COURT OF APPEALS
DECISION
DATED AND FILED

March 16, 2000

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

No. 99-2841-FT

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

COUNTY OF DODGE,

PLAINTIFF-RESPONDENT,

V.

CURTIS E. DITTBERNER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dodge County: JOHN R. STORCK, Judge. *Affirmed.*

¶1 ROGGENSACK, J.[1] Curtis E. Dittberner appeals from a judgment entered upon a no contest plea to a charge of operating a motor vehicle while under the influence of an intoxicant (OMVWI). Prior to entering the plea,

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1997-98) and expedited under WIS. STAT. RULE 809.17 (1997-98). Additionally, all further references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

Dittberner filed a suppression motion, challenging the underlying stop and arrest. He claims that the circuit court erred in denying his motion because his detention by an off-duty police officer, in which that officer used physical force to prevent Dittberner from leaving the area, constituted an arrest without probable cause. We agree with Dittberner that under the facts of this case his detention by the use of physical force was an arrest. However, because we conclude that Dittberner's arrest was based on probable cause, we affirm.

BACKGROUND

¶2 Corporal Todd Nehls, of the Dodge County Sheriff's Department, observed a black pick-up truck driving slowly and travelling in the middle of the road. Nehls was off-duty at the time. When the vehicle stopped for a stop sign, Nehls saw a beer can being thrown out the driver's side window. The vehicle then proceeded approximately a mile-and-a-half, and pulled into the parking lot of a local tavern.

¶3 Nehls called the sheriff's department and reported that he suspected the driver was intoxicated. He followed the vehicle into the tavern's parking lot and as he approached the vehicle, Dittberner emerged from the driver's side of the truck. Nehls identified himself as an officer of the Dodge County Sheriff's Department and asked Dittberner for identification. In a loud and boisterous manner, Dittberner responded "yeah, you're fucking Nehls, you're a pig, I know who you are." Dittberner then said that he was going to go into the tavern to have a few drinks. Nehls advised Dittberner that he needed to stay out in the parking lot until another officer from the sheriff's department arrived.

¶4 Dittberner tried several times to enter the tavern. On three occasions, Nehls physically restrained Dittberner from entering the tavern,

including putting him into a headlock on one occasion. Throughout his encounter with Dittberner, Nehls observed that Dittberner was unsteady on his feet and kept losing his balance; his speech was loud and often vulgar; and there was a strong odor of intoxicants coming from his breath.

¶5 Lieutenant Glenn Welles and Deputy Jeff Petersen of the Dodge County Sheriff's Office both arrived on the scene in response to Nehls's call. Petersen then administered field sobriety tests to Dittberner. After Dittberner failed several of the tests, he was told he was under arrest.

¶6 Dittberner filed a motion to suppress, claiming that his detention by Nehls constituted an arrest, without probable cause. He claimed there was no probable cause until his field sobriety tests were completed. In denying Dittberner's motion, the circuit court concluded that Dittberner was not under arrest until after Petersen performed the field sobriety tests. The parties then entered into an agreement by which Dittberner would plead no contest to OMVWI on the condition that the District Attorney's Office, on behalf of Dodge County, would stipulate that his plea did not waive his right to appeal the decision on the suppression motion.[2] Dittberner now appeals.

[2] Because this was Dittberner's first offense, it was a civil forfeiture matter and not a criminal conviction. A no contest plea is the equivalent of a guilty plea, and a person pleading no contest waives the right to raise all nonjurisdictional defects and defenses, including claimed violations of constitutional rights. *See* ***County of Racine v. Smith***, 122 Wis. 2d 431, 434, 362 N.W.2d 439, 441 (Ct. App. 1984). In criminal cases, an exception exists for orders denying motions to suppress evidence. *See* WIS. STAT. § 971.31(10). That exception, however, does not apply to civil forfeiture matters. *See* ***County of Racine***, 122 Wis. 2d at 436, 362 N.W.2d at 441. Still, waiver is not a jurisdictional bar to appeal, but rather a principle of judicial administration. Accordingly, we asked the parties to address the question of waiver in their briefs. Both parties have requested that we reach the merits of the suppression motion and we have decided to do so. In reaching the merits, however, we do not decide whether, in the future, parties may stipulate to a non-waiver of a right of appeal in similar circumstances.

DISCUSSION

Standard of Review.

¶7 When a suppression motion is reviewed, the circuit court's findings of fact will be sustained unless they are clearly erroneous. *See* ***State v. Roberts***, 196 Wis. 2d 445, 452, 538 N.W.2d 825, 828 (Ct. App. 1995). However, we will independently determine whether the established facts show that a person was under arrest. *See* ***State v. Swanson***, 164 Wis. 2d 437, 445, 475 N.W.2d 148, 152 (1991). Likewise, whether undisputed facts constitute probable cause to arrest is a question of law which we review without deference to the circuit court. *See* ***State v. Babbitt***, 188 Wis. 2d 349, 356, 525 N.W.2d 102, 104 (Ct. App. 1994).

Moment of Arrest.

¶8 An arrest occurs when "a reasonable person in the defendant's position would have considered himself or herself to be 'in custody,' given the degree of restraint under the circumstances." *See* ***Swanson***, 164 Wis. 2d at 446-47, 475 N.W.2d at 152. This is an objective test, focusing on what the officer's actions and words would reasonably have communicated to the defendant, rather than the subjective belief of either the officer or the defendant. *See* ***id.***

¶9 We conclude that a reasonable person in Dittberner's position would have considered himself to be in police custody when he was being detained by Nehls. Dittberner indicated his desire to leave the area and made several attempts to do so, but was told by Nehls that he had to wait until other law enforcement arrived. Further, when Dittberner did try to leave the area, Nehls physically restrained him from leaving on three separate occasions, once putting him into a headlock to do so. Finally, during the detention, Nehls did not ask Dittberner

questions to further investigate whether Dittberner had been driving while intoxicated, but instead, he merely detained him. A reasonable person in Dittberner's position could believe that he was in custody and would be formally arrested as soon as other law enforcement personnel arrived. Therefore, we conclude that Dittberner was under arrest for Fourth Amendment purposes prior to the arrival of the other law enforcement officers.

Probable Cause to Arrest.

¶10 Every warrantless arrest must be supported by probable cause. *See* ***Molina v. State***, 53 Wis. 2d 662, 670, 193 N.W.2d 874, 878 (1972); *see also* U.S. CONST. amend. IV; WIS. CONST. art. I, § 11. A police officer has probable cause to arrest when the totality of the circumstances within that officer's knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant probably committed a crime. *See* ***State v. Koch***, 175 Wis. 2d 684, 701, 499 N.W.2d 152, 161 (1993). This is a practical test based on "'considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" ***State v. Drogsvold***, 104 Wis. 2d 247, 254, 311 N.W.2d 243, 247 (Ct. App. 1981) (citation omitted). The objective facts before the police officer need only lead to the conclusion that guilt is more than a possibility. *See* ***State v. Richardson***, 156 Wis. 2d 128, 148, 456 N.W.2d 830, 838 (1990).

¶11 Dittberner contends that absent the results of the field sobriety tests, there was no probable cause to arrest him for OMVWI. He contends that his behavior was the result of being angry over his detention and that a reasonable person would not believe that he was operating while under the influence. We disagree.

¶12 First, we have never held that field sobriety tests are necessary before an arrest may be made for OMVWI.[3] Rather, we have previously upheld probable cause determinations where no field sobriety tests were given. *See, e.g.*, ***State v. Wille***, 185 Wis. 2d 673, 518 N.W.2d 325 (Ct. App. 1994) (holding that an officer had probable cause to arrest a suspect who had hit the rear end of a car parked along the highway, smelled of intoxicants, and stated in his hospital room that he had "to quit doing this"); ***Babbitt***, 188 Wis. 2d at 357-58, 525 N.W.2d at 104-05 (holding that an officer had probable cause when a suspect drove erratically, smelled of intoxicants, walked slowly and deliberately and was uncooperative). Thus, field sobriety tests are but one part of the totality of circumstances to be taken into account by the arresting officer.

¶13 Second, there was sufficient evidence for a reasonable police officer to conclude that there was more than a mere possibility that Dittberner had been driving while under the influence. When Nehls first observed Dittberner, he noticed that Dittberner was driving slowly and traveling down the middle of the roadway. Nehls also observed a beer can being thrown out the driver's side window. When Nehls approached Dittberner's vehicle, Dittberner used loud and vulgar speech, yelling at Nehls, "yeah, you're fucking Nehls, you're a pig, I know who you are." Dittberner smelled of intoxicants and was unsteady on his feet.

[3] We acknowledge that ***State v. Swanson***, 164 Wis. 2d 437, 453-54 n.6, 475 N.W.2d 148, 155 n.6 (1991), contains certain language which suggests that absent the administration of field sobriety tests confirming a suspicion of intoxication, an officer may not have probable cause to arrest. However, this language has since been explained. "It 'does not mean that under all circumstances the officer must first perform a field sobriety test, before deciding whether to arrest for operating a motor vehicle while under the influence of an intoxicant.'" ***State v. Kasian***, 207 Wis. 2d 611, 622, 558 N.W.2d 687, 692 (Ct. App. 1996) (citation omitted). Thus, the question of probable cause is properly assessed on a case-by-case basis. Field sobriety tests may be necessary in some cases to establish probable cause; however, in other cases, they may not. This case, we conclude, falls into the latter category.

Given these facts, we conclude that Nehls had probable cause to arrest Dittberner for OMVWI, when he detained him until other law enforcement arrived.[4]

CONCLUSION

¶14 We conclude that Dittberner's detention by an off-duty police officer, in which that officer used physical force to prevent Dittberner from leaving the area, constituted an arrest. However, because we conclude that Dittberner's arrest was based on probable cause, we affirm.

By the Court.—Judgment affirmed.

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

[4] An off-duty police officer who identifies himself in his professional capacity has the authority to arrest when he has probable cause to believe that a person has been driving while under the influence of intoxicants. *See* ***Williams v. State***, 45 Wis. 2d 44, 48, 172 N.W.2d 31, 33 (1969); WIS. STAT. § 175.40.