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DISTRICT II

January 29, 2020

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You are hereby notified that the Court has entered the following opinion and order:

2018AP2467-CR State of Wisconsin v. Paul S. Taliaferro (L.C. #2018CF20)

Before Reilly, P.J., Gundrum and Davis, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Paul Taliaferro appeals from his judgment of conviction for possession of cocaine as a second and subsequent offense and possession of narcotics. He specifically challenges the circuit court's denial of his motion to suppress evidence discovered following the traffic stop which led to the charges. Based upon our review of the briefs and record, we conclude at

conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).¹ We affirm.

On January 6, 2018, Winnebago County Sheriff's Deputy Russ Johnson performed a traffic stop on Taliaferro, which ultimately led to his arrest and criminal charges. Taliaferro moved to suppress heroin and cocaine evidence Johnson found during a search of Taliaferro on the basis that Johnson did not have probable cause to arrest him at the time of the search. The court denied Taliaferro's motion following an evidentiary hearing, concluding that at the time Johnson searched Taliaferro, he did have probable cause to arrest Taliaferro for operating a motor vehicle while under the influence of an intoxicant. Taliaferro appeals, raising the same argument as before the circuit court. Because we agree with the circuit court that at the time Johnson searched Taliaferro Johnson had probable cause to arrest him for OWI, we affirm.

Probable cause to arrest "is the quantum of evidence within the arresting officer's knowledge at the time of the arrest which would lead a reasonable police officer to believe that the defendant probably committed or was committing a crime." *State v. Secrist*, 224 Wis. 2d 201, 212, 589 N.W.2d 387 (1999) (citation omitted). Probable cause is "based on probabilities; and, as a result, the facts faced by the officer 'need only be sufficient to lead a reasonable officer to believe that guilt is more than a possibility.'" *County of Dane v. Sharpee*, 154 Wis. 2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990) (citation omitted). Probable cause "must be assessed on a case-by-case basis, looking at the totality of the circumstances." *State v. Lange*, 2009 WI 49, ¶20, 317 Wis. 2d 383, 766 N.W.2d 551. When the relevant facts are undisputed, we review de

¹ All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

novo whether probable cause exists. *Id.* “In determining whether there is probable cause, the court applies an objective standard, considering the information available to the officer and the officer’s training and experience.” *Id.*

Deputy Johnson was the only witness to testify at the suppression hearing, and his relevant testimony is as follows.

While heading northbound on Interstate 41, Johnson observed Taliaferro deviate from his travel lane multiple times. Johnson activated his emergency lights to perform a traffic stop, but Taliaferro did not initially pull over, so Johnson activated his siren as well. Taliaferro did then stop his vehicle, but in the far right lane of traffic, instead of on the shoulder of the road. Johnson called for backup because “[u]sually when somebody stops in the lane of traffic on an interstate, there may be some form of intoxication going on or some other factor.”

Making contact with Taliaferro, Johnson inquired as to why he stopped in the roadway, and Taliaferro responded that “he thought he pulled over far enough.” Johnson had Taliaferro pull his vehicle onto the shoulder of the road, and Johnson continued his investigation. Looking at Taliaferro’s identification, Johnson remembered having “previously arrested him for OWI drugs and possession of prescription pills without a prescription.”

Due to the cold weather, Johnson had Taliaferro perform field sobriety tests inside a nearby Kwik Trip. With the horizontal gaze nystagmus test (HGN), Johnson did not observe any clues of impairment; however, he did observe that Taliaferro’s pupils were “very constricted” and “a little sluggish,” which Johnson knew to be “an indication of drug use.” On the walk-and-turn test, Johnson observed two clues of impairment—that Taliaferro “performed an improper turn” and “stepped off-line throughout the test”—and further noted that “in the instructional

phase of the test [he] had to explain it to him twice ... most people understand it the first time.” With the one-leg-stand test, Johnson observed Taliaferro to demonstrate “three or four” clues of impairment—“swaying, using his arms for balance, and hopping in an attempt to maintain his balance.” Johnson then had Taliaferro perform the preliminary breath test, which indicated 0.0. Johnson asked Taliaferro why he initially only pulled over into the far right traffic lane and not onto the shoulder of the road, and Taliaferro indicated that he thought he had stopped “just fine.”

Johnson testified that at that point he intended to arrest Taliaferro, but Taliaferro had been indicating throughout the investigation that he needed to use the bathroom, so Johnson intended to permit that. Before allowing Taliaferro to use the bathroom, however, Johnson directed him to turn around and then “searched him to make sure he didn’t have anything that he was going to try to get rid of in the bathroom.” While searching Taliaferro, Johnson found “drugs” on him, which led to the charges against him.

The circuit court found that Taliaferro was under arrest when the officer searched him in Kwik Trip, that there was probable cause to support that arrest, and thus the search of Taliaferro incident to the arrest—which search led to the discovery of illegal drugs on Taliaferro—was lawful.

On appeal, Taliaferro argues only that Johnson did not have probable cause to arrest him at the time Johnson conducted the search in Kwik Trip. We disagree. Johnson began with reasonable suspicion to conduct a traffic stop after observing Taliaferro deviate from his traffic lane multiple times. When Johnson activated his emergency lights, Taliaferro did not pull over—indicating either an attempt to avoid apprehension and thus consciousness of guilt or, more likely, a lack of awareness of the emergency lights, suggesting a dulling of his senses or

cognitive abilities—so Johnson had to activate his siren as well. When Taliaferro did pull over, he stopped his vehicle in a traffic lane—on Interstate 41—rather than the shoulder of the road, indicating, as the State suggests, a “lack of spatial awareness.” All of this, particularly stopping in the traffic lane, indicated Taliaferro was likely impaired by something.

Seeing Taliaferro’s identification, Johnson recalled having previously arrested him “for OWI drugs and possession of prescription pills without a prescription,” adding to Johnson’s concern that Taliaferro was likely under the influence of some substance, as opposed to, for example, his poor driving being caused by physical or cognitive challenges due to a medical condition. While Johnson did not observe “clues” of impairment with the HGN test, he did observe Taliaferro’s pupils to be “very constricted” and “a little sluggish,” which Johnson knew indicated drug use.² Taliaferro also performed questionably on the walk-and-turn and one-leg-stand tests, with Taliaferro “swaying, using his arms for balance, and hopping in an attempt to maintain his balance” on the latter test.

The totality of the facts and circumstances indicate that at the time Johnson searched Taliaferro so that Taliaferro could then use the bathroom without risking the destruction of evidence, Johnson had probable cause to arrest him for operating while under the influence of drugs in violation of WIS. STAT. § 346.63(1)(a), which makes it illegal for a person to operate a

² Taliaferro contends we should not give “any weight” to Johnson’s testimony that he was aware that constricted and sluggish pupils suggest drug use because “no fact in the record established that Johnson possessed training or experience as a drug recognition expert.” But Taliaferro did not challenge—either by objection, motion, or questioning—Johnson’s testimony that he knew such observations to be “an indication of drug use,” and thus his appellate challenge to Johnson’s testimony on this has been forfeited. See *State v. Ndina*, 2009 WI 21, ¶30, 315 Wis. 2d 653, 761 N.W.2d 612 (“[S]ome rights are forfeited when they are not claimed at trial; ... failure to object constitutes a forfeiture of the right on appellate review.”).

motor vehicle while under the influence of “any ... drug to a degree which renders him or her incapable of safely driving.” Because Johnson had probable cause, the search of Taliaferro was lawful and the circuit court properly denied his motion to suppress the evidence discovered during that search.

Therefore,

IT IS ORDERED that the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals