COURT OF APPEALS
DECISION
DATED AND FILED

February 22, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP1954 **Cir. Ct. No. 2005TR382**

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

IN THE MATTER OF THE REFUSAL OF MELLISSA JACOBSON:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MELLISSA JACOBSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Washington County: ANNETTE K. ZIEGLER, Judge. *Affirmed.*

¶1 BROWN, J.[1] Mellissa Jacobson appeals a circuit court order revoking her operating privileges for refusing to submit to a chemical test of her blood. Her primary contention is that the State had no legitimate reason to register a refusal, despite her initial expressions, because she eventually submitted to the blood draw and because the officer was entitled to order the blood test notwithstanding any refusal. We disagree. The implied consent law was designed to enable an arresting officer to *expeditiously* obtain physical evidence because time is essential to obtaining accurate test results. Accuracy is paramount to the legislative objective of obtaining convictions against unsafe drivers while conserving judicial resources. We also reject Jacobson's assertion that the officer lacked probable cause to arrest her.

¶2 The following are the undisputed facts of this case. At 3:58 a.m. on January 30, 2005, a village of Germantown police officer Toni Olson arrived at the scene of an automobile accident. Olson briefly stopped at the scene of the accident and observed Jacobson's vehicle in a snow-filled cornfield. Olson then proceeded to the hospital, where the occupants of the vehicle, Jacobson and her husband, were receiving treatment for their accident injuries.

¶3 Upon Olson's arrival, a Mequon police sergeant informed her that both occupants appeared to be intoxicated. Olson then conducted several interviews with Jacobson and her husband. She interviewed the husband first and then spoke with Jacobson. When Olson entered Jacobson's room, she immediately smelled intoxicants. Jacobson was lying on a bed, and the officer had

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

some difficulty waking her. Olson concluded that Jacobson was more likely passed out than asleep. When Jacobson awoke, her eyes were extremely red and bloodshot, and her speech was slurred as she spoke. She admitted to drinking four glasses of wine that evening. Jacobson told the officer that she and her husband left a Christmas party around 1:30 a.m. to pick up their son. Jacobson stated that she was the initial driver of the vehicle but that they pulled over and switched places a couple of blocks into the drive. Jacobson then told the officer that she and her husband were lost at the time of the accident, which had occurred because they were fighting. The officer noted that Jacobsen appeared very emotional and observed that her front tooth was chipped.

¶4 Following this initial interview with Jacobson, Olson spoke to the husband a second time. His account of what happened differed from Jacobson's. He corroborated Jacobson's assertion that he was driving, but his story was that they were following friends to where they were going to spend the night and that they were not fighting at the time of the accident. He stated that he had exited the vehicle out of the passenger door because the driver's side door was jammed shut. The officer had performed field sobriety tests and placed Jacobson's husband under arrest when she received a call from one of the other officers who was still at the scene.

¶5 Olson learned some new information from her colleague. He told her that the driver's side door opened fine and that there were footprints in the snow coming from that side of the vehicle. He also stated that the driver's seat was forward for a shorter driver and that the officers had found two long strands of burgundy hair, one in the driver's side door and another on the driver's side visor. Jacobson has long, burgundy hair.

¶6 After this conversation with her colleague, Olson briefly spoke with Jacobson's husband again. She confronted him with the discrepancies between his story and his wife's story and informed him she would need to speak with Jacobson again. Jacobson insisted that her husband had driven, that she was very intoxicated and not stupid enough to drive in that condition after having been arrested for operating a motor vehicle while intoxicated (OWI) in the past. When Olson told Jacobson about the evidence that had been gathered at the scene, Jacobson began to cry and became very upset, yelling at Olson. Olson then checked Jacobson for a possible seatbelt mark. Olson observed a bruise on Jacobson's left upper shoulder. The officer felt that this bruise was consistent with a bruise caused by a driver's side seatbelt in an accident. Based on her own observations, the inconsistencies in the stories Jacobson and her husband gave, and the evidence from the scene of the accident, Olson placed Jacobson under arrest for OWI.

¶7 Olson next read Jacobson the Informing the Accused form and asked her to submit to a chemical test of her blood. Jacobson became verbally abusive and informed the officer that she would not cooperate with any tests. Olson warned her that her consent was not needed to obtain the blood and again asked Jacobson whether she was going to cooperate. Jacobson again told the officer that she was not giving blood and crossed her arms over her chest. Olson marked the Informing the Accused form as a refusal.

¶8 The nurse then summoned the lab technician to Jacobson's room to take the blood. The officer again told Jacobson that whether or not she cooperated, the blood would be taken. Olson also informed Jacobson that her license would be revoked because of the refusal, and Jacobson again yelled at the officer that she was not going to get any blood. The Mequon police sergeant stood

by to assist because of Jacobson's uncooperative behavior. She continued to be uncooperative while the lab technician prepared to administer the test, holding her arms close to her. When the technician was ready to draw the blood, Jacobson continued to yell at Olson, but she did extend her arm for the technician.

¶9 The State charged Jacobson with a refusal pursuant to WIS. STAT. § 343.305. Jacobson challenged the refusal charge at an April 13, 2005 refusal hearing. The circuit court considered whether the arresting officer had probable cause for the arrest and whether the State had any basis for pursuing the refusal charge. According to Jacobson, the purpose of the implied consent law was satisfied when the officer obtained her blood so a refusal prosecution was unnecessary and vindictive. The circuit court rejected Jacobson's arguments, and she appeals.

¶10 We first address whether the officer had probable cause to arrest Jacobson. Jacobson claims probable cause did not exist because the officer had no proof that Jacobson drove the vehicle. We review de novo whether undisputed facts constitute probable cause. ***State v. Babbitt***, 188 Wis. 2d 349, 356, 525 N.W.2d 102 (Ct. App. 1994). When a court determines probable cause at a refusal hearing, it does not weigh the State's evidence against the defendant's evidence. ***State v. Nordness***, 128 Wis. 2d 15, 36, 381 N.W.2d 300 (1986). It merely assesses the "totality of the facts and circumstances faced by the officer at the time of the arrest to determine whether he or she reasonably believed that the defendant had committed an offense." ***Dane County v. Sharpee***, 154 Wis. 2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990). The officer's observations "need only be sufficient to lead a reasonable officer to believe that guilt is more than a possibility." ***Village of Elkhart Lake v. Borzyskowski***, 123 Wis. 2d 185, 189, 366 N.W.2d 506

(Ct. App. 1985). Thus, "[t]he trial court simply must ascertain the plausibility of a police officer's account." ***Nordness***, 128 Wis. 2d at 36.

¶11 The arresting officer here did have probable cause to arrest Jacobson based on the totality of the circumstances. Before Olson met with Jacobson, the Mequon police sergeant had told her that both Jacobsons appeared to be intoxicated. Olson's own observations corroborated this information. During Olson's meeting with Jacobson, the officer observed that Jacobson was more likely passed out than asleep, smelled of intoxicants, had red, bloodshot eyes and slurred speech, and was emotional. Additionally, Jacobson admitted to being very intoxicated and to having had four glasses of wine that evening. A reasonable officer could have determined that Jacobson was intoxicated from the foregoing evidence. Olson also had reasonable grounds to believe that Jacobson operated the couple's vehicle in her intoxicated state. Most important was her admission that she had driven the first few blocks after leaving the party. Further, Olson was entitled to consider evidence imparted to her by her colleague at the scene indicating that Jacobson, not her husband, was in the driver's seat at the time of the accident. Again, the seat was pushed forward for a shorter driver, and Jacobson's hair, not her husband's, was found in the door. In addition, the chipped front tooth would be consistent with a driver's face hitting the steering wheel during an impact. Further, the officer was warranted in discounting the husband's admission that he was the driver, given that the evidence at the scene did not corroborate his story about exiting from the passenger's side because of a jammed driver's side door. Also, Olson testified a red mark or bruise on Jacobson's left shoulder was consistent with a driver's side seatbelt. Based on the facts discussed above, a reasonable police officer could have believed that it was "more than a possibility" that Jacobson committed the offense of OWI.

¶12 Notwithstanding that all of the above shows probable cause that Jacobson was the driver, including her own admission that she was driving at least part of the time, we will indulge Jacobson on her three main arguments as to why probable cause did not exist. Jacobson alleges that the trial court "ignored" evidence that both Jacobson and her husband said that her husband was driving. She also posits that the court should have attached no weight to the officer's observation of a bruise on her left shoulder because it "is a matter of common knowledge that it takes several days after the injury for a bruise to appear on the human skin." Finally, Jacobson alleges that the burgundy hair, found on the driver's side, should be discounted because this was a rollover accident.

¶13 We reject all three of these arguments. First, the trial court did not "ignore" the claim by Jacobson and her husband that her husband was the driver. Rather, by not giving any consideration to that self-serving testimony, we are confident that the court simply refused to attach any credibility to the claims. Second, as to the claim that it is common knowledge that bruises do not appear for several days, we are satisfied that the common knowledge is that the color of a bruise changes with age. Within the initial time of trauma until two days out, the bruise is red—which is consistent with the testimony here. Then, it changes to blue or purple after that and may change color after that. Even if our conception of common knowledge is incorrect, this just goes to show that perhaps there is no "common" knowledge and expert testimony should have been adduced by Jacobson on the subject. Third, Jacobson has provided no evidence supporting the claim that hair from a driver would not be found on the driver's side in a rollover accident. Her claim that there is such a connection is based totally on speculation, and courts do not find historical facts based on speculation. We conclude that the officer had plausible reason to determine that Jacobson was the driver.

¶14 We next address Jacobson's unwarranted prosecution argument. According to Jacobson, the purpose of the implied consent law is simply to allow the State to obtain physical evidence of intoxication. She contends that this purpose was satisfied here because she did not prevent the technician from taking her blood. Thus, she claims, there was simply no legitimate reason to charge her with a refusal. Jacobson also maintains that because ***State v. Bohling***, 173 Wis. 2d 529, 533, 494 N.W.2d 399 (1993), allows an officer to order a chemical test regardless of the subject's cooperation, no legitimate objective is served by charging an arrestee with a refusal.

¶15 We deem it important to reaffirm the basic policy behind the implied consent law. *See* WIS. STAT. § 343.305(2) ("Any person who … drives or operates a motor vehicle upon the public highways of this state … is deemed to have given consent to one or more tests of his or her breath, blood or urine, for the purpose of determining the presence or quantity in his or her blood or breath, of alcohol …."); § 343.305(9) and (10) (improper refusal shall result in revocation of license). Our supreme court has recognized that the purpose of the implied consent law is to "get drunk drivers off the road as expeditiously as possible and with as little [as] possible disruption of the court's calendar." *See* ***State v. Brooks***, 113 Wis. 2d 347, 359, 335 N.W.2d 354 (1983). This purpose is served when an arrestee submits to the chemical test and cooperates with the officer. Results showing a high blood alcohol level will facilitate the State's efforts to obtain convictions. Results that do not strongly corroborate intoxication, on the other hand, will likely not result in prosecutions, thereby allowing the courts to concentrate their scarce judicial resources on cases involving truly dangerous drivers.

¶16 Prior to ***Bohling***, intoxicated individuals who withheld their consent profited from their wrongful refusals because the refusal prevented the State from obtaining physical evidence probative of their guilt. *Cf. generally* ***Bohling***, 173 Wis. 2d at 546 (first Wisconsin case to allow chemical tests notwithstanding a refusal; noting the importance of physical evidence to the State's case). The practical effect of ***Bohling*** was to eliminate a drunk driver's disincentive to cooperate with law enforcement officers, thereby reinforcing the implied consent law. We therefore reject Jacobson's suggestion that ***Bohling*** renders the implied consent law obsolete.

¶17 We also reject Jacobson's "all's well that ends well" assumption that because she "eventually" submitted to the blood draw, the State was obligated to ignore her initial uncooperative behavior and verbal expressions of refusal. ***Bohling*** recognized the vital role of timing in obtaining a blood sample for both the State and the defendant. The court recognized an "exigent circumstances" exception to the constitutional requirement of a warrant because of the rate at which alcohol is eliminated from the blood. ***Id.*** at 533, 539. The court further pointed out that delay in administering a chemical test can also prejudice the arrestee's interests. It noted that when an individual stops drinking, his or her blood alcohol level initially *rises* for a period of time. ***Id.*** at 547. An individual who does not immediately cooperate with the arresting officer therefore runs the risk of an artificially high test result. *See* ***id.*** Such results prejudice the State's interest in pursuing OWI charges only against drivers who are drunk and pose a threat to the safety of other drivers. Thus, an arrestee's "initial refusal" subverts the goals of the implied consent statute regardless of how docile and compliant the person becomes at the time the test is actually administered. Jacobson's unequivocal verbal refusal and the initial uncooperative conduct that accompanied

it constituted an immediate violation of the law for which she was properly prosecuted.

¶18 To conclude, the wealth of facts discussed above demonstrates that the officer did have probable cause to arrest Jacobson. Moreover, the State had every right to prosecute her for her "initial refusal" to submit to a blood draw. The State has an important interest in obtaining physical evidence without undue delay that could prejudice the test results. The law requires a subject's immediate cooperation in order to properly effectuate the legislative intent of expeditiously convicting intoxicated drivers while not wasting judicial resources on prosecuting others. We affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.