COURT OF APPEALS
DECISION
DATED AND FILED

February 11, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1834-CR **Cir. Ct. No. 2014CT233**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

ROBERT A. SCHOENGARTH,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for La Crosse County: RAMONA A. GONZALEZ, Judge. *Reversed and cause remanded for further proceedings*.

¶1 BLANCHARD, J.[1] The State of Wisconsin has charged Robert Schoengarth with operating while intoxicated—second offense, and operating with

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

a prohibited alcohol concentration—second offense. The State appeals a circuit court order granting Schoengarth's motion in limine to prevent the State from introducing evidence at trial about two aspects of field sobriety tests that police had Schoengarth perform while on the side of a state highway. The court failed to provide clear reasoning to support its evidentiary decision. For reasons that I now explain, on my independent review of the record, I conclude that the court did not properly exercise its discretion, and accordingly reverse and remand for further proceedings.

BACKGROUND

¶2 The criminal complaint incorporates a police report and a field sobriety test performance report that include the following allegations. One night at 11:10 p.m., Investigator Marcon of the Onalaska Police Department observed a truck on State Highway 35 "straddl[e] the lane divider line," then "swerv[e] within its lane of travel," then cross the fog line twice, and then cross the centerline. Marcon pulled the truck over on the side of the highway.

¶3 The driver was Robert Schoengarth, and he had a female passenger. Marcon smelled "an odor of an intoxicant from the vehicle." Schoengarth reported to Marcon that he had consumed one beer about two hours earlier.

¶4 Police Sergeant Jobe arrived on the scene. Marcon asked Schoengarth if he would perform field sobriety tests. Schoengarth agreed to do so. "The area where the field sobriety tests were performed was the paved roadway between [Marcon's] patrol vehicle and [Schoengarth's] vehicle."

¶5 During the tests, Marcon observed all six possible clues of impairment in the Horizontal Gaze Nystagmus test, all eight possible clues of

impairment in the walk and turn test, and three clues of impairment in the one-leg stand test, before Marcon terminated the field sobriety testing.

¶6 After Schoengarth submitted to a preliminary breath test that showed a result of .14 breath alcohol concentration, Schoengarth was arrested, and subsequently charged in a criminal complaint.

¶7 Among the motions in limine that Schoengarth filed was one for an order excluding "from use at trial testimony or evidence of any kind by [Marcon] related to the performance of … Schoengarth, on field sobriety tests, specifically, the 'walk and turn test' and the 'one-leg stand.'" In support, Schoengarth submitted an affidavit in which he averred the following:

> I agreed to perform field sobriety tests at the request of [Marcon,] with the understanding that my performance on the field sobriety testing would be video[recorded,] which I believed would result in exculpatory information.[2] I was positioned by [Marcon] between [his] patrol vehicle and my vehicle[,] which I believed to be for video purposes….
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> ….
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> I requested production of the video[record] of the performance of my field sobriety testing in the course of discovery in this case. One video[record] was provided to me. The video[record] did not include my performance on the field sobriety tests[,] which I believe to be exculpatory. I did not participate in the video[recording] process and[,] accordingly, any error in the course of obtaining the video by the officers present at the scene did not occur as a result of any conduct on my part.

[2] At the hearing on the suppression motion, defense counsel elaborated on how he thought the court should construe the affidavit. "[W]hat happens is Mr. Schoengarth says, look, I'm not drunk; I'm happy to do your tests; and they're gonna show that I'm not guilty. So they set it up."

¶8 As authority for this motion, Schoengarth cited, without explanation: ***California v. Trombetta***, 467 U.S. 479, 485 (1984); ***State v. Oinas***, 125 Wis. 2d 487, 373 N.W.2d 463 (Ct. App. 1985); and WIS. STAT. §§ 910.01 and 910.02.[3]

¶9 At a hearing convened by the circuit court on this motion, counsel for Schoengarth supplied the following additional, uncontested facts. The parties had been informed by police in advance of the suppression hearing that, at the time of the stop, Marcon's squad "car didn't have video," and therefore "Sergeant Jobe came over and video [recorded the scene, but] the video doesn't show the performance of the field tests." In part by viewing the video recording during the hearing, the court confirmed that it is not possible to make out the image of Schoengarth performing the field sobriety tests. As defense counsel summarized it, the recording "simply shows a bunch of bodies standing out in the dark because [the scene] wasn't illuminated."

¶10 Defense counsel suggested that this presented a "best evidence" problem, which apparently involves the concept that the video was the "best evidence" regarding the field sobriety tests, and the testimony of the officers was in some sense merely "collateral." Defense counsel also argued that the unavailability of usable video images at trial unfairly impeded Schoengarth's

[3] I note that this authority addresses circumstances in which evidence was collected and then destroyed or otherwise mishandled by authorities. In ***California v. Trombetta***, 467 U.S. 479, 485 (1984), the United States Supreme Court rejected the defendants' claim that police failure to preserve breath samples denied the defendants the ability to impeach the results of the breath testing machine used to determine their blood alcohol content. In ***State v. Oinas***, 125 Wis. 2d 487, 490, 373 N.W.2d 463 (Ct. App. 1985), this court held that, because a wallet that police found at the scene of a sexual assault did not possess exculpatory value apparent to police before fingerprints on it were destroyed, the officers' failure to preserve the evidence, due to alleged mishandling, did not violate the defendant's right to due process under ***Trombetta***. As for WIS. STAT. §§ 910.01 and 910.02, these provisions address when original forms of evidence are required to be introduced.

ability to cross-examine Marcon "as to how [Schoengarth] performed" in the field sobriety tests.

¶11 The circuit court first appeared inclined to deny the motion, observing, "If I don't have anything to show that [police] nefariously clipped the video or did anything that was an intentional misconduct, I think I let it all in. Let the jury decide which way they go." However, in later discussion the court expressed concern that perhaps Schoengarth should not be "force[d]" to testify at trial about the field sobriety tests due to the fact the police failed to obtain usable video images of the tests.

¶12 In making its ruling, the court noted that Schoengarth has a right to challenge the credibility of the officers and granted the motion without further discussion.

DISCUSSION

¶13 The standard of review for a circuit court's evidentiary ruling is "highly deferential." ***Martindale v. Ripp***, 2001 WI 113, ¶29, 246 Wis. 2d 67, 629 N.W.2d 698. The question is "'whether the trial court exercised its discretion in accordance with accepted legal standards and in accordance with the facts of record.'" ***Id.*** (quoted source omitted). "We will not find an erroneous exercise of discretion if there is a rational basis for a circuit court's decision." ***Id.*** "For a discretionary decision of this nature to be upheld, however, the basis for the court's decision should be set forth." ***Id.*** "If the circuit court fails to provide reasoning for its evidentiary decision, this court independently reviews the record to determine whether the circuit court properly exercised its discretion." ***Id.***

¶14 I first address and reject arguments that Schoengarth makes or suggests that do not appear to have played any role in the circuit court's reasoning in granting the motion.

¶15 First, the rule that the original of a writing, recording, or photograph must be used to prove the contents of the exhibit, except as otherwise provided in the statutes or rules, *see* WIS. STAT. § 910.02 and definitions at WIS. STAT. § 910.01, has no relevance to this case. Schoengarth failed to present even a coherent argument along these lines, much less a developed, persuasive one, before the circuit court and he fails to do so again on appeal. If Schoengarth means to argue that the State should be precluded from offering any evidence regarding a driver's field sobriety tests in a drunk driving case unless the police produce a high quality squad car video of those tests, he fails to provide authority for this proposition. I reject it as meritless.

¶16 Second, on appeal Schoengarth points to WIS. STAT. § 904.03, which allows courts to exercise their discretion to exclude evidence under circumstances that include the following: the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, or the evidence would be merely cumulative. However, the determination of whether to apply § 904.03 to exclude evidence is the epitome of a discretionary decision for circuit courts to make. Schoengarth made no suggestion to the circuit court that it should exclude the evidence based on § 904.03, and I see nothing in the record to suggest that court granted, or would have granted, the motion based on § 904.03. Moreover, numerous factors point in the opposite direction.

¶17 Third, some of the arguments that Schoengarth makes seem to assume that this case involves the destruction of evidence. However, I reject all

arguments tied to this notion, and all cited authority related to it, because there was no finding by the circuit court that evidence was destroyed. To the contrary, the record reflects that the parties and the circuit court operated from the premise that police attempted in good faith to video record the field sobriety tests, but apparently did not sufficiently take lighting needs into account or employed inadequate equipment. There is no dispute that police attempted to collect the evidence at issue, but due to the conditions at the time of the recording or the equipment used they failed to produce the quality of evidence that they hoped to capture.

¶18 I now turn to a topic raised by Schoengarth that might have informed the circuit court's decision. This is the statement in the Schoengarth affidavit that he agreed to participate in the field sobriety tests with "the understanding" that police would be video recording it. On appeal, Schoengarth refers to this as a "negotiation" with police over his consent, which is an exaggeration of the factual assertions that he made in the circuit court. In any case, assuming without deciding that there was discussion between Schoengarth and police that could be called a "negotiation" for his agreement to participate in the field sobriety tests, this concept fails as a legal argument for at least the following reason. The police tried to video record the field sobriety tests. Absent any suggestion of a ruse in attempting to video record the field sobriety tests, or after-the-fact doctoring, the officers acted as Schoengarth now says he expected and hoped that they would based on the alleged "negotiation." Schoengarth fails to develop an argument that inadequate video recording skills or technology render officer testimony about field sobriety tests inappropriate or unfair.

¶19 This disposes of all of the grounds that Schoengarth now points to in support of the circuit court decision.

¶20 On my review of the record I see no additional grounds that could support the exercise of the court's discretion in excluding this evidence. The circuit court expressed concern that Schoengarth would be unfairly "forced" to testify regarding the field sobriety tests in the absence of a video recording that successfully captured the scene. However, the court did not suggest a rationale, consistent with the rules of evidence, to explain why exclusion of officer testimony is an appropriate response on these facts, and no rationale is evident to me.

By the Court.—Order reversed and cause remanded for further proceedings.

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