COURT OF APPEALS
DECISION
DATED AND FILED

October 2, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP882-CR **Cir. Ct. No. 2007CT565**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MITCHELL A. LANGE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: DIANE M. NICKS, Judge. *Reversed and cause remanded with directions*.

¶1 DYKMAN, J.[1] Mitchell Lange appeals from a judgment convicting him of operating a motor vehicle while intoxicated, second offense, contrary to

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

WIS. STAT. § 346.63(1)(a). Lange argues that police did not have probable cause to arrest him for OWI after witnessing his erratic driving at bar time leading to a one-car crash. The State responds that those facts amount to probable cause to believe Lange had committed the offense of OWI. We conclude that the facts of this case do not establish probable cause to arrest Lange for OWI, and therefore reverse and remand with directions to grant Lange's motion to suppress.

Background

¶2 The following facts are undisputed. On January 21, 2007, at 2:52 a.m., Police Officer Don Penly was driving home from work when he saw a white car traveling ten to fifteen miles per hour above the speed limit on Sherman Avenue in Maple Bluff. The white car was traveling toward Penly, and Penly witnessed the car significantly cross the road's center line in his direction.

¶3 At approximately the same time, Police Officer Margaret Hoffman was running stationary speed radar at the intersection of North Sherman Avenue and Commercial in Maple Bluff when she observed the white car traveling in the far left-hand lane of the four-lane road, so that it was two lanes into the southbound side while travelling northbound. She visually estimated the car was travelling at fifteen miles per hour over the speed limit. Hoffman followed the vehicle and activated her overhead lights. She observed the car travelling for fifty to seventy-five feet before it started moving back toward the correct lane. Hoffman increased her speed to eighty-four miles per hour, but was unable to close the distance between herself and the white car. She then saw a cloud of gray smoke up ahead, and when she reached it, she saw a downed utility pole held off the ground by its wires, the white car flipped onto its roof, and Lange lying unconscious on the ground. The only thing she smelled at the scene was gasoline.

¶4 When Penly saw in his rearview mirror that Hoffman had activated her overhead lights, he turned his car around and travelled in Hoffman's direction. When he reached her location, he also witnessed the sheared utility pole held up by its wires, the white car on its roof and Lange lying unconscious on the ground. The only smell he detected on the scene was gasoline. After Penly and Hoffman discussed their observations, and the fact that it was around bar time, Hoffman arrested Lange for OWI. Lange moved to suppress the evidence obtained when his blood was drawn following his arrest, arguing police did not have probable cause to arrest him.[2] The trial court denied Lange's motion, and he appeals.

Standard of Review

¶5 Whether an arrest was supported by probable cause is a question of constitutional fact. ***State v. Secrist***, 224 Wis. 2d 201, 208, 589 N.W.2d 387 (1999). Questions of constitutional fact present a mixed question of fact and law; we review the trial court's factual findings under the clearly erroneous standard, but review the application of those facts to constitutional principles independently. ***State v. Post***, 2007 WI 60, ¶8, 301 Wis. 2d 1, 733 N.W.2d 634. Because the facts here are undisputed, we address only the question of law of whether the facts supported probable cause, which we review de novo. *See* ***id.***

[2] Lange concedes that if police had probable cause to arrest him, they had authority to draw his blood.

Discussion

¶6 The parties present a very narrow issue for our review: whether there was probable cause to arrest Lange for OWI.[3] We conclude that there was not.

¶7 "There is probable cause to arrest when the totality of the circumstances within [the arresting] officer's knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant probably committed a crime." ***State v. Sykes***, 2005 WI 48, ¶18, 279 Wis. 2d 742, 695 N.W.2d 277 (citation omitted). Further, "[t]he objective facts before the police officer need only lead to the conclusion that guilt is more than a possibility." ***Id.*** (citation omitted).

¶8 The supreme court recently revisited the issue of probable cause to arrest for OWI in ***Washburn County v. Smith***, 2008 WI 23, 308 Wis. 2d 65, 746 N.W.2d 243. There, Smith was arrested for OWI after police observed him driving well above the speed limit, he had a delayed response and crossed the highway's double-yellow centerline twice in the process of pulling over, and police detected alcohol on his breath and he admitted he had been drinking. ***Id.***, ¶¶8-12. Smith argued that the facts amounted only to reasonable suspicion of OWI, but not probable cause to arrest. ***Id.***, ¶7.

[3] "Although an appellate court may, *sua sponte*, consider an issue not raised by the parties, we will usually decline to do so, and we see no reason to depart from that practice in this case." ***State ex rel. S.M.D. v. F.D.L.***, 125 Wis. 2d 529, 532, 372 N.W.2d 921 (Ct. App. 1985) (citation omitted).

¶9 In concluding that police had probable cause to arrest Smith, the supreme court reviewed two of its oft-cited cases relied upon by the defendant (and which Lange relies on here), ***State v. Seibel***, 163 Wis. 2d 164, 471 N.W.2d 226 (1991), and ***State v. Swanson***, 164 Wis. 2d 437, 475 N.W.2d 148 (1991). *See* ***Smith***, 308 Wis. 2d 65, ¶¶17-37. The ***Smith*** court distinguished ***Seibel*** because in ***Seibel***, the court held that police needed only reasonable suspicion to draw Seibel's blood when they had probable cause to arrest for negligent homicide by use of a motor vehicle, and did not address whether police had probable cause to arrest for OWI. ***Smith***, 308 Wis. 2d 65, ¶20. The ***Seibel*** court then determined there was reasonable suspicion to draw Seibel's blood based on police observation of Seibel's erratic driving and subsequent serious accident, a strong odor of alcohol on Seibel's fellow motorcycle drivers, an officer's belief that he smelled alcohol on Seibel, and Seibel's belligerent and out-of-touch conduct.. *See* ***Smith***, 308 Wis. 2d 65, ¶21. As Lange argues here, Smith argued that ***Seibel*** supported his position that police lacked probable cause based on similar facts. *See* ***Smith***, 308 Wis. 2d 65, ¶17. The supreme court stated that ***Seibel*** was not dispositive because, first, that court never considered whether those facts amounted to probable cause; and, second, because the police in ***Smith*** had greater indicia of intoxication than in ***Seibel***: unlike Seibel, Smith admitted he had been drinking and gave inconsistent statements to the police about the amount, putting his credibility in doubt. ***Smith***, 308 Wis. 2d 65, ¶¶22-23.

¶10 Next, the supreme court distinguished ***Swanson***. There, police observed Swanson drive onto the sidewalk in front of a tavern and nearly hit a pedestrian at 2:00 a.m. ***Smith***, 308 Wis. 2d 65, ¶25. When the police spoke to Swanson, they smelled intoxicants on his breath. ***Id.*** Police searched Swanson and discovered contraband, then arrested him for possession of a controlled

substance. ***Id.***, ¶¶26-27. The court concluded that the search violated the Fourth Amendment of the United States Constitution because Swanson was not under arrest when searched. ***Id.***, ¶¶27-29. Although the State argued that the police could have arrested Swanson for a number of offenses, the court rejected that argument "[b]ecause the State failed to show that an arrest for anything other than possession of a controlled substance was ever implied, attempted or accomplished."[4] ***Id.***, ¶29. Although the court did not address whether probable cause for OWI existed, it observed in a footnote that "'[u]nexplained erratic driving, the odor of alcohol, and the coincidental time of the incident form the basis for a reasonable suspicion but should not, in the absence of a field sobriety test, constitute probable cause to arrest someone for driving while under the influence of intoxicants.'" ***Id.***, ¶32 (quoting ***Swanson***, 164 Wis. 2d at 453 n.6).

¶11 The ***Smith*** court explained that ***Swanson*** did not guide its outcome because, first, "***Swanson*** did not announce a general rule requiring field sobriety tests in all cases as a prerequisite for establishing probable cause to arrest a driver for operating a motor vehicle while under the influence of an intoxicant." ***Smith***, 308 Wis. 2d 65, ¶33. Instead, probable cause must always be assessed on a case-by-case basis. ***Id.***, ¶34. Second, the court distinguished ***Swanson*** because in ***Smith*** there were greater indicia of intoxication: Smith's admission to drinking an indeterminate number of drinks during ten hours at a bar prior to driving. ***Smith***, 308 Wis. 2d 65, ¶34.

[4] The supreme court later abrogated one of its holdings in ***State v. Swanson***, 164 Wis. 2d 437, 475 N.W.2d 148 (1991), in ***State v. Sykes***, 2005 WI 48, 279 Wis. 2d 742, 695 N.W.2d 277. In ***Sykes***, 279 Wis. 2d 742, ¶27, the supreme court held that police are not required to arrest for the same crime that supported probable cause to arrest prior to a search.

¶12 Thus, while not retreating from its holdings in ***Seibel*** and ***Swanson***, the supreme court held that the facts in ***Smith*** were sufficient to establish probable cause to arrest for OWI. While not establishing any bright line rules and reiterating that probable cause is always determined on a case-by-case basis, the court emphasized that the significant indicia of intoxication in ***Smith***—the odor of intoxicants and Smith's admission of drinking—distinguished it from those cases where the indicia of intoxication were not as strong.

¶13 Our prior cases follow the reasoning reaffirmed in ***Smith***. In ***State v. Kasian***, 207 Wis. 2d 611, 622, 558 N.W.2d 687 (Ct. App. 1996), we concluded that there was probable cause to arrest for OWI when police found Kasian injured at the scene of a one-car accident, smelled intoxicants on Kasian, and noted Kasian's speech was slurred. Similarly, in ***State v. Wille***, 185 Wis. 2d 673, 683-84, 518 N.W.2d 325 (Ct. App. 1994), we concluded that police had probable cause to arrest Wille after Wille struck a car parked on the shoulder of a highway and the police smelled intoxicants on Wille at the hospital, knew that a firefighter had smelled intoxicants on Wille as well, and Wille told them he had "to quit doing this."

¶14 In contrast, the facts here show no actual evidence of alcohol consumption. Although erratic driving and a crash at bar time create a suspicion of intoxicated driving, it is only the possibility of intoxicated driving. *See* ***Sykes***, 279 Wis. 2d 742, ¶18. Unlike in ***Smith***, ***Kasian***, and ***Wille***, police did not smell any intoxicants on the scene and Lange did not admit to drinking alcohol prior to his arrest, and there are no comparable indicia of intoxication.[5] Accordingly, we

[5] We recognize the State's argument that any odor of intoxicants was masked by the smell of gasoline, police were focused on saving Lange rather than on searching for evidence of (continued)

reverse and remand with directions to suppress the evidence obtained in drawing Lange's blood.

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

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

intoxicants, and that Lange was unconscious when police arrived at the scene. Nonetheless, if the particular facts of a case preclude a finding of probable cause, an arrest is not justified. Good reasons for a lack of evidence are not themselves evidence.