COURT OF APPEALS
DECISION
DATED AND FILED

August 13, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP738-CR **Cir. Ct. No. 2012CT226**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KENT W. HUBBARD,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Affirmed*.

¶1 REILLY, J.[1] Kent W. Hubbard appeals from a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant or other drug, contrary to WIS. STAT. § 346.63(1)(a), as a second offense. Hubbard argues that the results of his nonconsensual and warrantless blood test should have been suppressed by the circuit court as police had neither probable cause to arrest him nor exigent circumstances to take his blood without a warrant. We affirm as police had probable cause to arrest, and exigent circumstances justified Hubbard's blood draw based on a reasonable suspicion that he was operating his vehicle with a mixture of alcohol and controlled substances in his system.

BACKGROUND

¶2 Hubbard was stopped at 2:45 a.m. for driving with an unlit taillight. The police officer observed Hubbard's eyes to be red and bloodshot. Hubbard acknowledged that he had consumed "two shots," and a preliminary breath test (PBT) showed a result of approximately .02. Hubbard failed the one-leg-stand test and exhibited several clues of impairment on other field sobriety tests. Hubbard admitted smoking "weed" about nine hours prior and consented to a search of his car, during which two glass pipes containing burnt residue as well as a pill bottle containing a green seed and a Ziploc bag containing a green leafy substance, both smelling like marijuana, were found. Hubbard was arrested for operating a vehicle with a detectable amount of a restricted controlled substance in his blood and read the Informing the Accused form asking him to submit to a chemical test of his

[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.

blood. Hubbard refused to consent to a test, stating "that he had been a prior heroin addict and he did not want to have a needle put into his arm." A blood draw was taken without a warrant and it showed that Hubbard had methamphetamine in his blood. Hubbard was charged with one count of operating a motor vehicle while under the influence of an intoxicant, controlled substance, or any other drug or *combination of substances*, contrary to WIS. STAT. § 346.63(1)(a), and one count of operating a motor vehicle with a detectable amount of a restricted controlled substance in his blood, contrary to § 346.63(1)(am).

¶3 Hubbard filed a motion to suppress the evidence obtained subsequent to his arrest on the ground that police lacked probable cause to arrest him. At the evidentiary hearing, the officer was the sole witness. He testified, in addition to the above facts, that he had been a police officer for more than two years and that he had received drug training related to impaired driving, where he had learned that marijuana could remain in the bloodstream for "24 hours or longer." The circuit court[2] found there was probable cause to arrest Hubbard based on his admission to smoking marijuana before driving.

¶4 Hubbard filed a subsequent ***Bohling***[3] motion to suppress the results of his blood test, arguing that as the officer testified that marijuana could stay in the bloodstream for twenty-four hours, no exigent circumstances existed to do a

[2] The Honorable Robert J. Kennedy presided over Hubbard's first motion to suppress. The Honorable David M. Reddy presided over Hubbard's second suppression motion. The Honorable James L. Carlson signed the judgment of conviction.

[3] ***State v. Bohling***, 173 Wis. 2d 529, 494 N.W.2d 399 (1993), *abrogated by* ***Missouri v. McNeely***, 569 U.S. ___, 133 S. Ct. 1552 (2013).

blood draw without a warrant. The arresting officer was again the only witness at the evidentiary hearing held on Hubbard's second suppression motion. The officer testified that prior to the blood draw, he had learned that Hubbard had been convicted for a prior offense of operating while under the influence of an intoxicant or other drug. The officer testified that, based on his training and experience, "I can't take everyone's word" for how much they had to drink or when they last took drugs. The court denied Hubbard's second motion. Hubbard subsequently pled guilty to operating under the influence as a second offense. Hubbard appeals.

DISCUSSION

Probable Cause to Arrest

¶5 Hubbard argues that the officer did not have probable cause to arrest him. He argues that the information available to the officer at the time of arrest "did not indicate the presence of a detectable amount of restricted controlled substance." We disagree.

¶6 Probable cause to arrest refers to the quantum of evidence within the arresting officer's knowledge at the time of arrest that would lead a reasonable officer to believe that the defendant probably committed a crime—in this case, operating a motor vehicle with a detectable amount of a restricted controlled substance in his blood. *See* ***State v. Paszek***, 50 Wis. 2d 619, 624-25, 184 N.W.2d 836 (1971). In assessing probable cause, we look to the totality of the circumstances. ***State v. Babbitt***, 188 Wis. 2d 349, 356, 525 N.W.2d 102 (Ct. App. 1994). Where the facts are undisputed, as here, whether police had probable cause for arrest is a question of law that we review independently without deference to

the circuit court. ***State v. Drogsvold***, 104 Wis. 2d 247, 262, 311 N.W.2d 243 (Ct. App. 1981).

¶7 Hubbard focuses his argument on the evidence that did not support probable cause: no erratic driving, no odor of burnt marijuana emanating from Hubbard or his car, no odor of intoxicants, no indicators of intoxication on some field sobriety tests, and a PBT result below the legal limit for driving. Hubbard's argument fails as the officer had sufficient other evidence to support a reasonable belief that Hubbard had operated his vehicle with a detectable amount of a restricted controlled substance in his blood. The most persuasive evidence known to the officer was Hubbard's own admission that he smoked marijuana ("weed") within nine hours of driving. The officer's training instructed that this would be recent enough for marijuana to be detected in his blood. Hubbard's red, bloodshot eyes and the officer's experience also told him that Hubbard might have smoked marijuana more recently than he admitted. The officer also discovered marijuana in Hubbard's car along with two pipes that could be used to smoke the drug.

¶8 WISCONSIN STAT. § 346.63(1)(am) forbids anyone from operating a motor vehicle with "a detectable amount of a restricted controlled substance in his or her blood." The term "restricted controlled substance" applies to a number of drugs defined by WIS. STAT. § 340.01(50m), including delta-9-tetrahydrocannabinol, the primary active ingredient in marijuana. *See* ***State v. Smet***, 2005 WI App 263, ¶¶2, 4, 288 Wis. 2d 525, 709 N.W.2d 474. Proof of impairment is not necessary to find a violation of the law. *See* ***id.***, ¶¶15-16. Under the totality of the circumstances, the officer had probable cause to believe that Hubbard had operated his vehicle with a detectable amount of a restricted controlled substance in his blood.

Exigent Circumstances

¶9 Hubbard next argues that even if there was probable cause for his arrest, the State did not establish that exigent circumstances justified the subsequent warrantless, nonconsensual blood draw. Whether a nonconsensual blood draw following an arrest falls within the exigent circumstances exception to the warrant requirements of our federal and state constitutions is a question of law subject to de novo review. ***State v. Faust***, 2004 WI 99, ¶9, 274 Wis. 2d 183, 682 N.W.2d 371.

¶10 Hubbard argues that the police officer's testimony that marijuana can stay in a person's bloodstream for twenty-four hours after ingestion undermines the State's stance that exigent circumstances justified taking his blood without a warrant. Hubbard argues that either the officer had plenty of time to obtain a warrant or, if the officer was mistaken about how long marijuana stays in the system, a blood draw based upon this mistaken belief would be unreasonable. We disagree with Hubbard as there was reasonable suspicion that Hubbard's blood contained evidence of a crime—not just operating with a detectable amount of a restricted controlled substance, contrary to WIS. STAT. § 346.63(1)(am), but also operating while under the influence of a combination of alcohol and a controlled substance, contrary to § 346.63(1)(a). The dissipation of alcohol in the blood provided exigent circumstances justifying the warrantless blood draw.

¶11 Blood may be drawn incident to arrest, without a warrant, and over an arrestee's objection if there is reasonable suspicion that the blood contains evidence of a crime. ***Bohling***, 173 Wis. 2d at 537 & n.8; ***State v. Seibel***, 163 Wis. 2d 164, 166, 471 N.W.2d 226 (1991). The reasonable suspicion standard requires "a particularized and objective basis" to believe that evidence may be

found within the arrestee's blood. ***Seibel***, 163 Wis. 2d at 173 (citations omitted). Furthermore, exigent circumstances must exist to justify such a warrantless search and the search must be carried out in a reasonable manner. ***Bohling***, 173 Wis. 2d at 537. Exigent circumstances exist where "there is a threat that 'evidence will be lost or destroyed if time is taken to obtain a warrant.'" ***Faust***, 274 Wis. 2d 183, ¶11. The test for whether exigent circumstances exist is an objective one that looks at "[w]hether a police officer under … circumstances known to the officer at the time reasonably believes delay in procuring a warrant would … risk destruction of evidence." ***Bohling***, 173 Wis. 2d at 538. At the time of Hubbard's blood draw, Wisconsin law provided that exigent circumstances existed "based solely on the rapid dissipation of alcohol from a person's bloodstream." ***Faust***, 274 Wis. 2d 183, ¶18.[4]

¶12 When Hubbard was arrested for having a detectable amount of a restricted controlled substance in his blood, the particular facts at the time of his arrest also gave rise to reasonable suspicion that Hubbard operated his vehicle while under the influence of a combination of intoxicating and controlled substances. Hubbard was stopped early in the morning and admitted to drinking alcohol, and a PBT result indicated that some alcohol was in his system. Hubbard also admitted to smoking marijuana and his red, bloodshot eyes indicated that he might have been operating a motor vehicle while under the influence of alcohol, controlled substances, or a combination of substances. Additionally, prior to the

[4] This holding from ***Bohling*** has since been overruled by the United States Supreme Court. *See* ***McNeely***, 133 S. Ct. at 1556. Hubbard does not argue that ***McNeely*** mandates suppression of the blood test results in this case, but that the State failed to meet the requirements of ***Bohling***, which was clear and settled precedent at the time of the blood draw. *See* ***State v. Reese***, 2014 WI App 27, ¶¶18, 22, 353 Wis. 2d 266, 844 N.W.2d 396.

blood test, the officer learned that Hubbard had a previous conviction for operating under the influence, *see* ***State v. Goss***, 2011 WI 104, ¶22 & n.19, 338 Wis. 2d 72, 806 N.W.2d 918, and that he was a recovering drug addict. Under the circumstances known to the officer at the time of the blood draw, a reasonable police officer would have had a "particularized and objective basis" to believe that a blood test would uncover evidence of alcohol and/or controlled substances in Hubbard's blood and that, at least in the case of alcohol, this evidence would be lost if the officer delayed a test to wait for a warrant. Looked at objectively, exigent circumstances under ***Bohling*** existed so as to justify the blood draw.[5]

By the Court.—Judgment affirmed.

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

[5] Hubbard also challenges his blood draw on the ground that his refusal because of his previous heroin addiction was a reasonable objection, and therefore, the blood draw violated ***Bohling***. *See* ***Bohling***, 173 Wis. 2d at 533-34. Hubbard provides no citations to authority to support his argument that an arrestee's fear "that use of a syringe may trigger a relapse for a recovering heroin addict" is a reasonable objection. Hubbard also fails to refute in his reply brief that this argument should be rejected as undeveloped. We therefore decline to address Hubbard's undeveloped argument. *See* ***State v. Bentdahl***, 2013 WI 106, ¶5, 351 Wis. 2d 739, 840 N.W.2d 704.