COURT OF APPEALS
DECISION
DATED AND FILED

March 15, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 99-2640-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL GREENE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: ROGER P. MURPHY, Judge. *Affirmed.*

¶1 NETTESHEIM, J.[1] Daniel Greene appeals from a judgment of conviction for operating a motor vehicle while intoxicated (OWI) pursuant to WIS.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

STAT. § 346.63(1)(a).[2] The judgment followed a jury's guilty verdict.

¶2 On appeal, Greene challenges the trial court's ruling rejecting his motion to suppress evidence of a blood sample obtained from him following his arrest. We hold that the police had reasonable suspicion to believe that Greene's blood contained evidence of a crime pursuant to ***State v. Seibel***, 163 Wis. 2d 164, 471 N.W.2d 226 (1991). We also reject Greene's argument that certain expert testimony exceeded the scope of his discovery demand. Finally, we reject Greene's argument that the State engaged in improper argument to the jury. We affirm the judgment of conviction.

¶3 We will recite the relevant facts as we discuss the issues.

1. Reasonable Suspicion that Greene's Blood Contained Evidence of a Crime

¶4 Greene brought a motion to suppress evidence of a blood test which the police obtained following his arrest on an outstanding warrant. We take the facts from the hearing on the motion to suppress.

¶5 Wisconsin State Trooper Samuel White observed Greene's car speeding as it passed him in the city of Waukesha on June 19, 1996, at approximately 11:00 a.m. White observed no other erratic driving. He followed Greene's vehicle as it pulled into a nearby parking lot.

¶6 White then spoke with Greene about the speeding incident. He did not notice anything unusual about Greene's speech. However, Greene did drop his driver's license as he attempted to hand it to White. While Greene waited in the

[2] Greene was convicted as a repeat offender. A companion charge of operating a motor vehicle with a prohibited alcohol concentration was dismissed.

squad car, White ran a record check and discovered that there was an outstanding warrant for Greene's arrest. As a result, White arrested Greene. While handcuffing Greene, White noticed an odor of alcohol on Greene's breath. He also noticed that Greene's eyes were "bloodshot, a little glassy." Under questioning, Greene stated that he had been out drinking the night before. Later, while Greene was still in the squad car, White described the odor of intoxicants as "quite strong." Besides the arrest warrant, White told Greene that he also was under arrest for OWI.

¶7 White then transported Greene to Waukesha Memorial Hospital where he read Greene the "Informing the Accused" form pursuant to the Implied Consent Law. *See* WIS. STAT. § 343.305(4). Following this, Greene agreed to submit to a blood test. The analysis of the sample produced a blood alcohol concentration of 0.14%.

¶8 Greene brought a motion to suppress the blood test result. He argued that White did not have reasonable suspicion, as required by ***Seibel***, to believe that his blood contained evidence of a crime. The trial court denied the motion. Greene renews this argument on appeal.

¶9 We begin with an important concession made by the State at the suppression hearing. Although White arrested Greene for OWI as well as for the outstanding warrant, the State conceded at the outset of the suppression hearing that White did not have probable cause to arrest Greene for OWI. In light of that concession, the State could not justify the drawing of Greene's blood on any claim that he was validly arrested for OWI.

¶10 Instead, the State relied on ***Seibel***. There, the supreme court approved the extraction of a blood sample from a suspect who had been arrested

for homicide by negligent operation of a motor vehicle. *See* ***Seibel***, 163 Wis. 2d at 168. "[W]e conclude that a blood sample may be drawn incident to a lawful arrest if the police reasonably suspect that the defendant's blood contains evidence of a crime." ***Id***. at 179.

¶11 That brings us to a potential issue posed by the facts of this case, but which Greene does not raise. Unlike ***Seibel***, the facts of this case do not establish that the purpose of the blood draw was related to the charge recited in the outstanding warrant. In fact, the record does not even establish the offense for which the warrant was issued.[3] The question posed is whether ***Seibel*** extends to a case such as this where there is no linkage between the crime for which the defendant is arrested and the alleged reasonable suspicion that the defendant's blood contains evidence of a crime. But because this issue was not raised in the trial court and is not argued on appeal, we do not address it further.

¶12 Thus, the issue narrows to whether White had reasonable suspicion to believe that Greene's blood contained evidence of any crime. Greene compares this case with the four indicia of drinking identified by the ***Seibel*** court, *see* ***id***. at 181-82, and argues that this case comes up short under these indicia. To the extent Greene is arguing that the ***Seibel*** indicia are the benchmark for all cases, we observe that the supreme court made no such statement. Instead, the court was merely analyzing the facts of that particular case.[4] In short, each case must be

[3] In fact, Greene's brief represents that it was later determined that the warrant was not even valid. The State does not dispute this statement.

[4] The four indicia of drinking identified in ***Seibel*** were: (1) the nature and cause of the accident, (2) the strong odor of intoxicants at the accident scene, (3) a police officer's smell of intoxicants at the hospital, and (4) the defendant's conduct at the hospital. *See* ***State v. Seibel***, 163 Wis. 2d 164, 181-82, 471 N.W.2d 226 (1991).

judged on its own facts. In this case, some of the ***Seibel*** factors are present and others are not. In addition, there are other factors present in this case that were not present in ***Seibel*** that support the argument for reasonable suspicion.

¶13 In a ***Terry***[5] setting, our supreme court has said that reasonable suspicion is less than probable cause, but more than a hunch. *See* ***State v. Guy***, 172 Wis. 2d 86, 94, 492 N.W.2d 311 (1992). Here, White had observed Greene speeding. While many nonintoxicated persons also speed, an intoxicated person is less likely to be aware of the rules of the road and more likely to violate those rules. In addition, Greene dropped his driver's license as he attempted to hand it to White. Greene also admitted to drinking the night before. White also observed that Greene's eyes were bloodshot and glassy. Besides initially noticing an odor of intoxicants when handcuffing Greene, White observed that this odor was "quite strong" when Greene was later in the squad car. Obviously, none of these factors standing alone would constitute reasonable suspicion to believe that Greene's blood would reveal evidence of a crime. But viewed in their totality, we conclude that they sufficed to raise reasonable suspicion that Greene's blood contained evidence of the crime of OWI.

¶14 Greene also cites to ***State v. Swanson***, 164 Wis. 2d 437, 475 N.W.2d 148 (1991). There, the supreme court said that the police had reasonable suspicion, but arguably no probable cause to arrest, where the facts demonstrated erratic driving and an odor of intoxicants, and the incident occurred at the time bars usually close in Wisconsin. *See* ***id***. at 453 n.6. The court said that these factors "should not, in the absence of a field sobriety test, constitute probable

[5] ***Terry v. Ohio***, 392 U.S. 1 (1968).

cause to arrest someone for [OWI]." ***Id.*** But we see ***Swanson*** as supporting the State, not Greene, because the issue here is reasonable suspicion, not probable cause. Thus, field sobriety tests were not necessary to support a finding of reasonable suspicion in this case. And as with ***Seibel***, we do not see the factors which the supreme court cited in ***Swanson*** as the benchmark for every case. Again, each case stands or falls on its own facts.

¶15 We conclude that the facts observed by White represented more than a mere hunch that Greene might be intoxicated. Rather, the facts presented reasonable suspicion of that condition and therefore reasonable suspicion that Greene's blood would reveal evidence of the crime of OWI. We uphold the trial court's rejection of Greene's motion to suppress.

2. Expert Testimony and Greene's Discovery Demand

¶16 During the trial, Patrick Harding, the crime lab chemist who analyzed Greene's blood sample, also testified how "seasoned drinkers" might exhibit signs of intoxication. Greene contends that this testimony was inadmissible because this line of testimony was not revealed by the State in response to Greene's pretrial demand for discovery.

¶17 As relevant to this issue, Greene's discovery demand, paraphrasing the words of WIS. STAT. § 971.23(1)(e), required the State to furnish the defense with copies of "any and all reports or statements of experts made in connection with this case including results of physical, medical, or mental examinations and of scientific tests, experiments or comparisons." The only report or statement provided by Harding to the State at the time of Greene's discovery demand was the blood analysis report. This report was furnished to Greene in accord with the demand. Harding had not provided the State with any report or statement that

addressed how "seasoned drinkers" might exhibit signs of intoxication. Therefore, Greene was not provided with any report about Harding's opinion regarding "seasoned drinkers."

¶18 However, the discovery statute addresses this situation. It provides that "if the expert does not prepare a report or statement," then the State must provide "a written summary of the expert's findings or the subject matter of his or her testimony." ***Id.*** But this obligation is conditioned on the statute's threshold requirement that the defendant make demand for such material. ("*Upon demand*, the district attorney shall … disclose to the defendant … all of the following materials and information …." WIS. STAT. § 971.23(1).) Here, Greene's demand covered all reports and statements of experts, but it did not extend to a situation where "the expert does not prepare a report or statement." Section 971.23(1)(e).

¶19 The State's obligation to comply with the discovery statute is triggered by the defendant's demand for discovery. But the scope of that obligation is obviously governed by the scope of the demand. Here, Greene's discovery demand did not extend to a summary of any expert's anticipated testimony in the event the expert had not presented the State with a report.[6]

3. The State's Final Argument to the Jury

¶20 Greene contends that the State made an improper final argument to the jury by: (1) arguing that Greene was a "seasoned drinker," (2) commenting on the lack of evidence from the defense to refute the blood test result, and (3)

[6] Given our conclusion that the State complied with Greene's discovery demand, we need not address the State's further argument that Greene should have anticipated, in any event, that Harding's testimony would have covered the topic of "seasoned drinkers."

referring to the driver in the "Princess Diana" accident.[7] He contends that any one of these arguments warranted a mistrial.

¶21 The State's "seasoned drinker" argument stems from Harding's testimony. Greene contends that this argument was not supported by any evidence of his drinking habits. As a result, Greene argues that the jury was encouraged to disregard the instructions concerning the burden of proof and presumption of innocence and to penalize him for not testifying.

¶22 It is true that there was no direct evidence of Greene's drinking habits. However, it is important to put this theory of the State's prosecution in its proper context.[8] As we have already noted, as early as the hearing on the motion to suppress, the State conceded that White did not have probable cause to arrest Greene. Moreover, at the trial, White testified that he did not ask Greene to perform any field sobriety tests because he believed Greene would pass the tests. Thus, one of the State's theories of defense was that a "seasoned drinker" would be less likely to exhibit classic symptoms of intoxication.

¶23 Lawyers are allowed "considerable latitude" in making closing arguments and are entitled to argue for reasonable inferences which the evidence suggests. *See* ***State v. Draize***, 88 Wis. 2d 445, 454, 276 N.W.2d 784 (1979). A prosecutor crosses over this line when the argument for a guilty verdict is based on factors other than the evidence. *See* ***id***. Here, we are not persuaded that the

[7] Greene's statement of the issues recites that the State made five improper arguments. However, the argument section of his brief is broken down into three sections. We follow the latter format.

[8] Another of the State's theories was that Greene had consumed more alcohol than he had contended in his testimony. Taking Greene's own testimony that he had his last drink at 1:30 a.m., Harding calculated that Greene's blood alcohol content at that time was 0.29%.

prosecutor crossed this line. This was an unusual drunk driving case given the State's unique theory of prosecution. But the evidence allowed for the inference argued by the State.

¶24 Next, Greene contends that the State improperly commented on his right to silence when it stated that the defense had failed to present any evidence disputing the blood test result. We disagree. This court has said:

> The comment [to observe that the defendant could produce a witness if he wished] does not alter the burden of proof or penalize the exercise of a constitutional right. Unless the prosecutor indirectly invites an inference based on the *defendant's own silence*, he may pursue evidentiary inferences for what they are worth….

State v. Patino, 177 Wis. 2d 348, 381-82, 502 N.W.2d 601 (Ct. App. 1993) (emphasis added).

¶25 Here, the challenged statement by the State did not allude to Greene's choice not to testify. Instead, the argument focused on the blood test result and whether it represented convincing evidence for the jury. The State was entitled to observe that this evidence stood unrefuted.

¶26 Finally, Greene complains that the State referred to the famous videotape of the driver operating the vehicle in the Princess Diana crash.[9] The State noted that this driver also did not exhibit any signs of intoxication. We agree

[9] The prosecutor's statement was as follows:

> [I]t's a perfect example of what people want you to believe about impairment, is when Princess Diana, and when we saw the driver, if you saw that at all, they kept telling you, look, no one knew, he walked fine, he talked fine, everything was fine, there was no indication, no one would have gotten in the car with him. But we know differently now, don't we.

that this argument was irrelevant to the issue in this case.[10] However, we do not deem this remark so far off the mark as to warrant a mistrial. This was an isolated remark at the conclusion of the State's argument. Moreover, the trial court instructed the jury to hold its decision to the facts and evidence introduced at the trial and cautioned the jury that the arguments of the attorneys were not evidence.

¶27 A motion for a mistrial based on improper prosecutorial jury argument is addressed to the sound discretion of the trial court. *See* ***Haskins v. State***, 97 Wis. 2d 408, 419, 294 N.W.2d 25 (1980). That determination is made in light of the whole proceeding, and the proper inquiry is whether the claimed error was sufficiently prejudicial to warrant a new trial. *See* ***State v. Grady***, 93 Wis. 2d 1, 13, 286 N.W.2d 607 (Ct. App. 1979). The reference to the Princess Diana episode was more irrelevant than prejudicial. Based on the record as a whole, we see no error in the trial court's discretionary decision to reject Greene's motion for a mistrial.

Conclusion

¶28 We uphold the trial court's rejection of Greene's motion to suppress. We also uphold the court's ruling admitting the disputed portion of Harding's testimony because Greene's discovery demand did not seek a summary of any undocumented reports or statements of any experts. Finally, we uphold the court's discretionary determination rejecting Greene's motion for a mistrial.

By the Court.—Judgment affirmed.

[10] Although we agree that this line of argument was improper, we reject Greene's claim that it violated the "golden rule" argument. This kind of argument asks the jury to place itself in the position of another and to decide what the juror would want for a particular injury or damage. *See* ***Rodriguez v. Slattery***, 54 Wis. 2d 165, 170, 194 N.W.2d 817 (1972). That is not what the State asked the jury to do.

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