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DISTRICT IV

February 20, 2020

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

2018AP2425-CR State of Wisconsin v. James G. Bavers (L.C. # 2017CF169)

Before Blanchard, Kloppenburg, and Nashold, 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).

James Bavers appeals a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant (OWI) as a fourth offense. Bavers contends that the circuit court erred by denying his motion for a hearing to challenge the blood draw search warrant because, as Bavers argues, information omitted from the search warrant affidavit undermined the issuing magistrate's probable cause determination. Bavers also contends that the court erred by denying

his motion to suppress his statements at the hospital because, he argues, he was subjected to unconstitutional police interrogation. 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. We summarily affirm.

Police responded to a motor vehicle accident and made contact with Bavers, who was being treated by emergency medical services (EMS) in an ambulance. EMS then transported Bavers to the hospital. Police made contact with Bavers at the hospital and questioned him about consuming alcohol prior to the accident. After Bavers admitted consuming alcohol prior to the accident, he was placed under arrest. After Bavers refused to consent to a blood draw for testing, police obtained a search warrant to seize a sample of Bavers' blood.

Bavers was then charged with OWI and operating a motor vehicle with a prohibited blood alcohol concentration (BAC), both as a fourth offense. Bavers moved for a ***Franks*/*Mann***[1] hearing to challenge the blood draw search warrant, arguing that police failed to include information in the search warrant affidavit that would have undermined the magistrate's determination of probable cause. He also moved to suppress his answers to police questioning at the hospital, arguing that the questioning was unconstitutional. The circuit court denied Bavers' motion for a ***Franks*/*Mann*** hearing, finding that probable cause existed even considering the omitted information. After an evidentiary hearing, the court denied Bavers' motion to suppress his statements at the hospital, finding that Bavers was not in custody when he was interrogated by police. Bavers then pled no contest to OWI as a fourth offense.

[1] *See* ***Franks v. Delaware***, 438 U.S. 154 (1978), and ***State v. Mann***, 123 Wis. 2d 375, 367 N.W.2d 209 (1985).

A ***Franks*/*Mann*** hearing is required if a defendant makes a "substantial preliminary showing" that the search warrant affidavit omitted facts necessary to the determination of probable cause. *See* ***Franks v. Delaware***, 438 U.S. 154, 155-56 (1978) (hearing required upon defendant's substantial preliminary showing that false statement was included in an affidavit with reckless disregard for the truth, and that the statement is necessary to finding of probable cause); ***State v. Mann***, 123 Wis. 2d 375, 385-89, 367 N.W.2d 209 (1985) ("[A]n omitted fact [is] the equivalent of a deliberate falsehood or a reckless disregard for the truth" if it is "an undisputed fact that is critical to an impartial judge's fair determination of probable cause." (internal citations omitted)). The defendant must show that the omitted fact, if included, would prevent a finding of probable cause. ***Mann***, 123 Wis. 2d at 388-89. "[I]f, when the material previously omitted is inserted into the complaint, there remains sufficient content ... to support a finding of probable cause, no ... hearing is required." ***Id.*** at 388. We independently review whether a defendant was entitled to a ***Franks*/*Mann*** hearing. ***State v. Manuel***, 213 Wis. 2d 308, 315, 570 N.W.2d 601 (Ct. App. 1997).

Probable cause for a search warrant exists if there is a fair probability that the specified search will uncover evidence of wrongdoing. *See* ***State v. Romero***, 2009 WI 32, ¶3, 317 Wis. 2d 12, 765 N.W.2d 756. The warrant-issuing magistrate may draw reasonable inferences from the facts set forth in the search warrant affidavit. *See* ***State v. Multaler***, 2002 WI 35, ¶8, 252 Wis. 2d 54, 643 N.W.2d 437. "The test is not whether the inference drawn is the only reasonable inference. The test is whether the inference drawn is a reasonable one." ***State v. Ward***, 2000 WI 3, ¶30, 231 Wis. 2d 723, 604 N.W.2d 517.

Bavers contends that police omitted information from the search warrant affidavit that Bavers was suffering a hypoglycemic episode following the car accident.[2] He contends that police failed to set forth in the affidavit that Bavers' medical condition could have been the cause of his demonstrating indicia of intoxication as observed by police. He contends that, had the information been included, the magistrate may have determined that Bavers was suffering the effects of hypoglycemia rather than intoxication. He contends that police recklessly omitted the information with disregard for the truth, and that the search warrant was invalid as a result.

We conclude that Bavers failed to make a substantial preliminary showing that the omitted information—that Bavers was suffering a hypoglycemic episode—was critical to a probable cause determination. *See* ***Franks***, 438 U.S. at 155-56. The following facts set forth in the search warrant affidavit established a fair probability that a search of Bavers' blood would reveal evidence of wrongdoing. Bavers admitted that he was driving the vehicle that was involved in the accident and that he had consumed three to four beers prior to driving. Police determined that Bavers caused the accident by failing to yield the right of way. EMS personnel reported Bavers stating that "he was done because he was drunk." Bavers emitted a moderate odor of intoxicants and had bloodshot, glassy eyes and slow speech. Bavers was uncooperative, exhibited mood swings, and refused to perform field sobriety tests or a preliminary breath test. Additionally, Bavers had three prior OWI-related convictions. Those facts supported a reasonable inference that Bavers had

[2] Bavers also contends that police failed to explain that the assertion in the affidavit that Bavers was "uncooperative" meant simply that he refused medical treatment. In response, the State argues that Bavers forfeited this argument by failing to assert it in the circuit court. *See* ***Townsend v. Massey***, 2011 WI App 160, ¶25, 338 Wis. 2d 114, 808 N.W.2d 155. In reply, Bavers does not dispute the State's contention that this argument was forfeited and we therefore do not address Bavers' argument further. *See* ***United Coop. v. Frontier FS Coop.***, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578 (appellant's failure to respond in reply brief to an argument made in response brief may be taken as a concession).

consumed enough alcohol prior to driving to result in his blood alcohol concentration being above the reduced threshold of .02. *See* WIS. STAT. § 340.01(46m)(c) (2017-18) (after third OWI offense, prohibited blood alcohol concentration is more than .02).

We agree with the State that adding the omitted information to the search warrant affidavit would not have prevented a finding of probable cause. The facts set forth above, together with information that Bavers was suffering a hypoglycemic episode, established a fair probability that evidence of wrongdoing would be found in Bavers' blood.[3] First, assuming that a reasonable inference could have been drawn that Bavers' hypoglycemic episode caused Bavers to fail to yield the right of way and caused Bavers' uncooperativeness, mood swings, odor of intoxicants, and slowed speech, that is still only one reasonable inference from the facts. It remains that another reasonable inference is that Bavers was intoxicated. *See* ***Ward***, 231 Wis. 2d 723, ¶30. Second, assuming the magistrate would have drawn the inference that those facts were caused by the hypoglycemic episode, the remaining facts were sufficient to establish probable cause. Specifically, Bavers was subject to a .02 blood alcohol limit based on his prior OWI-related convictions, and he both admitted to consuming three to four beers before driving and told EMS personnel that he was "done because he was drunk." Those additional facts established a fair

[3] In reply, Bavers contends that the omitted information about his hypoglycemic episode placed the facts in the search warrant in dispute. He offers by analogy a scenario in which an omitted fact that an eyewitness saw a person exit the driver's seat following a crash and flee the scene would place in dispute whether there was probable cause that an unconscious person still on the scene was the driver. Here, as in the analogy in Bavers' reply brief, the omitted information does not place the *facts* set forth in the search warrant affidavit in dispute, but rather arguably allows for other reasonable inferences to be drawn from those facts. As set forth in this opinion, even allowing for the other reasonable inferences that could have been drawn from some of the facts had the omitted information been included, the search warrant still established probable cause.

probability that a search of Bavers' blood would reveal evidence that he had operated a motor vehicle with a prohibited blood alcohol concentration.

Next, Bavers contends that statements Bavers made in response to police questioning at the hospital prior to Bavers receiving ***Miranda***[4] warnings must be suppressed. He contends that the police questioning was impermissible because police already knew that Bavers would be placed under arrest prior to the questioning, and thus the failure to give ***Miranda*** warnings prior to questioning was an impermissible circumvention of constitutional safeguards. We are not persuaded.

When we review a motion to suppress, we uphold the circuit court's factual findings unless they are clearly erroneous. ***State v. Sveum***, 2010 WI 92, ¶16, 328 Wis. 2d 369, 787 N.W.2d 317. We independently review whether those facts satisfy constitutional provisions. *See* ***id.***

Bavers cites ***State v. Knapp***, 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899, for the proposition that police may not circumvent the ***Miranda*** warning requirements to obtain evidence. In ***Knapp***, 285 Wis. 2d 86, ¶20, the State conceded that physical evidence was obtained as a result of an intentional ***Miranda*** violation by police. The issue was whether the fruit of the poisonous tree doctrine applied to require suppression of the non-testimonial evidence. ***Id.***, ¶¶1-2, 20. The court concluded that physical evidence obtained as a result of a deliberate ***Miranda*** violation must be suppressed, explaining that the court would "not tolerate the police deliberately ignoring ***Miranda***'s rule as a means of obtaining inculpatory physical evidence." ***Id.***, ¶¶72-73. The court stated: "This state has accepted the doctrine that courts must consider the means used in obtaining

[4] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

evidence and not receive it if obtained by violation of constitutional rights of an accused." ***Id.***, ¶73 (internal citation omitted).

Bavers also cites ***Missouri v. Seibert***, 542 U.S. 600 (2004), for the proposition that it is impermissible for police to withhold ***Miranda*** warnings until after questioning a suspect. There, police intentionally withheld ***Miranda*** warnings and conducted a custodial interrogation of Seibert. ***Id.*** at 604-05. After Seibert made incriminating statements, police gave Seibert her ***Miranda*** warnings and conducted a repeated interrogation. ***Id.*** at 605. The court found that Seibert's post-***Miranda*** statements were inadmissible because, on these facts, the warnings did not serve the purpose of ***Miranda***. ***Id.*** at 617.

As Bavers recognizes, ***Miranda*** applies only to custodial interrogation. *See* ***Michigan v. Tucker***, 417 U.S. 433, 443 (1974). Neither ***Knapp*** nor ***Seibert*** supports Bavers' contention that police questioning violates ***Miranda*** when police have the subjective intent to arrest the defendant before questioning begins. Rather, as the State points out, the threshold question is whether the defendant was in custody at the time of the interrogation. *See* ***State v. Bartelt***, 2018 WI 16, ¶30, 379 Wis. 2d 588, 906 N.W.2d 684 ("[T]he ***Miranda*** safeguards apply only to custodial interrogations under both [the United States and Wisconsin] constitutions." (internal citation omitted)). Here, Bavers does not develop an argument that he was in custody at the time of police

questioning.[5] *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992). To the extent that Bavers is asking this court to develop the law to recognize a ***Miranda*** violation under a scenario in which interrogation occurs outside of police custody, we are not persuaded that it would be appropriate for this court to do so.

Therefore,

IT IS ORDERED that the judgment is summarily affirmed pursuant to 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 Appeal

[5] The extent of Bavers' custody argument in his brief in chief is a footnote citing ***State v. Hoffman***, 163 Wis. 2d 752, 761, 472 N.W.2d 558 (Ct. App. 1991), for the proposition that an officer's intentions with respect to whether a suspect is in custody are relevant. However, the ***Hoffman*** court was addressing the test for when a defendant is under "arrest" for purposes of the escape statute, not for when a defendant is in "custody" for purposes of ***Miranda***. ***Id.***, 761-63. In his reply brief, Bavers points out that a formal arrest is not required to implicate ***Miranda***. *See* ***State v. Pounds***, 176 Wis. 2d 315, 322, 500 N.W.2d 373 (Ct. App. 1993) (suspect may be in "custody," requiring police to give ***Miranda*** warnings, prior to formal arrest). Bavers repeats that police had the subjective intent to arrest Bavers prior to arriving at the hospital. However, Bavers does not dispute the State's contention that a reasonable person in Bavers' position would have felt free to terminate the questioning, and that Bavers was therefore not in custody. *See* ***State v. Bartelt***, 2018 WI 16, ¶31, 379 Wis. 2d 588, 906 N.W.2d 684 ("The test to determine whether a person is in custody under ***Miranda*** is an objective test…. [l]ooking at the totality of the circumstances … [to] consider whether a reasonable person would not feel free to terminate the interview and leave the scene." (internal citation omitted)). Because Bavers does not develop an argument that Bavers was in custody for ***Miranda*** purposes, we do not address that issue further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (this court will not develop arguments for a litigant).