COURT OF APPEALS DECISION DATED AND FILED

September 11, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 01-3391-CR

Cir. Ct. No. 01-CF-34

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

VERNON L. HUBBARD,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Affirmed*.

Before Brown, Anderson and Snyder, JJ.

¶1 PER CURIAM. Vernon L. Hubbard appeals from the judgment of conviction entered against him. Hubbard was convicted of operating while intoxicated as a fifth offense. The issue on appeal is whether the police had probable cause to arrest Hubbard. The trial court found that the police had probable cause and denied Hubbard's motion to suppress evidence, including

blood analysis results. Because we agree with the trial court that the police had probable cause to arrest Hubbard, we affirm.

¶2 Hubbard was charged with operating while intoxicated as a fifth offense and operating with a prohibited alcohol concentration as a fifth offense. After the circuit court denied his suppression motion, he pled no contest to one count of operating while intoxicated as a fifth offense. The court withheld sentence and placed him on probation for two years.

¶3 In his suppression motion, Hubbard argued before the trial court that the police did not have probable cause to detain him. At the suppression hearing, the officer who detained Hubbard testified that a motorist had flagged him down and told him about a suspicious male in front of a closed grocery store. This occurred at about 11:30 p.m. The officer called his dispatcher who suggested that the person at the store might be the person whose car was in a ditch about three-quarters of a mile from the store. The officer then went to the store and talked to Hubbard. The officer noted that Hubbard was swaying, was using slurred speech, and smelled of intoxicants. The officer also noted that one of Hubbard's pant legs was wet up to the knee and his boots were muddy. When the officer asked about the wet pants, Hubbard stated that he had been dropped off in the city and walked through the snow to the store.

¶4 The officer then asked Hubbard about the car in the ditch. Hubbard denied any knowledge of the car. The officer went to investigate the car. Another officer was already there. When they ran a license plate check, they discovered that the car belonged to Tammy Hubbard who lived at the same address as Vernon. They also noted that the keys were still in the ignition, and saw footprints leading from the passenger side of the car. One of the footprints had broken

through the snow and ice into mud. Dispatch then told the officer that the Walworth County Sheriff's Department wanted Hubbard detained.

¶5 The officer returned to the store and told Hubbard he was detaining him. When the officer told Hubbard that the car was registered to his wife, Hubbard responded that his wife had driven the car into a ditch earlier that evening. The officer then asked Hubbard to take a preliminary breath test. Hubbard consented and that test showed a .16 blood alcohol content. Hubbard also said to the officer "do you think I'd leave the keys in the ignition if I was driving?" The officer had not told Hubbard the keys were still in the car.

¶6 While Hubbard was being detained, his father-in-law drove up. He told the officer that Hubbard's wife had called him and said that Hubbard needed a ride home because he was driving and his car had gone into a ditch. The officer then attempted to call Hubbard's wife. When the officer eventually talked to her, she first told him that she had driven the car into a ditch. When the officer told her she could be charged with obstructing if she lied, she then said that she did not know what had happened and she would get Hubbard to tell the officer the truth. The officer then let Hubbard talk to her and overheard Hubbard saying to her "just tell Walworth County that you were driving." Shortly after this, officers from the Walworth County Sheriff's Department arrived and arrested Hubbard for driving while intoxicated.

¶7 Hubbard argues on appeal that the detention by the first officer constituted an arrest without probable cause, that the officer did not have probable cause to administer the preliminary breath test, and that the arresting officer did not have probable cause to arrest him. We sustain a circuit court's findings of fact relating to a suppression motion unless they are clearly erroneous. ***State v.***

Roberts, 196 Wis. 2d 445, 452, 538 N.W.2d 825 (Ct. App. 1995). Whether the established facts constitute probable cause is a question of law that we review de novo. ***State v. Babbitt***, 188 Wis. 2d 349, 356, 525 N.W.2d 102 (Ct. App. 1994). We agree with the circuit court that the facts show that the officers acted properly throughout.

¶8 Hubbard argues that when the first officer detained him at the store, this detention constituted an arrest. We disagree. A police officer may, in the appropriate circumstances, "detain a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest." ***State v. Quartana***, 213 Wis. 2d 440, 445, 570 N.W.2d 618 (Ct. App. 1997). "[S]uspicious conduct by its very nature is ambiguous, and the principal function of the investigative stop is to quickly resolve that ambiguity. Therefore, if any reasonable inference of wrongful conduct can be objectively discerned, … the officers have the right to temporarily detain the individual for the purpose of inquiry." ***State v. Anderson***, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990). During the course of the stop, police officers may try to obtain information to confirm or dispel their suspicions. ***Quartana***, 213 Wis. 2d at 446.

¶9 At the time the officer detained Hubbard to wait for the Walworth county officers, he had more than ample evidence to create an inference of wrongful conduct. Hubbard, when first asked, denied any knowledge of the car in the ditch. The officer then discovered that the car was registered to Hubbard's wife. Hubbard was swaying, slurring his speech, and smelled of intoxicants. Further, Hubbard gave an implausible story of how he came to be at the closed grocery store late at night.

¶10 Hubbard argues that the means used to detain him approached the conditions of arrest. He relies on a number of cases to support this argument, all of which are distinguishable from the facts presented here. For example, in ***Florida v. Royer***, 460 U.S. 491 (1983), the defendant was taken from an airport terminal to a small room, where he was questioned and told that he was suspected of transporting narcotics. ***Id.*** at 494-96. The court stated that being in a small room confronted by two officers created "an almost classic definition of imprisonment." ***Id.*** at 496. In this case, however, Hubbard was not detained in any sort of enclosure or by the use of any force or physical restraint. He merely waited with the officer outside the closed grocery store. And ***Quartana*** is also not helpful to Hubbard. In that case, the court concluded that a stop and detention was constitutionally reasonable even though the police transported the defendant from the place where he was stopped. ***Quartana***, 213 Wis. 2d at 448.

¶11 In this case, the officer did not use any force or threats to detain Hubbard, Hubbard was not handcuffed or physically restrained in any way, nothing was taken from him, nor was he moved from the place where he was found. Further, the length of the detention was extremely short. We conclude that under all of these facts, the detention did not constitute an arrest for purposes of the Fourth Amendment.[1]

¶12 Nor did the administration of the preliminary breath test transform the lawful detention into an arrest. A person is not under arrest for purposes of the Fourth Amendment when he or she is asked to perform field sobriety tests. ***State***

[1] Since we conclude that the detention was permissible, we need not rule on whether the first officer had probable cause to arrest Hubbard.

v. Swanson, 164 Wis. 2d 437, 449, 475 N.W.2d 148 (1991). Given the indicia of intoxication that Hubbard was exhibiting, the officer had probable cause to administer the breath test. We conclude that both the detention and the breath test were constitutionally permissible.

¶13 Hubbard also argues the Walworth county officers did not have probable cause to arrest him. An 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 committed an offense. ***State v. Koch***, 175 Wis. 2d 684, 701, 499 N.W.2d 152 (1993). The officer's observations supporting an arrest need not be sufficient to prove guilt beyond a reasonable doubt, nor adequate to prove that guilt is more likely than not. ***State v. Mitchell***, 167 Wis. 2d 672, 681-82, 482 N.W.2d 364 (1992). It is only necessary that the evidence would lead a reasonable officer to believe that guilt is more than a mere possibility. ***State v. Paszek***, 50 Wis. 2d 619, 625, 184 N.W.2d 836 (1971). "In dealing with probable cause, ... as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." ***Id.*** (quotations and citations omitted).

¶14 We conclude that the facts established gave the police probable cause to arrest Hubbard. Hubbard had been found within walking distance of his abandoned car. He gave police an implausible story about how he came to be there. He first denied any knowledge of the car and then said his wife had driven it into a ditch. He appeared intoxicated and then later was shown to be by the preliminary breath test. His father-in-law arrived at the scene and told the police that his daughter had told him Hubbard had driven his car into a ditch. Hubbard knew that the keys to the car had been left in the ignition. All of these facts allow

a reasonable person to infer that it was probable that Hubbard had driven the car while intoxicated.

¶15 For the reasons stated, we affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.