COURT OF APPEALS
DECISION
DATED AND FILED

March 4, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2459-CR **Cir. Ct. No. 2014TR3551**

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

COUNTY OF WINNEBAGO,

PLAINTIFF-APPELLANT,

V.

PAVEL FORD,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Winnebago County: THOMAS J. GRITTON, Judge. *Affirmed*.

¶1 GUNDRUM, J.[1] The County of Winnebago appeals from the circuit court's order dismissing this case following the court's suppression of

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

evidence stemming from the arrest of Pavel Ford for operating a motor vehicle with a detectable amount of a restricted controlled substance in his blood. The County contends the court erred in concluding that the arresting deputy lacked probable cause to arrest Ford and procure a sample of his blood. Because we conclude that the County failed to meet its burden to demonstrate that the deputy had probable cause, we affirm.

Background

¶2 Ford was arrested, a sample of his blood was procured, and he was charged with a first offense violation of WIS. STAT. § 346.63(1)(am), operating a motor vehicle with "a detectable amount of a restricted controlled substance in his … blood." *See* ***id.*** He moved to suppress the evidence. He and the two Winnebago County sheriff's deputies involved with his arrest were the only witnesses to testify at the suppression hearing on Ford's motion. Their relevant testimony is as follows.

¶3 Deputy Nathan Olig testified that around 3 p.m. on January 19, 2014, he was dispatched to investigate a report of vehicles racing on an oval track on frozen Lake Winnebago. Once there, he observed two vehicles going around such a track approximately 100 yards from the shoreline, with other individuals and vehicles inside the ring of the track. The snowmobile patrol made contact with Ford, who was the driver of one of the vehicles, and ordered him to the shoreline near Olig. When Ford's vehicle was within about ten to fifteen feet of Olig, Olig smelled the odor of marijuana coming from inside it. Olig testified that he "explained to [Ford] that it was [Olig's] understanding that [Ford] had smoked marijuana within a half hour of operating a motor vehicle and [Ford] confirmed [Olig's] understanding."

¶4 On cross-examination, Olig acknowledged that he had initially indicated to another deputy that his visual estimation was that the individuals on the track were between 400 and 500 yards from Olig. He confirmed that he had written in his report of the incident that one of the deputies had indicated to him that Ford had admitted to using marijuana, but testified that he could not recall which deputy told him this. Olig also acknowledged that he administered field sobriety tests to Ford, but that based on the results of those tests, he did not believe there was probable cause to arrest Ford "for OWI."

¶5 Testifying next, Deputy Jason Rippl stated he was performing his duties on a snowmobile when he made contact with Ford on the frozen lake and smelled the odor of marijuana coming from inside of Ford's vehicle. On cross-examination, Rippl confirmed that he had asked Ford about the marijuana smell and Ford indicated that "some people" had been in his vehicle about a half hour earlier and had been smoking marijuana, causing it to smell as it did. Rippl further acknowledged that Ford never admitted to him that he had smoked marijuana and that Rippl never found any illegal substances during a subsequent search of Ford's vehicle. Rippl confirmed that from where Olig was standing on shore, Olig had been around 400 to 500 yards from the vehicles on the ice.

¶6 Ford then testified on his own behalf. Through his counsel's questioning, Ford confirmed that when deputies approached him in his vehicle on the lake, they stated they could smell marijuana; he told the deputies "somebody else" had been smoking in the vehicle prior to him getting in it; he never told them he himself had smoked marijuana; and he passed field sobriety tests. Ford further confirmed in reference to a Google map exhibit that he drove a distance of approximately 2265 feet from where he made contact with the deputy by the oval track to where Olig was located on the shore.

¶7 Following the hearing, the circuit court issued it decision, drawing parallels between this case and the case in ***State v. Graske***, Nos. 2009AP1933-CR, 2009AP1934, unpublished slip op. (WI App Mar. 24, 2010):

> What is interesting between the two cases is … bottom line the Court of Appeals says … the marijuana smell wasn't enough in and of itself to arrest the individual in the ***Graske*** case and they suppress some of the statements.
>
> Now, … [Ford's counsel], I noticed at the end of your request you ask that statements be also suppressed, I think from a statement standpoint … it is a little different case because that individual in ***Graske*** was physically placed under arrest on a warrant and as a result, ***Miranda***[[2]] was appropriate for him. That's not the case here.
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> So the question of Mr. Ford in this case I think is an investigatory question and he indicates that *they had smoked the marijuana earlier*.
>
> A couple of things, also, that I think are relevant for whether or not there was reason to arrest Mr. Ford under these circumstances was a search of the vehicle. It accounted for nothing being found. He passed the field sobriety tests. So if I'm remembering correctly, and I have looked back at the transcript as well, *really the only thing we have is that there was some smell, an odor of marijuana coming from the car,* and *that's where I think* ***Graske*** *is helpful*.
>
> In ***Graske*** they indicate [an odor of marijuana coming from the car] *by itself without a link to more is insufficient evidence for the arrest* for driving while under the influence of a controlled substance[] *so* I think the officer had every right to go through the process *but I don't think there is probable cause in the end for the arrest*, and so for that purpose I'm going to suppress the blood test that was as a result of the arrest. (Emphasis and footnote added.)

The circuit court subsequently entered an order suppressing the evidence and dismissing the case. The County appeals.

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

Discussion

¶8 Probable cause "must be assessed on a case-by-case basis, looking at the totality of the circumstances." ***State v. Lange***, 2009 WI 49, ¶20, 317 Wis. 2d 383, 766 N.W.2d 551. "Probable cause to arrest is the quantum of evidence within the arresting officer's knowledge at the time of the arrest which would lead a reasonable police officer to believe that the defendant probably committed or was committing a crime." ***State v. Secrist***, 224 Wis. 2d 201, 212, 589 N.W.2d 387 (1999). This is an objective standard based upon the information available to the officer. ***State v. Kutz***, 2003 WI App 205, ¶12, 267 Wis. 2d 531, 671 N.W.2d 660. In reviewing a motion to suppress evidence based on a lack of probable cause, we uphold the circuit court's fact finding unless clearly erroneous. ***Id.***, ¶13. If the facts are not in dispute, or when we uphold the circuit court's factual findings, all that remains is the question of whether the facts fulfill the probable cause standard. *See* ***id.*** This court reviews that question de novo. ***Id.***

¶9 At a suppression hearing, the government bears the burden of persuading the court that probable cause existed to arrest the defendant. *See* ***State v. Wille***, 185 Wis. 2d 673, 682, 518 N.W.2d 325 (Ct. App. 1994). The weight of testimony and credibility of witnesses are to be determined by the trier of fact, and where the circuit court is the trier of fact, we will not disturb its factual findings so long as they at least can be reasonably inferred from the credible evidence. *See* ***Johnson v. Merta***, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980). "Such deference to the [circuit] court's determination of the credibility of witnesses is justified … because of '… the superior opportunity of the [circuit] court to observe the demeanor of witnesses and to gauge the persuasiveness of their testimony.'" ***Id.*** (citation omitted).

¶10 The question before us in this case is whether, based upon the totality of the circumstances as evidenced by the undisputed facts and those facts found by the circuit court which are not clearly erroneous, a reasonable law enforcement officer possessing such facts would have reasonably believed Ford probably committed a crime—here the crime of operating a motor vehicle with a detectable amount of a restricted controlled substance in his blood.[3] As the County points out, the elements for this offense are that a defendant (1) drove or operated a motor vehicle on a highway and (2) had a detectable amount of a restricted controlled substance in his or her blood while doing so. *See* WIS. STAT. § 346.63(1)(am); *see also* WIS JI—CRIMINAL 2664B. Ford raises no challenge to the first element, but argues that at the time of arrest the deputies did not possess probable cause that he had a detectable amount of a controlled substance in his blood while operating his vehicle.

¶11 In its oral ruling, the circuit court commented: "So the question of Mr. Ford in this case I think is an investigatory question and [Ford] indicates that *they* had smoked the marijuana earlier." (Emphasis added.) We interpret this comment by the court as an acceptance of Rippl's testimony that when Rippl had asked Ford about the smell of marijuana coming from Ford's vehicle, Ford told Rippl that "some people" had been inside Ford's vehicle about a half hour earlier and had been smoking marijuana, causing the odor.[4] Immediately following this

[3] The County states in its brief-in-chief that the restricted controlled substance at issue is Delta-9 Tetrahydrocannabinol. Ford does not dispute this.

[4] While the circuit court's reference to "they" in this statement, if taken out of context, could potentially be read as a reference to other persons *and* Ford smoking marijuana, the court's subsequent comments clearly indicate that it at no point made a finding that Ford had consumed marijuana himself.

comment by the court, the court noted that a search of Ford's vehicle resulted in no evidence of marijuana and Ford passed field sobriety tests, which would support the conclusion that Ford was not impaired by marijuana.[5] The court then stated:

> [R]eally the *only thing* we have is that there was some smell, *an odor of marijuana coming from the car*, and *that's where I think* ***Graske*** *is helpful*.
>
> In ***Graske*** they indicate [an odor of marijuana coming from the car] *by itself without a link to more is insufficient evidence for the arrest* for driving while under the influence of a controlled substance[] *so* I think the officer [in this case] had every right to go through the process *but I don't think there is probable cause in the end for the arrest*, and so for that purpose I'm going to suppress the blood test that was as a result of the arrest. (Emphasis added.)

¶12 ***Graske*** involved the smell of marijuana in a vehicle occupied by a driver and a passenger. ***Graske***, Nos. 2009AP1933-CR, 2009AP1934, unpublished slip op., ¶2. We ultimately held that because there was only an odor of marijuana and no admissible evidence specifically connecting the cause of the odor to the driver's, as opposed to the passenger's, consumption of marijuana, "the necessary link to establish probable cause" did not exist to conclude that the driver had operated the motor vehicle with a detectable amount of a controlled substance in his blood. ***Id.***, ¶8 (citing ***Secrist***, 224 Wis. 2d at 217-18).

¶13 Our supreme court's decision in ***Secrist*** is also instructive. In that case, an officer smelled a strong odor of marijuana coming from a vehicle and

[5] While impairment is not the question on a charge of operating a motor vehicle with a detectable amount of a restricted controlled substance, passing field sobriety tests would support, at least somewhat, an inference that Ford did not have marijuana in his system. Of course, we assume a person could also have "a detectable amount" of Delta-9 THC in his or her system and yet pass field sobriety tests.

arrested the driver, who was the lone occupant of the vehicle, on drug charges. ***Secrist***, 224 Wis. 2d at 205. A search incident to arrest led to evidence of drugs. ***Id.*** The defendant argued that the odor of burned marijuana was insufficient to establish that he was the one who smoked the marijuana. ***Id.*** at 213. In rejecting the defendant's position, the court held that "the odor of a controlled substance provides probable cause to arrest when the odor is unmistakable and may be linked to a specific person." ***Id.*** at 204. In reaching this conclusion, the court stated that under the totality of the circumstances test, where "the odor is not strong or recent, if the source of the odor is not near the person, if there are several people in the vehicle, or if a person offers a reasonable explanation for the odor," probable cause to believe the person is linked to the drug is diminished. ***Id.*** at 218.

¶14 In the present case, with the circuit court's comments, *see supra*, ¶11, which we interpret as an acceptance of Rippl's testimony, its comments about finding no drug evidence during the search of Ford's vehicle and Ford "pass[ing] the field sobriety tests," and its paralleling of this case to ***Graske*** as it did, we can only read the court's final statement on probable cause as an indication that it found there was no evidentiary link demonstrating that it was Ford's—as opposed to someone else's—consumption of marijuana that caused the marijuana odor.

¶15 Essentially, it appears the circuit court found credible (1) Rippl's testimony that Ford told him that other individuals had been smoking marijuana in the vehicle and were the cause of the marijuana odor, (2) Ford's testimony that he told the deputies this, and (3) Ford's testimony that he never told any of the deputies he had smoked marijuana. The court's acceptance of Ford's testimony that he never told any of the deputies he had smoked marijuana is essentially a

rejection of Olig's testimony that Ford had indicated to Olig that Ford had smoked marijuana within a half hour of operating the vehicle.[6]

¶16 The circuit court had the opportunity to directly observe the demeanor of the witnesses and weigh their testimony. We cannot say the court erred in its apparent belief in Ford's testimony that he never told any deputies he had smoked marijuana; after all, such testimony is at least consistent with other evidence, as found by the court, that no evidence of drug use was discovered during a search of Ford's vehicle and Ford passed field sobriety tests. Further, we must interpret the court's comments in a manner consistent with its ultimate holding. *See* ***State v. Long***, 190 Wis. 2d 386, 398, 526 N.W.2d 826 (Ct. App. 1994) ("Even when a [circuit] court fails to make express findings of fact necessary to support its legal conclusions, we assume that the [circuit] court made such findings in the way that supports its decision.").

¶17 Further, of substantial significance, it was the County's burden to show at the hearing that the deputies had probable cause, and there was no clear evidence presented that Ford actually was the only person in the vehicle when the deputies smelled marijuana coming from it. Even accepting all the other findings of the circuit court, the deputies would have had probable cause to arrest Ford and test his blood if there had simply been undisputed testimony or a supportable finding by the circuit court that Ford was the only person in his vehicle when the deputies smelled the odor of marijuana emanating from it. As our supreme court

[6] The County acknowledges in its brief-in-chief that if the circuit court had found Ford's testimony regarding smoking marijuana credible and Olig's testimony not credible, "the County would not be appealing its determination." The County states that the court never made such a credibility determination. It appears to us that the court, at least implicitly, did indeed make such a credibility determination.

has cited with approval, "[a]n odor of burnt marijuana creates an inference that marijuana is not only physically present in the vehicle, but that some of it has been smoked recently." ***Secrist***, 224 Wis. 2d at 210-11 (quoting ***State v. Judge***, 645 A.2d 1224, 1228 (1994)). Accordingly, if Ford had been the driver and only occupant when the odor was detected, a reasonable officer could make a reasonable inference that Ford's blood likely contained a detectable amount of a controlled substance, justifying the arrest and blood draw.[7] However, no evidence that Ford was alone in the vehicle was presented and the court made no such finding, explicitly or implicitly. We cannot assume this fact from the testimony presented; indeed, it would be error to do so, in that any assumptions we make must be made in a manner which supports the circuit court's ruling. *See* ***Long***, 190 Wis. 2d at 398. Based on the record made at the suppression hearing, the County failed to meet its burden to establish the link between the odor of marijuana and Ford's personal consumption of the drug as the source of that odor.

¶18 Considering all of the above, we conclude that the circuit court did not err in its ultimate determination that the County did not meet its burden of showing the deputies had probable cause to arrest Ford and procure a blood sample.

[7] Although evidence also existed from which the deputies alternatively could have inferred that a person or persons other than Ford caused the odor, namely Ford's statement to Rippl to this effect, the deputies would not have been bound to accept that inference. ***State v. Kutz***, 2003 WI App 205, ¶12, 267 Wis. 2d 531, 671 N.W.2d 660 ("When a police officer is confronted with two reasonable competing inferences, one justifying arrest and the other not, the officer is entitled to rely on the reasonable inference justifying arrest.").

By the Court.—Order affirmed.

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