COURT OF APPEALS
DECISION
DATED AND FILED

December 18, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1041-CR **Cir. Ct. No. 2011CT678**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

AARON J. FUCHS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sauk County: PATRICK J. TAGGART, Judge. *Affirmed*.

¶1 LUNDSTEN, J.[1] Aaron Fuchs appeals a judgment of conviction for operating a motor vehicle with a prohibited blood alcohol concentration as a third

[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 2009-10 version, the version in effect at all relevant times here, unless otherwise noted.

offense. He challenges the circuit court's denial of his motion seeking suppression of the result of a blood alcohol test. I affirm the circuit court.

Background

¶2 The background facts necessary to understand the discussion below are few. At about 11:30 p.m. on a September evening, the arresting officer learned information indicating that Fuchs had possibly been violent and intoxicated at a wedding reception at the Wintergreen Resort in the Village of Lake Delton. The officer, located in Sauk County, learned that the suspect lived in the Town of Baraboo and the officer went to Fuchs' address to wait. About 15 minutes later, Fuchs arrived. The officer made contact and observed some indications of intoxication. The officer then administered field sobriety tests. After the field sobriety tests, the officer requested that Fuchs submit to a preliminary breath test (PBT). Fuchs agreed, and the PBT result was .14. A subsequent blood alcohol test showed a blood alcohol concentration of .144.

Discussion

¶3 Fuchs makes two arguments. First, he contends that his detention for the purpose of conducting field sobriety tests was not supported by reasonable suspicion. Second, Fuchs argues that the officer's request that Fuchs submit to a PBT was not supported by "probable cause to believe." I reject both arguments.

Reasonable Suspicion Supporting Detention

¶4 When reviewing the denial of a motion to suppress evidence, a reviewing court upholds circuit court findings of fact unless those findings are clearly erroneous. ***State v. Eckert***, 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996). Whether those facts satisfy a legal standard is a question of law that

is reviewed de novo. *See* ***State v. Ellenbecker***, 159 Wis. 2d 91, 94, 464 N.W.2d 427 (Ct. App. 1990).

¶5 Fuchs contends that reasonable suspicion is lacking here. His argument hinges on a relatively narrow proposition. According to Fuchs, when assessing reasonable suspicion, it is improper here to consider the officer's knowledge of an allegation that Fuchs had been acting violently and in an intoxicated manner at a wedding reception shortly before the officer's contact with Fuchs. Fuchs contends that, if this information is discarded, what remains does not supply reasonable suspicion. Fuchs does not contend that, if information about his suspected behavior at the wedding reception is properly considered, reasonable suspicion is lacking. More specifically, Fuchs argues that the "violent and intoxicated" information here was worthless under the reasoning employed in ***State v. Pickens***, 2010 WI App 5, 323 Wis. 2d 226, 779 N.W.2d 1 (WI App 2009). I disagree.

¶6 Fuchs correctly states that, in ***Pickens***, we concluded that an officer's mere knowledge that Pickens was a suspect in a shooting incident that occurred on a prior occasion did not add to a reasonable belief that, at the time police made contact with Pickens, Pickens posed a threat to the police. *See* ***id.***, ¶¶5, 8-9, 13. However, unlike here, the problem in ***Pickens*** was that nothing about the prior shooting or why Pickens was a suspect was known. At the ***Pickens*** suppression hearing, the prosecutor could have relied on the collective knowledge doctrine and presented information supporting the suspicion of other officers, but no such information was presented. *See* ***id.***, ¶¶12, 17. Thus, the suppression hearing evidence amounted to nothing more than the bare fact that Pickens was, for reasons unknown, suspected of unspecified involvement in an unspecified shooting incident. *See* ***id.***, ¶16.

¶7 The situation here is much different. Here, the officer had more information about the suspected behavior, and the officer personally made observations tying Fuchs to that suspected behavior. The following articulable facts easily supply reasonable suspicion:

- Police officers had been dispatched to the Wintergreen Resort in the Village of Lake Delton at about 11:24 p.m. to investigate a disturbance.
- The disturbance involved a male who was violent and intoxicated and may have damaged a motel room.
- The suspect left the resort in a black Trail Blazer with Wisconsin registration 998STS.
- The Trail Blazer observed leaving the resort was registered to Aaron Fuchs.
- Fuchs had been at a wedding reception at the resort, an event at which alcohol is typically served.
- The arresting officer, a Sauk County Sheriff's deputy, proceeded to Fuchs' Glacier Drive address in the Town of Baraboo, parked across the street, and waited.
- About 15 minutes later, at about 11:56 p.m., the black Chevy Trail Blazer registered to Fuchs pulled into Fuchs' driveway.
- The officer identified the driver as Fuchs, whom he recognized from prior contacts.
- When the officer informed Fuchs that the officer was there because of a "disturbance that occurred at the Wintergreen Resort," Fuchs replied "I know," a response that supported the inference that Fuchs

had been at the resort and knew that something had happened there that warranted police attention.[2]

- Fuchs had an odor of intoxicants on his breath.

- When the officer asked Fuchs how much he had to drink, Fuchs responded, "I don't know. What do you want me to say?"

- Fuchs went on to admit that he had been drinking "off and on" at the Wintergreen Resort from 2:30 p.m. to 11:00 p.m. and that his last drink was a tap beer. The circuit court characterized this as Fuchs' admission that he had been "drinking several hours at a wedding reception."

- The time of the contact, just before midnight, is consistent with a time that people are more likely to be intoxicated.[3]

- Whatever happened at the Wintergreen Resort, it resulted in Lake Delton Police lodging "disorderly conduct domestic related" charges against Fuchs, leading the officer to believe that he had the authority to take Fuchs into custody on those charges.[4]

[2] Fuchs asserts that the State overstates the inculpatory nature of the "I know" statement. According to Fuchs, the State treats the response as if it were a tacit admission that Fuchs was violent and intoxicated. It is not clear to me that the State takes it this far. Regardless, I consider the response as an apparent admission that Fuchs had been at the resort and knew that something had happened there that warranted police attention.

[3] Fuchs hopes I will conclude that ***County of Sauk v. Leon***, No. 2010AP1593, unpublished slip op. ¶25 (WI App Nov. 24, 2010), an unpublished one-judge opinion, is persuasive authority for the proposition that the time, 11:56 p.m., "adds little." I am not persuaded. It is not apparent to me that there is a significant difference generally between "bar time" and midnight. More specifically, here the time must be understood in connection with other information that gave the officer reason to believe Fuchs had been drinking at a wedding reception starting at 2:30 p.m.

[4] The circuit court assumed that the officer heard over his radio a dispatch discussion of a "domestic incident at Wintergreen where a male was acting violent, was intoxicated and had caused damage." Fuchs does not challenge this finding.

As should be apparent, these facts amount to much more than the "shooting incident" evidence in ***Pickens***. No reasonable police officer would have failed to believe that it was likely that Fuchs had drank too much at the reception, became involved in an altercation in a motel room, and left in his Trail Blazer while intoxicated. Particularly inculpatory were Fuchs' responses when asked about drinking and why the officer made contact with him. When he was told the officer was there to follow up regarding an incident at the resort, Fuchs did not express surprise or otherwise indicate a lack of knowledge, but instead responded with words ("I know") suggesting Fuchs knew about events at the resort that would have prompted police attention. When the officer asked Fuchs how much he had to drink, Fuchs did not simply respond, "I don't know," he went on to suspiciously and rhetorically ask: "What do you want me to say?"

¶8 I conclude that these articulable facts supply more than reasonable suspicion of intoxicated driving.

"Probable Cause To Believe" Supporting The PBT Request

¶9 Fuchs argues that, even if reasonable suspicion supported having him perform field sobriety tests, the field sobriety tests did not yield significant inculpatory information. According to Fuchs, after administration of the field sobriety tests, the officer still had no more than reasonable suspicion of intoxicated or impaired driving and, therefore, lacked the "probable cause to believe" needed to request that Fuchs submit to a PBT.

¶10 By statute, a police officer must have "probable cause to believe" a person has violated an operating while intoxicated statute before the officer may request that the person submit to a PBT. *See* WIS. STAT. § 343.303; ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 317, 603 N.W.2d 541 (1999). "Probable

cause to believe," in this context, means less than normal probable cause. "'[P]robable cause to believe' refers to a quantum of proof greater than the reasonable suspicion necessary to justify an investigative stop ... but less than the level of proof required to establish probable cause for arrest." ***Id.*** at 316; *see also* ***State v. Fischer***, 2010 WI 6, ¶5, 322 Wis. 2d 265, 778 N.W.2d 629.

¶11 As with the first suppression issue, I rely on the circuit court's factual findings unless those findings are clearly erroneous, and I independently determine whether those facts meet the applicable legal standard.

¶12 Fuchs' lack-of-probable-cause-to-believe argument is based on the proposition that the indications of intoxicated driving here are weaker than in three published decisions: ***Renz***; ***State v. Colstad***, 2003 WI App 25, 260 Wis. 2d 406, 659 N.W.2d 394; and ***State v. Begicevic***, 2004 WI App 57, 270 Wis. 2d 675, 678 N.W.2d 293. However, in making this comparison, Fuchs starts with a flawed summary of the indicators here.

¶13 Referring to the indicators of intoxication prior to the field sobriety tests, Fuchs contends that "[t]he only possible indicators observed by [the officer] are a non-specific ... odor of intoxicant on Mr. Fuchs coupled with Mr. Fuchs's non-specific statements that he drank earlier." This favorable characterization is one that Fuchs might ask a fact finder to adopt, but it is not one that I am free to adopt. Rather, I must view the evidence in a manner that supports the circuit court's decision. *See* ***State v. Pallone***, 2000 WI 77, ¶44 n.13, 236 Wis. 2d 162, 613 N.W.2d 568 (when an express finding is not made, appellate courts normally assume the circuit court made findings in a manner that supports its final decision), *overruled on other grounds by* ***State v. Dearborn***, 2010 WI 84, ¶¶25-29, 327 Wis. 2d 252, 786 N.W.2d 97. I have previously summarized the articulable

inculpatory facts that existed prior to the field sobriety tests and will not repeat those facts here. It is sufficient to say that Fuchs' reliance on ***Renz***, ***Colstad***, and ***Begicevic*** is unpersuasive because he compares the facts in those cases to a version of the facts here that is most favorable to Fuchs, not a version that is most favorable to the circuit court's decision.

¶14 Turning to the additional indications of intoxication gleaned from the field sobriety tests, I begin by acknowledging that Fuchs performed relatively well on the tests. At the same time, Fuchs' performance on the tests did add to the totality of the incriminating factors.

¶15 Making inferences that support the circuit court's decision, I conclude that the circuit court found the following results of the field sobriety tests added to "probable cause to believe": the Horizontal Gaze Nystagmus (HGN) test yielded at least four of a possible six clues;[5] the walk and turn test yielded one clue; and the one-leg stand test yielded one clue. I need not discuss the tests in detail. It is sufficient to say that each test that was administered revealed at least some evidence of impairment. When I add these to factors already discussed, the "probable cause to believe" standard is met.

¶16 Finally, I acknowledge, as Fuchs has repeatedly stressed, that several typical indicators of intoxication were absent, such as erratic driving or slurred speech. And, I agree it is appropriate to consider all of the facts. However, the

[5] The parties dispute whether the record supports the view that the HGN test revealed four clues, rather than six. The circuit court's decision states that the HGN test resulted in "at least four out of six clues." Thus, I will assume the test yielded four clues.

factors indicating that it was reasonable to think that Fuchs was intoxicated at the resort, and remained so when he drove his vehicle, are strong.

Conclusion

¶17 For the reasons above, I affirm the circuit court.

By the Court.—Judgment affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)4. (2011-12).