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DISTRICT II

February 1, 2023

To:

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Clerk of Circuit Court
Waukesha County Courthouse
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You are hereby notified that the Court has entered the following opinion and order:

2021AP1664-CR State of Wisconsin v. Peter A. Strader (L.C. #2018CF1511)

Before Neubauer, Grogan and Lazar, 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).

Peter A. Strader appeals from a judgment entered after he pled guilty to operating a motor vehicle with a prohibited alcohol concentration, seventh offense, contrary to WIS. STAT. § 346.63(1)(b) (2019-20).[1] He contends the police lacked probable cause to believe he was operating his vehicle under the influence and therefore acted unlawfully when they asked him to consent to a preliminary breath test (PBT). He argues the PBT led to discovering his six prior operating-while-under-the-influence (OWI) convictions and the fact that he was subject to the

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

.02 blood alcohol concentration (BAC) restriction. Therefore, he believes the information discovered after the PBT was the fruit of the poisonous tree and should have been suppressed. He also argues the circuit court erred when it denied his motion collaterally attacking a previous OWI conviction. 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 affirm.

In October 2018, at about 4:30 p.m., Waukesha County Deputy Chadwick Niles performed a traffic stop because Strader's vehicle had a defective exhaust pipe. There was no indication of bad driving. When Niles approached Strader's vehicle, he smelled a faint odor of marijuana and saw Strader smoking a cigarette. Strader told the officer he had marijuana in the car a few days before but that there were no drugs in the vehicle at that time. Niles also smelled a faint odor of alcohol. When Niles asked Strader if he had been drinking, Strader admitted to drinking two beers earlier, explaining he had stopped drinking about an hour before driving. Niles then noticed a small cooler on the seat next to Strader containing what appeared to be unopened beer cans.

When a K-9 officer alerted to narcotics on Strader's passenger door, Strader admitted there was a marijuana joint in the truck, which police found along with a drug pipe. Police conducted field sobriety tests, which showed only two clues on the horizontal gaze nystagmus test. Strader passed the walk-and-turn and one-leg stand tests. Strader agreed to take a PBT—the results of which showed a .056 BAC. Niles then returned to his squad car, intending to give Strader drug citations. However, when Niles ran Strader's record, he learned that Strader had six prior OWI convictions and was subject to the .02 BAC restriction. Niles arrested Strader for operating a motor vehicle with a prohibited alcohol concentration (PAC) and also issued the drug citations.

After the State charged Strader with seventh-offense PAC, he filed a motion to suppress. He argued the police lacked probable cause to request the PBT and that, without it, the police lacked probable cause to arrest him because the information obtained following the PBT was inadmissible. After holding a hearing on the suppression motion where only Niles testified, the circuit court denied the motion. The circuit court set aside the PBT altogether and concluded that Niles had probable cause to arrest Strader for the PAC violation based on his admission to drinking, odor of alcohol, and Niles's knowledge Strader was subject to the .02 BAC restriction.

Prior to entering his guilty plea, Strader filed a motion collaterally attacking his third-offense OWI from 2000. He argued that this conviction should not be counted because he did not have counsel in proceedings related to the 2000 offense, he did not properly waive counsel, and he did not understand the penalties or seriousness of a third OWI. No transcript from the 2000 conviction exists, but other documents from the 2000 conviction were located. One showed that Strader personally signed a waiver of attorney form and initialed all twenty-three sentences explaining his right to counsel and the rights he was giving up by deciding to proceed without counsel. Strader testified at the hearing, claiming he did not read these documents closely and did not fully understand their meaning, but the circuit court found Strader's testimony in that regard not credible. The circuit court also found that Strader understood the penalties associated with his third-offense OWI because he received a copy of the amended criminal complaint where the minimum and maximum penalties were listed. The circuit court denied Strader's motion. Strader now appeals.

Strader raises two issues. First, he contends the circuit court erred in denying his suppression motion. Second, he argues the circuit court erred in denying his motion collaterally

attacking his third OWI conviction from 2000. We reject Strader's arguments and affirm on both issues.

An order granting or denying a motion to suppress evidence presents a question of constitutional fact, which requires a two-step analysis on appellate review. ***State v. Asboth***, 2017 WI 76, ¶10, 376 Wis. 2d 644, 898 N.W.2d 541. "First, we review the circuit court's findings of historical fact under a deferential standard, upholding them unless they are clearly erroneous. Second, we independently apply constitutional principles to those facts." ***State v. Robinson***, 2010 WI 80, ¶22, 327 Wis. 2d 302, 786 N.W.2d 463 (citations omitted). Whether probable cause exists is an objective test. *See* ***State v. Richardson***, 156 Wis. 2d 128, 148, 456 N.W.2d 830 (1990). The objective facts before a police officer need not prove guilt beyond a reasonable doubt; rather, they are sufficient if they lead to the conclusion that a violation of the law is more than a mere possibility. ***Id.*** Probable cause exists if the totality of the circumstances "'would lead a reasonable police officer to believe that the defendant probably committed a crime.'" ***State v. Nordness***, 128 Wis. 2d 15, 35, 381 N.W.2d 300 (1986) (citations omitted). In reviewing whether probable cause exists, courts may consider the officer's training and investigative experience. ***State v. Wille***, 185 Wis. 2d 673, 683, 518 N.W.2d 325 (Ct. App. 1994).

The circuit court did not err with respect to Strader's first issue. The facts show the officer knew that Strader could not legally drive if he had a blood alcohol concentration over .02 and knew Strader had consumed two beers earlier in the afternoon. The officer also noticed a faint odor of alcohol, had eighteen years of law enforcement experience, and had "specialized training in relation to detecting OWI-related offenses[.]" The circuit court concluded that under these circumstances, there was probable cause to arrest. We agree. These facts provide an officer with an objectively reasonable basis to believe Strader was probably violating the law that

prohibited him from driving with a .02 BAC or higher. The .02 restriction is a low threshold and requires the consumption of very little alcohol to reach it. *See* ***State v. Goss***, 2011 WI 104, ¶26, 338 Wis. 2d 72, 806 N.W.2d 918 (recognizing that an officer's knowledge that a driver is subject to the .02 restriction together with the odor of alcohol "make[s] the conclusion that [the driver] was likely in violation of the statute highly plausible"). Strader admitted that he consumed two beers and said he stopped drinking only one hour before the traffic stop. He also smelled of alcohol. This is sufficient to establish probable cause to arrest. The circuit court correctly concluded that Niles had probable cause to arrest Strader for violating the PAC statute.

Although Strader argues the PBT was unlawful, and therefore all information obtained subsequent to it must be suppressed as fruit of the poisonous tree, we disagree. Strader ignores the fact that the circuit court set aside the PBT in determining whether the police had probable cause to arrest and did not directly address whether it was unlawfully obtained. It did not rely on the PBT. Further, the "fruit of the poisonous tree" doctrine requires suppression of evidence only when police act unlawfully to obtain the information. *See* ***Nardone v. United States***, 308 U.S. 338, 341 (1939). Here, the information about Strader's prior convictions and the knowledge that he was subject to the .02 restriction would have been discovered even without the PBT. The Record reflects that Niles intended to issue drug citations, which required entering Strader's name into the computer to check his prior record. Niles would have discovered Strader's prior convictions and .02 restriction at that time. Moreover, our supreme court has recognized that an officer conducting a traffic stop may engage in "'ordinary inquiries,'" which include "'checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance.'" ***State v. Smith***, 2018 WI 2, ¶19, 379 Wis. 2d 86, 905 N.W.2d 353 (citation omitted). Conducting these

ordinary inquiries is lawful. Thus, the discovery that Strader's six prior OWI convictions subjected him to the .02 restriction would have occurred regardless of whether there was a PBT in this case.

In regard to Strader's second issue, we see no error. Strader attempted to collaterally attack his third OWI conviction from almost twenty years earlier, claiming he was deprived of the right to counsel. After holding an evidentiary hearing in which Strader testified, the circuit court found that the State proved Strader knowingly, intelligently, and voluntarily waived his right to counsel and that he knew the penalties and seriousness of the offense. Although there were no transcripts available from the conviction Strader was attacking, there were other documents to refute his claims. These documents included the waiver of attorney form, a plea questionnaire/waiver of rights, minutes, and the amended criminal complaint, all of which provide evidence of Strader's understanding of his rights and the consequences he faced.

Strader testified that he did not read these documents closely, but just "breezed" through them and signed/initialed them without fully understanding. The circuit court found Strader's testimony in that regard not credible. The circuit court also found that he understood the penalties associated with his third-offense OWI because he received a copy of the amended criminal complaint where the minimum and maximum penalties were listed. The Record reflects that Strader had two other countable OWI convictions before his 2000 case—the last one being in 1999—and he admitted to having attorneys for those. Strader also admitted that he knew his sentence would include jail time. The circuit court found that Strader understood the seriousness of the 2000 OWI. Strader has presented nothing to convince us that the circuit court's findings or credibility determination were clearly erroneous.

Although the circuit court made its decision before our supreme court decided ***State v. Clark***, 2022 WI 21, 401 Wis. 2d 344, 972 N.W.2d 533, its decision is supported both under the pre-***Clark*** law and under ***Clark***. ***Clark*** held that when a defendant collaterally attacks a prior conviction where no transcripts exist, the defendant has the burden to prove the error. ***Id.***, ¶18. Strader concedes that ***Clark*** applies because his case is still on direct appeal. *See* ***State v. Lagundoye***, 2004 WI 4, ¶12, 268 Wis. 2d 77, 674 N.W.2d 526 ("[A] new rule of substantive criminal law is presumptively applied retroactively to all cases, whether on direct appeal or on collateral review."). Strader contends he proved his right to counsel was violated because the record showed he wanted a lawyer and did not understand the seriousness of a third OWI conviction or the maximum penalties associated with such a conviction. We disagree.

The Record does reflect that Strader attempted to have counsel appointed and was denied based on his income, but it also shows that he signed a waiver of attorney form and initialed next to each of its twenty-three sentences advising him of his rights. He acknowledged that this form said he was *deliberately* choosing to proceed without counsel and that it advised him of all his rights associated with his right to counsel. The form also says: "I have read this entire form and any attachments. I fully understand this document and any attachments." The only evidence proffered to show that Strader was denied his right to counsel in 2000 is his own self-serving testimony, which the circuit court found in relevant part to be not credible. His attorney even stated the obvious: Strader's "memory is not incredibly great about what happened twenty years ago[.]" Documents that indicate Strader knowingly, intelligently, and voluntarily waived the

right to counsel with an understanding of the serious nature of the charge and its penalties refute Strader's twenty-year-old memories.[2]

Given the documentation in the Record and the circuit court's findings, Strader cannot prove he was deprived of the right to counsel in 2000. Thus, the circuit court correctly denied his motion collaterally attacking that conviction.

Therefore,

IT IS ORDERED that the judgment of the circuit court 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 Appeals

[2] The documents discussed suffice to show Strader's deliberate choice to proceed without counsel and the seriousness of the charge he was facing (along with its range of possible penalties). His counsel conceded that Strader was "aware of the difficulties and disadvantages of self-representation." *See* ***State v. Klessig***, 211 Wis. 2d 194, 205-06, 564 N.W.2d 716 (1997) (discussing the requirements of a valid waiver of counsel).