COURT OF APPEALS
DECISION
DATED AND FILED

July 3, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2367-CR **Cir. Ct. No. 2011CT469**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANDRE DURAND REGGS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Rock County: KENNETH W. FORBECK, Judge. *Affirmed*.

¶1 LUNDSTEN, J.[1] Andre Reggs appeals the circuit court's judgment convicting him of operating a motor vehicle while under the influence of an

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

intoxicant as a fourth offense. Reggs argues that the circuit court erred in denying his motion to declare a 2001 Illinois drunk driving conviction void for sentencing purposes. Reggs also argues that the circuit court erred in concluding that there was probable cause for the arrest that led to Reggs' conviction here. I reject both arguments, and affirm.

Background

¶2 Reggs moved to have his 2001 Illinois drunk driving conviction declared void for sentencing purposes because he was not represented by counsel at the time of the conviction and did not knowingly, intelligently, and voluntarily waive his right to counsel as required by ***State v. Ernst***, 2005 WI 107, 283 Wis. 2d 300, 699 N.W.2d 92. Reggs also moved to suppress evidence obtained from his person, including a blood test, arguing that the officer who stopped him lacked probable cause to arrest him for driving while intoxicated here.

¶3 The circuit court concluded that Reggs failed to make a prima facie showing that he did not knowingly, intelligently, and voluntarily waive the right to counsel for Reggs' 2001 conviction. The court also concluded that the officer had probable cause to arrest Reggs for intoxicated driving here. I reference additional facts below in discussing Reggs' argument that the circuit court erred in both respects.

Discussion

Waiver Of Counsel For Illinois Conviction

¶4 It is undisputed that Reggs' 2001 Illinois conviction was uncounseled. Also undisputed is that a defendant may challenge a prior conviction for sentence enhancement purposes on the ground that the defendant

did not knowingly, intelligently, and voluntarily waive the right to counsel in the prior proceeding. *See* ***State v. Bohlinger***, 2013 WI App 39, ¶15, 346 Wis. 2d 549, 828 N.W.2d 900 ("A defendant may collaterally attack a prior conviction in an enhanced sentence proceeding on the ground that he or she was denied the constitutional right to counsel in [that proceeding].").

¶5 The parties dispute, however, whether Reggs had the right to counsel in the Illinois proceeding and, if he did, whether the waiver of that right in an Illinois proceeding should be analyzed under ***Ernst***, a Wisconsin case, or under ***Iowa v. Tovar***, 541 U.S. 77 (2004). The parties agree that ***Ernst*** provides greater protections to criminal defendants than what is constitutionally required under ***Tovar***.

¶6 I will assume without deciding, that, as Reggs argues, he had the right to counsel in the Illinois proceeding and that ***Ernst*** applies to the waiver question here. Even so, I agree with the circuit court that Reggs failed to make a prima facie showing that he did not knowingly, intelligently, and voluntarily waive the right to counsel in the Illinois proceeding. Reggs' collateral attack on the Illinois conviction therefore fails.

¶7 ***Ernst*** explains that, for a defendant to make the required prima facie showing, the defendant must do more than simply allege that the court at the prior proceeding failed to adequately inform the defendant of the right to counsel. *See* ***Ernst***, 283 Wis. 2d 300, ¶25; *see also* ***Bohlinger***, 346 Wis. 2d 549, ¶15 ("[D]efendant must do more than merely assert that the waiver colloquy in the prior case was deficient."). The defendant must also "point to facts that demonstrate that he or she 'did not know or understand the information which should have been provided' in the previous proceeding and, thus, did not

knowingly, intelligently, and voluntarily waive his or her right to counsel." ***Ernst***, 283 Wis. 2d 300, ¶25 (quoted source omitted). Whether the defendant has made a prima facie showing is a question of law that this court reviews de novo. ***Id.***, ¶26.[2]

¶8 Reggs argues that an affidavit he submitted was sufficient to make a prima facie showing under ***Ernst***. I disagree. Indeed, Reggs' affidavit is deficient in much the same way that the defendant's allegations were deficient in ***Ernst***.

¶9 In ***Ernst***, the defendant alleged that the circuit court "did not take a knowing and voluntary waiver of counsel," and relied on the plea transcript as factual support. ***Id.***, ¶¶5-6, 26. However, the defendant in ***Ernst*** failed to point to specific facts suggesting that his waiver was not actually knowing, intelligent, and voluntary. ***Id.***, ¶26. The court in ***Ernst*** explained that, at least in the context of a collateral attack, this "lack of specific facts result[s] in a failure to establish a prima facie case." ***Id.***

¶10 Much like the defendant in ***Ernst***, Reggs provided facts suggesting that his waiver colloquy was deficient, but he failed to aver or otherwise provide specific facts suggesting that he did not know of or understand his right to counsel. Reggs' affidavit states, as most pertinent here, that:

> 4. Your affiant was never advised of his right to counsel by the presiding Judge [in the Illinois proceeding].
>
> 5. Your affiant was never advised of the difficulties of proceeding without counsel by the presiding Judge, specifically, but not limited to, the fact that an attorney with sufficient legal training could potentially spot legal

[2] If the defendant makes a prima facie showing, then the burden shifts to the State to show by clear and convincing evidence that the defendant's waiver of counsel was knowing, intelligent, and voluntary. ***State v. Ernst***, 2005 WI 107, ¶27, 283 Wis. 2d 300, 699 N.W.2d 92.

> issues which would constitute a defense to the crime alleged.
>
> 6. Had the Judge informed him of his right to counsel and the advantages and disadvantages of having counsel, he would have actively pursued legal counsel.

¶11 While it is true, as Reggs argues, that an affidavit can be sufficient to make a prima facie showing under ***Ernst***, the facts set forth in Reggs' affidavit are not enough. In particular, I have considered whether paragraph 6 of the affidavit might reasonably be read to support an inference that Reggs did not know of or understand his right to counsel, but I conclude that paragraph 6, even when read in context, is not sufficiently specific under ***Ernst***.

¶12 Reggs cites an unpublished case, ***State v. Bowe***, No. 2013AP238-CR, unpublished slip op. (WI App Sept. 17, 2013), as support for his assertion that he made the "specific averments" that are necessary under ***Ernst***. But ***Bowe*** actually supports my conclusion that Reggs failed to make a prima facie showing. The court in ***Bowe*** concluded that the defendant there failed to make a prima facie showing under ***Ernst*** because he "made no specific averments regarding what he did not know or understand." ***Bowe***, No. 2013AP238-CR, ¶14.

¶13 Accordingly, I conclude that Reggs failed to make a prima facie showing under ***Ernst*** and, therefore, that his collateral attack on his Illinois conviction fails.

¶14 Before proceeding to the probable cause issue, I pause to acknowledge that my reasoning on the waiver-of-counsel issue differs somewhat from the circuit court's and the State's. Unlike the circuit court and the State, I do not rely on documentary evidence that the State submitted to show that Reggs was informed of his right to counsel and understood the right. Rather, I conclude that,

regardless of the State's documentary evidence, Reggs' affidavit failed to make a prima facie showing under ***Ernst***.

¶15 Given my conclusion, I need not address whether the circuit court properly relied on the State's documentary evidence in deciding whether Reggs made a prima facie showing. In particular, I need not address Reggs' arguments that the circuit court erred by ignoring his objections to the documentary evidence and by failing to require testimony before relying on it. As noted above, whether Reggs made a prima facie showing under ***Ernst*** is a question of law that I review de novo. *See* ***Ernst***, 283 Wis. 2d 300, ¶26; *see also* ***Milton v. Washburn Cnty.***, 2011 WI App 48, ¶8 n.5, 332 Wis. 2d 319, 797 N.W.2d 924 ("[I]f a circuit court reaches the right result for the wrong reason, [the court of appeals] will nevertheless affirm.").

Probable Cause To Arrest Reggs For Intoxicated Driving

¶16 I turn to Reggs' argument that the circuit court erred in concluding that there was probable cause to arrest him for intoxicated driving. The applicable standards are well settled and are not in dispute:

> Probable cause to arrest for operating while under the influence of an intoxicant refers to that quantum of evidence within the arresting officer's knowledge at the time of the arrest that would lead a reasonable law enforcement officer to believe that the defendant was operating a motor vehicle while under the influence of an intoxicant. The burden is on the state to show that the officer had probable cause to arrest.
>
> The question of probable cause must be assessed on a case-by-case basis, looking at the totality of the circumstances. Probable cause is a "flexible, common-sense measure of the plausibility of particular conclusions about human behavior." When the facts are not disputed, whether probable cause to arrest exists in a given case is a question of law that th[e] court determines independently

> …. 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.

State v. Lange, 2009 WI 49, ¶¶19-20, 317 Wis. 2d 383, 766 N.W.2d 551 (footnotes omitted).

¶17 Here, the facts supporting the circuit court's probable cause determination come from the arresting officer's suppression hearing testimony. The court found that testimony to be credible and "candid." Reggs did not testify.

¶18 The officer testified that he first observed Reggs' vehicle at about 2:30 a.m.[3] Even though it was dark outside, the vehicle's headlights were not on. The vehicle made a "wide left hand turn," turning into the outside lane instead of the inside lane on a four-lane road. It then jerked suddenly to the left, and came within about a foot of striking the curb. During the time the officer observed the vehicle, it was traveling about five miles per hour in a 25-mile-per-hour zone.

¶19 The officer initiated a traffic stop. He acknowledged that Reggs "pulled over as a normal, sober person would have."

¶20 When the officer made contact with Reggs and advised Reggs that his headlights were off, Reggs initially stated that the lights were on, leading the officer to believe that Reggs did not realize the lights were off. While speaking with Reggs, the officer smelled a slight odor of intoxicants, observed that Reggs' eyes were reddish and glassy, and noticed that Reggs' speech was slightly slurred. Reggs admitted that he had consumed two "glasses" of Crown Royal and stated

[3] The transcript initially shows the officer testifying that it was 2:30 p.m., but the officer's subsequent testimony made it clear that it was 2:30 a.m.

that he was coming from a friend's house. When the officer asked for additional information about where Reggs had been, Reggs became "[v]ery evasive."

¶21 The officer directed Reggs to exit his vehicle and asked Reggs to perform field sobriety tests: the horizontal gaze nystagmus (HGN) test, the "one step walk and turn" test, and the one-leg stand test. Reggs performed the HGN test, but told the officer he had physical limitations that prevented him from performing the other two tests.

¶22 Reggs also told the officer that he was blind in his left eye. Thus, the officer administered the HGN test by watching for "clues" of intoxication in Reggs' right eye. Reggs may have told the officer that he was cross-eyed as well, but Reggs did not appear cross-eyed to the officer and the officer thought Reggs' eyes were moving in sync during the HGN test. The officer observed two of three possible clues of intoxication in Reggs' right eye. After administering the HGN test, the officer arrested Reggs for driving while intoxicated.

¶23 Reggs' counsel challenged the reliability of the HGN test and argued that the officer lacked probable cause to arrest Reggs without a reliable HGN test. The circuit court concluded that there was probable cause to arrest Reggs for intoxicated driving even if the court disregarded the HGN test.

¶24 On appeal, the parties dispute the reliability of the HGN test and whether the totality of the circumstances provided probable cause. I agree with the State that the officer's testimony supports the circuit court's conclusion. I need not address the reliability of the HGN test. Rather, like the circuit court, I choose to disregard it.

¶25 Particularly relevant among the totality of the circumstances here are the numerous, accumulating signs of intoxication that the officer observed or that can reasonably be inferred from the officer's testimony. They include:

- Reggs failed to turn on his headlights even though it was dark outside.
- Reggs made a wide left-hand turn into an outside lane, then jerked suddenly to the left and came within about a foot of striking the curb.
- During the time the officer observed Reggs' vehicle, Reggs was traveling about five miles per hour in a 25-mile-per-hour zone. Although Reggs may have properly slowed down for the turn, there is a reasonable inference that the officer observed Reggs driving unusually slow even when Reggs did not need to slow down for the turn.
- While speaking with Reggs, the officer smelled a slight odor of intoxicants.
- When confronted with the fact that his headlights were off, Reggs said he thought they were on, apparently not realizing or forgetting that he had failed to turn them on.
- Reggs' eyes were reddish and glassy.
- Reggs' speech was slightly slurred.
- Reggs stated that he had had two "glasses" of Crown Royal to drink and was coming from a friend's house. There is a reasonable inference that the two "glasses" constituted more than two servings of alcohol or what would normally be considered two "drinks."
- When the officer asked for additional information about where Reggs had been, Reggs became very evasive.
- All of this occurred at around 2:30 a.m., a time when it is reasonable to believe that intoxicated drivers are particularly likely to be on the road.

¶26 As I understand it, Reggs argues that probable cause was lacking here for essentially four reasons. None of Reggs' reasons is convincing.

¶27 First, Reggs points out that there are numerous indicators of intoxicated driving that are *not* present here. For example, Reggs points to testimony in which the officer admitted that he did not observe Reggs engaging in a long list of indicators such as abrupt acceleration, erratic gestures, difficulty following commands, and difficulty locating his license. Reggs also points out that, unlike in some cases where the court found probable cause, his case does not involve a motor vehicle accident. To Reggs' list, I would add the officer's acknowledgment that Reggs pulled over like a "normal, sober person" would. Still, I am not persuaded that the absence of these indicators tips the balance against probable cause.

¶28 Second, Reggs appears to argue that his reddish and glassy eyes had reduced or no value as a sign of intoxication because Reggs had informed the officer that he suffered from one or more eye problems. However, I see nothing in what Reggs told the officer or in the officer's other testimony suggesting any link between reddish and glassy eyes and Reggs' eye problems. Thus, I see no reason to discount the significance of Reggs' reddish and glassy eyes.

¶29 Third, Reggs argues that an odor of intoxicants is a weak indicator of intoxicated driving, and here, the officer described the odor as "slight." Reggs cites an unpublished case supporting the proposition that the odor of intoxicants is not, by itself, sufficient to provide even reasonable suspicion of intoxicated driving. *See* ***State v. Meye***, No. 2010AP336-CR, unpublished slip op. ¶6 (WI App July 14, 2010). Reggs' argument based on ***Meye*** goes nowhere because Reggs exhibited numerous additional indicators of intoxication.

¶30 Finally, Reggs appears to argue that the arrest was lacking in probable cause or otherwise unreasonable because the officer failed to conduct

alternative field sobriety tests that Reggs could have performed. Reggs relies on the following language from a footnote in ***State v. Swanson***, 164 Wis. 2d 437, 475 N.W.2d 148 (1991), *overruled on other grounds by* ***State v. Sykes***, 2005 WI 48, ¶27, 279 Wis. 2d 742, 695 N.W.2d 277:

> Unexplained erratic driving, the odor of alcohol, and the coincidental time of the incident form the basis for a reasonable suspicion but should not, in the absence of a field sobriety test, constitute probable cause to arrest someone for driving while under the influence of intoxicants. A field sobriety test could be as simple as a finger-to-nose or walk-a-straight-line test. Without such a test, the police officers could not evaluate whether the suspect's physical capacities were sufficiently impaired by the consumption of intoxicants to warrant an arrest.

Id. at 454 n.6. Reggs' reliance on ***Swanson*** is not persuasive because we previously explained in ***State v. Wille***, 185 Wis. 2d 673, 518 N.W.2d 325 (Ct. App.), *review denied*, 524 N.W.2d 140 (1994), that this ***Swanson*** footnote does not require field sobriety tests to establish probable cause in all cases. *See* ***Wille***, 185 Wis. 2d at 684. Moreover, the officer here testified that he did not perform the alternative tests because he was not trained in them. Reggs fails to convince me that alternative tests were necessary here to establish probable cause or to establish the reasonableness of his arrest.

Conclusion

¶31 For all of the reasons stated, I affirm the judgment of conviction.

By the Court.—Judgment affirmed.

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