COURT OF APPEALS
DECISION
DATED AND FILED

December 8, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP342-CR **Cir. Ct. No. 2012CF283**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS J. ANKER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Shawano County: JAMES R. HABECK, Judge. *Reversed and cause remanded with directions*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Thomas Anker appeals an order denying his motion to suppress evidence obtained following his arrest. In an earlier appeal,[1]

[1] ***State v. Anker***, 2014 WI App 107, 357 Wis. 2d 565, 855 N.W.2d 483.

this court reversed the judgment of conviction after the State failed to contest, thereby conceding, the asserted lack of probable cause to arrest Anker. We remanded the matter for the circuit court to consider whether the evidence was nonetheless admissible under either the independent source doctrine or the doctrine of inevitable discovery, and to conduct further proceedings necessary to make those determinations.

¶2 On remand, the State presented no evidence regarding those two doctrines, but rather presented additional evidence related to the probable cause issue. The circuit court then denied Anker's motion to suppress, concluding the arresting officer had probable cause to arrest Anker and, in the alternative, the evidence sought to be suppressed would have been inevitably discovered without reliance on the premature arrest. We reverse the order because the probable cause determination ignores the law of the case and was beyond the scope of this court's remand mandate, and because the record in this case does not support application of the inevitable discovery doctrine.

BACKGROUND

¶3 As described in greater detail in the prior appeal, ***State v. Anker***, 2014 WI App 107, ¶¶5-9, 357 Wis. 2d 565, 855 N.W.2d 483, Anker was charged with various crimes arising out of a traffic accident that caused injury to another person. According to a witness, following the accident, the driver of the vehicle walked away from the scene into a wooded area. A short time later, a conservation warden arrested Anker after he saw Anker come out of the woods. A search incident to arrest resulted in recovery of the keys to the vehicle, and Anker's blood was drawn for chemical testing. Anker filed a motion to suppress the results of the blood test, any statements taken from him at the scene of his

detention and arrest, all observations made of him at the scene of his arrest, any physical test results taken after his arrest, and any other evidence derived from the arrest. After the circuit court denied the motion, Anker entered no contest pleas to sixth offense operating a vehicle while intoxicated and causing injury by intoxicated use of a vehicle, preserving his right to appeal the suppression ruling.

¶4 In the prior appeal, the State made no argument to support a finding of probable cause to arrest Anker, thereby conceding the issue. ***Id.***, ¶¶2, 13. Rather, it argued Anker was not arrested but merely temporarily detained (thereby requiring the detaining officer only to have reasonable suspicion of criminal activity by Anker), a proposition which we rejected. ***Id.***, ¶¶2-3, 14, 24. While it was unclear from the State's briefing, we noted the State appeared to argue, alternatively, for application of either the independent source doctrine or the inevitable discovery doctrine as defenses to Anker's motion to suppress. Noting that it appeared the State never made such arguments before the circuit court, thus depriving that court the opportunity to make relevant factual findings and rule upon the application of such doctrines in the first instance, we reversed the judgment of conviction and remanded the matter for the circuit court to do so. ***Id.***, ¶27. Specifically, we authorized the circuit court, on remand, to hold any additional proceedings it deemed necessary to resolve those issues, and we concluded by instructing, "If the court concludes neither the independent source nor the inevitable discovery doctrines apply, it shall grant Anker's suppression motion." ***Id.***

DISCUSSION

¶5 On remand, the State argued that this court's authorization to conduct further proceedings authorized the circuit court to take additional

evidence on the issue of whether there was probable cause to arrest Anker. The circuit court agreed with this approach, over Anker's objection. In doing so, the State and the circuit court overstated the scope of the authority granted by this court's mandate. The issues on remand were specifically limited to application of the independent source and inevitable discovery doctrines. Our conclusion that the arrest was made without probable cause is law of the case. *See* ***State v. Stuart***, 2003 WI 73, ¶23, 262 Wis. 2d 620, 664 N.W.2d 82. The State argues law of the case should not apply here because the rule is not absolute. ***Id.***, ¶24. However, the State cites no authority that would allow the circuit court to disregard or circumvent this court's ruling from a prior appeal. Taking additional evidence regarding the probable cause determination and then addressing, anew, the issue of probable cause were beyond the scope of this court's remand mandate.

¶6 As for the inevitable discovery doctrine, the record in this case does not support the circuit court's finding that the evidence against Anker would have been inevitably discovered by lawful means. First, because the State presented no evidence or argument on that question after remand , it forfeited the right to argue that issue. Second, and in part related to the State's failure to admit any evidence on this issue, the circuit court's ruling was not based on facts derived from this case. Rather, the court relied on things it had "seen" in other cases, such as the police department posting an officer at a suspect's address in efforts to apprehend him or her when he or she returned home. In this case, the State did not present any evidence that law enforcement even considered dispatching an officer to Anker's home. The court's speculation as to what could have been done cannot constitute evidence of what actually was done, or what is typical for the State to do when investigating such cases. The speculation that an officer would have found Anker, with the same blood alcohol content, with his keys in his possession,

resulting in the same oral statements and officer's observations is not supported by any evidence of record in this case.

¶7 Although the circuit court did not adopt the State's argument that the doctrine of attenuation might also apply so as to avoid application of the exclusionary rule, the State promotes that argument on appeal. The attenuation doctrine applies when evidence acquired following an unlawful arrest is so unconnected to the arrest that the taint is dissipated. ***Wong Sun v. United States***, 371 U.S. 471, 491 (1963). The question is whether the evidence in question came at the exploitation of a prior police illegality or by means sufficiently attenuated so as to purge the taint. ***State v. Phillips***, 218 Wis. 2d 180, 206, 218 N.W.2d 794 (1990). If there is a close causal connection between the illegal conduct and the evidence obtained, the evidence is inadmissible. ***State v. Noble***, 2002 WI 64, ¶29, 253 Wis. 2d 206, 646 N.W.2d 38.

¶8 We decline to apply the doctrine of attenuation here for two reasons. First, the State did not argue that issue either prior to or in the first appeal, and because it was not authorized by this court's remand mandate, the issue was not properly presented to the circuit court and is not a proper issue for this appeal. In addition, the State concedes two of the three factors that relate to the attenuation doctrine, the time lapse and the intervening circumstances, disfavor application of the doctrine. *See* ***Brown v. Illinois***, 422 U.S. 590, 603-04 (1975). The State relies entirely on the third factor, which is the purpose and flagrancy of the official misconduct, ***id***. at 604, contending there was no improper purpose or flagrant misconduct here. If the officer's lack of improper motive or flagrant misconduct attenuates evidence acquired moments after an unlawful arrest with no intervening circumstances, the attenuation doctrine would apply in virtually every case.

Accepting the State's argument on that factor would effectively eviscerate the exclusionary rule.

¶9 Therefore, we reverse the order and remand the cause with directions to grant the motion to suppress.

By the Court—Order reversed and cause remanded with directions.

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