COURT OF APPEALS
DECISION
DATED AND FILED

May 14, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1360-CR **Cir. Ct. No. 2013CF46**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MORRIS J. BEARHART,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Burnett County: EUGENE D. HARRINGTON, Judge. Affirmed.

Before Blanchard, P.J., Higginbotham and Kloppenburg, JJ.

¶1 PER CURIAM. Morris Bearhart appeals a judgment convicting him of eighth offense operating a vehicle while intoxicated (OWI).[1] He argues:

[1] The notice of appeal could be construed to also appeal a separate judgment convicting Bearhart of resisting an officer. However, all of the issues raised on appeal relate to the OWI conviction.

(1) the State presented insufficient evidence to support the jury's finding that Bearhart drove on a public street while intoxicated; (2) the court should have suppressed evidence of Bearhart's blood alcohol content because the deputy lacked probable cause to arrest Bearhart; (3) the blood evidence should have been suppressed because the deputy did not have a good reason for failing to request a search warrant and the good faith exception should not apply; and (4) the court lacked personal jurisdiction because it erred when it found sufficient cause to adjourn the preliminary hearing to allow the State more time to acquire Bearhart's driving record and blood test results. We reject these arguments and affirm the judgment.

BACKGROUND

¶2 A citizen called police at approximately 3:00 a.m. to report a car in her driveway with the lights on and the motor running. The car had not been there when she went to bed no later than midnight.

¶3 Deputy Ryan Bybee arrived at 3:19 a.m. and parked behind the reported car in the driveway. The driver, Bearhart, was passed out with his foot on the accelerator and the engine was "revving hard." Bybee turned on his emergency lights, opened Bearhart's car door and instructed Bearhart to turn off the engine. Bearhart responded by putting the car in reverse, and backing to within one foot of Bybee's vehicle. Bybee ordered Bearhart to turn off the car, and Bearhart responded, "I can't" and tried again to put the car in reverse, but could not because he did not have his foot on the brake. Bybee then administered a shock using his Taser, but Bearhart continued to attempt to shift the car in reverse. Bybee pulled Bearhart from the car. Bybee smelled a strong odor of intoxicants and observed Bearhart's red, glassy eyes, slurred speech, and inability

to maintain his balance. Bearhart was placed under arrest and, with the assistance of another deputy, had to be carried to the squad car because he appeared to be too intoxicated to walk. Bybee conducted an inventory search of Bearhart's car and found no alcohol or receptacles in the car or around areas near the house. Deputy Mikal Anton transported Bearhart to a hospital where his blood was drawn. Anton testified that the blood tested at 0.232.

DISCUSSION

¶4 The State presented sufficient evidence to support the verdict. In reviewing sufficiency of the evidence, this court must view the evidence most favorably to the State and conviction, and reverse only if the evidence is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. ***State v. Hayes***, 2004 WI 80, ¶56, 273 Wis. 2d 1, 681 N.W.2d 203. Facts can be established by reasonable inference as well as direct evidence. *See* ***State v. Perkins***, 2004 WI App 213, ¶14, 277 Wis. 2d 243, 689 N.W.2d 684. Inferences are drawn by logical deduction from admitted or established facts viewed in light of common knowledge or experience. *See* ***Belich v. Szymaszek***, 224 Wis. 2d 419, 425, 592 N.W.2d 254 (Ct. App. 1999). This court must accept reasonable inferences drawn by the jury even if other inferences could be drawn from the evidentiary facts. ***State v. Routon***, 2007 WI App 178, ¶17, 304 Wis. 2d 480, 736 N.W.2d 530.

¶5 The evidence shows Bearhart was intoxicated while sitting in a private driveway that intersects with a public road. Bearhart argues that if he arrived in the driveway between midnight and 1:19 a.m., "the State loses any presumption the law would grant it that the test result is probative on the issue of impairment at the time of driving" because his blood was not drawn until

4:19 a.m. We disagree. From the high level of blood alcohol at 4:19 a.m., the jury could reasonably extrapolate that Bearhart was intoxicated when he entered the driveway from the public road. Any other suggestion would require the jury to find that Bearhart drove sober into a stranger's driveway, which is not supported by the record.

¶6 The court properly denied Bearhart's motion to suppress evidence based on a lack of probable cause to arrest Bearhart. Probable cause to arrest for operating a vehicle while intoxicated refers to that quantum of evidence 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. ***State v. Kasian***, 207 Wis. 2d 611, 621, 558 N.W.2d 687 (Ct. App. 1996). It is sufficient that the evidence known to the investigating officer at the time of the arrest would lead a reasonable officer to believe that the defendant was probably guilty of OWI. ***State v. Lange***, 2009 WI 49, ¶38, 317 Wis. 2d 383, 766 N.W.2d 551. Bearhart's driving into a stranger's driveway and passing out with his foot on the accelerator, his conduct after the deputy arrived, his red, glassy eyes, slurred speech, the strong smell of intoxicants, and inability to stand and walk provided probable cause for the arrest even though no portable breath test was administered. There is no rule requiring a field sobriety test as a prerequisite to establishing probable cause to arrest a suspect for drunk driving. ***Washburn Cnty. v. Smith***, 2008 WI 23, ¶33, 308 Wis. 2d 65, 746 N.W.2d 243.

¶7 After Bearhart's arrest, the United States Supreme Court issued its decision in ***Missouri v. McNeely***, 133 S. Ct. 1552 (2013), concluding that officers should obtain a search warrant before taking a blood sample if a warrant can reasonably be obtained. ***Id.*** at 1554-55. Bearhart argues that the good faith exception recognized by this court in ***State v. Reese***, 2014 WI App 27, 353

Wis. 2d 266, 844 N.W.2d 396, should not apply. However, the Wisconsin Supreme Court has recently resolved that issue, holding that the good faith exception to the exclusionary rule applied to evidence obtained as a result of a blood draw. ***State v. Foster***, 2014 WI 131, ¶56, 360 Wis. 2d 12, 856 N.W.2d 847.

¶8 Finally, the circuit court's decision to grant an adjournment of the preliminary hearing provides no basis for relief. The cases Bearhart cites regarding personal jurisdiction were abrogated by ***State v. Webb***, 160 Wis. 2d 622, 634-35, 467 N.W.2d 108 (1991). Any defect in the preliminary examination was waived by Bearhart's failure to seek immediate review. *See* ***id.*** at 631, 636. In addition, the court properly exercised its discretion by granting a continuance based on the State's justification and the lack of prejudice to Bearhart. *See* ***State v. Selders***, 163 Wis. 2d 607, 613, 472 N.W.2d 526 (Ct. App. 1991). The prosecutor explained that he had not yet received Bearhart's driving record and blood alcohol report. In addition, Bearhart was incarcerated on a probation hold at that time. Therefore, the statutory remedy of release from custody set out in WIS. STAT. § 970.03(2) would not apply.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2013-14).