropriate to dismiss the refusal proceeding. ***Id.*** at 350. This court reversed, concluding that the circuit court erroneously exercised its discretion because the OWI plea did not make the refusal proceeding moot. ***Id.*** The supreme court disagreed and decided the circuit court had properly exercised its discretion. It stated:

> Accordingly, we conclude that the general purpose behind the laws relating to operating while under the influence of intoxicants and implied consent to take alcohol tests—to get drunk drivers off the road as expeditiously as possible and with as little possible disruption of the court's calendar—is best served by the exercise of discretion in the dismissal of a refusal case once there has been a plea of guilty to the OWI charge.
>
> We stress that the power to dismiss is a discretionary one. There may be circumstances where the court may conclude in a particular case not to dismiss the refusal charge although a plea of guilty to OWI has been taken. Whether such refusal to dismiss can be justified as a proper exercise of discretion will be dependent upon the ambience of the particular case.

Id. at 359-60.

¶28 We agree with Ryan that there are statements in ***Brooks*** that, read in isolation, would support the view that a refusal proceeding should be dismissed any time there is a plea to an OWI charge:

> The accurate, scientific evidence of blood-alcohol level is to be used to secure convictions. However, when an individual pleads guilty to OWI, there is no longer a need for such evidence. The conviction has been secured. The court has imposed the legislatively chosen penalty on the offender. Thus, the ultimate purpose of the implied consent law—successful prosecution of drunk drivers—has been accomplished.

Id. at 356.[6] However, it must be kept in mind that the context of this statement is the supreme court's decision affirming a circuit court's dismissal of the refusal proceeding as a proper exercise of discretion. The supreme court is not deciding as a matter of law that a circuit court must dismiss, and this is particularly significant when the facts differ from those in ***Brooks***, as they do in this case.

¶29 In ***Brooks*** the refusal hearing had not taken place at the time the accused entered a guilty plea to the OWI charge. The supreme court considered this fact relevant to the court's exercise of discretion because it raised the question whether the expenditure of judicial resources in going through the refusal proceeding served a purpose at that time. Thus, the court framed the issue as:

> [T]he question is whether, assuming the trial judge was correct in his assumption that the only purpose of the implied consent law is to furnish evidence of intoxication, the trial judge could, in his discretion, protect his calendar and promote efficiency and the conservation of limited judicial resources by refusing to undertake a substantially useless judicial proceeding.

Id. at 352. And, as is evident from the court's conclusion, quoted above in ¶27, the court considered the fact that a refusal hearing had not yet occurred in its conclusion.

¶30 We are satisfied that ***Brooks*** did not obligate the circuit court here to dismiss the refusal order after Ryan pleaded guilty to the OWI charge. We conclude that the court could, consistent with ***Brooks***, consider the facts that Ryan had chosen to contest the refusal revocation and that the issue had been resolved

[6] The dissent in ***State v. Brooks***, 113 Wis. 2d 347, 360, 335 N.W.2d 354 (1983), points out that this reasoning would logically also support dismissal of a refusal proceeding after a conviction for OWI, when the accused pleaded not guilty instead of guilty.

against him before he entered his guilty plea. The circuit court could reasonably decide, that, after Ryan took the court's time to contest the refusal revocation and after his challenge failed, he should not escape the consequences of that result. This is reasonable because it removes an incentive to challenge the refusal revocation on the assumption that, if one loses, one can avoid the negative consequences of losing by pleading guilty to the OWI. Accordingly, the circuit court did not erroneously exercise its discretion in denying Ryan's motion to vacate the refusal order.

By the Court.—Judgment and order affirmed.

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