COURT OF APPEALS
DECISION
DATED AND FILED

September 20, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP206-CR **Cir. Ct. No. 2011CT408**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PORTIA M. MEYER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: NICHOLAS McNAMARA, Judge. *Affirmed*.

¶1 LUNDSTEN, P.J.[1] Portia Meyer appeals a judgment of the circuit court finding her guilty of operating a motor vehicle while under the influence of

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

an intoxicant, as a second offense. Meyer argues that the circuit court erred when it denied her motion to suppress evidence of intoxication. Meyer asserts that this evidence should have been suppressed because it was obtained as the result of an unlawful arrest. I agree with the circuit court that the circumstances do not merit suppression, and I affirm.

Background

¶2 In the early morning hours of February 26, 2011, City of Madison Police Officer Boespflug was driving westbound on a main thoroughfare in the City of Madison. Portia Meyer was driving eastbound on the same road. It was snowing, and there was a layer of snow on the road. Meyer entered a left-hand turn lane and, without having the right-of-way, turned in front of Officer Boespflug's squad car, causing a collision. When Officer Boespflug extricated herself from her squad car, she was having trouble breathing and seeing, had pain in her arm, and felt nauseated. Officer Boespflug approached Meyer and asked if she was injured. At this point, Officer Boespflug smelled intoxicants on Meyer. Officer Boespflug then placed Meyer in handcuffs while Boespflug waited for the arrival of back-up. Officer Boespflug informed Meyer that she was not under arrest, but that she needed to be handcuffed due to the officer's state and to prevent any flight risk.

¶3 Upon arrival at the scene, Officer Hill put Meyer, still handcuffed, in the back of his squad car while he assessed the condition of Officer Boespflug and the accident scene. Officer Hill then returned to his squad car and informed Meyer that she could get out of the car. Officer Hill smelled intoxicants emanating from the rear of the squad car where Meyer was sitting. Meyer chose to get out of the car, and Officer Hill informed her that she was not under arrest.

He removed her handcuffs. Officer Hill noticed that Meyer was speaking with slurred speech and that she smelled of intoxicants. After asking a few questions, Officer Hill asked Meyer if she would accompany him to a nearby police district building to perform field sobriety tests where it was warmer and dry, to which she responded yes. Meyer failed the field sobriety tests and an Intoximeter test. Officer Hill then issued Meyer citations for operating a motor vehicle while under the influence and failure to yield while making a left turn.

¶4 Meyer moved to suppress on the basis of an unlawful detention and arrest. The circuit court denied her motion, and convicted her of operating while under the influence, as a second offense. Meyer appealed.

Discussion

¶5 The parties dispute whether an arrest occurred, the legality of the arrest, and whether "attenuation" exists because the arrest was terminated before the evidence at issue here was obtained. I need not resolve the other disputes because I conclude that, even assuming Officer Boespflug placed Meyer under arrest, the arrest was proper.

¶6 When reviewing a denial of a motion to suppress, the circuit court's findings of fact will be upheld unless they are clearly erroneous. ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 316, 603 N.W.2d 541 (1999). The application of these facts to ascertain the legality of an arrest is, however, a question of law that is reviewed de novo. *See* ***State v. Popke***, 2009 WI 37, ¶10, 317 Wis. 2d 118, 765 N.W.2d 569.

¶7 Meyer argues that the circuit court erred when it denied suppression of evidence of intoxication because that evidence arose from an unlawful arrest.

Meyer does not dispute that Officer Boespflug could have conducted an investigative stop at the scene of the accident. Meyer's complaint is that, by handcuffing her and later putting her in the back of a squad car, the officers elevated an investigative stop to an illegal arrest. However, I agree with the State that the arrest was proper as an arrest for a traffic violation, namely, the failure to yield the right-of-way.

¶8 Police may arrest a person without a warrant for "the violation of a traffic regulation if the traffic officer has reasonable grounds to believe that the person is violating or has violated a traffic regulation."[2] WIS. STAT. § 345.22. Traffic regulations for the purpose of § 345.22 include any "provision of chs. 194 or 341 to 349 for which the penalty for violation is a forfeiture or an ordinance enacted in accordance with s. 349.06." WIS. STAT. § 345.20(l)(b). Failing to yield the right-of-way when making a left turn under WIS. STAT. § 346.18(2)[3] falls within the definition of a traffic regulation because the penalty for this violation is a forfeiture. WIS. STAT. § 346.22(1)(a) and (c). Thus, an officer may make an arrest if he or she has reasonable grounds to believe a person is violating or has violated this statute.

[2] Probable cause is synonymous with reasonable grounds. ***Johnson v. State***, 75 Wis. 2d 344, 348, 249 N.W.2d 593 (1977).

[3] WISCONSIN STAT. § 346.18(2) states:

> **(2)** TURNING LEFT OR MAKING A U-TURN AT INTERSECTION. The operator of a vehicle within an intersection intending to turn to the left or make a U-turn shall yield the right-of-way to any vehicle approaching from the opposite direction.

¶9 Meyer advances three arguments for why an arrest pursuant to WIS. STAT. § 345.22 was improper under the circumstances here.[4]

¶10 First, Meyer argues that, because she did not intend to make a left-hand turn, the officers lacked probable cause to arrest for a violation of WIS. STAT. § 346.18(2). In order to violate this regulation, a driver must "intend[] to turn to the left" and must fail to yield the right-of-way to another vehicle. WIS. STAT. § 346.18(2). On appeal, Meyer contends that, due to the snowy and icy conditions at the time of the accident, the intent required under § 346.18(2) was not established.

¶11 This argument fails because it was not properly raised before the circuit court. *See* ***State v. Rogers***, 196 Wis. 2d 817, 825-27, 539 N.W.2d 897 (Ct. App. 1995) (to preserve arguments for appeal, a party must raise them before the circuit court). The State correctly points out that Meyer conceded a violation of WIS. STAT. § 346.18(2) during the suppression motion hearing. In response to the court's assertion that Meyer was "at least guilty for failing to yield the right-of-way," Meyer responded, "I agree with that." Meyer went on to argue that the arrest was illegal because the officers had not met certain procedural requirements, but she did not argue that she lacked the intent to commit the offense. Accordingly, the argument that she lacked intent to commit this offense has been forfeited.

[4] Meyer additionally argues that no probable cause existed to arrest her for operating under the influence, citing two Wisconsin Supreme Court cases to support this assertion: ***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). I need not address that argument, however, because of my conclusion that the arrest, if there was one, was proper on other grounds.

¶12 Even if I assume that Meyer did not forfeit her lack-of-intent argument, it is not persuasive. Officer Boespflug needed only reasonable grounds to believe that the regulation was violated. Reasonable grounds require that "the information lead a reasonable officer to believe that guilt is more than a possibility." ***Popke***, 317 Wis. 2d 118, ¶14 (internal citations omitted). Officer Boespflug testified that she was driving westbound when she saw Meyer's car enter the oncoming left-hand turn lane. Meyer's car turned left in front of Officer Boespflug's squad car, at which point the collision occurred. Officer Boespflug also testified that she had the right-of-way at this intersection. Despite the snowy conditions, these facts show reasonable grounds to believe that Meyer had intended to turn left in violation of WIS. STAT. § 346.18(2).

¶13 Second, Meyer argues that WIS. STAT. § 345.22 is inapplicable because the officers did not assert the traffic violation as the reason for handcuffing Meyer. This argument is without merit because the officers' subjective motivation is irrelevant. *See* ***State v. Baudhuin***, 141 Wis. 2d 642, 651, 416 N.W.2d 60 (1987) ("As long as there was a proper legal basis to justify the intrusion, the officer's subjective motivation does not require suppression of the evidence or dismissal.").

¶14 Finally, Meyer asserts that the arrest was not legal under WIS. STAT. § 345.22 because neither officer followed up on the procedural requirements of WIS. STAT. § 345.23. Specifically, Meyer argues that, for the officers to legally arrest her, they would have had to issue a citation immediately after the accident. *See* § 345.23 (the arresting officer "shall issue a citation" to the person under arrest for a traffic violation). Meyer raises this argument for the first time on appeal in her reply brief and it is, therefore, forfeited. *See* ***State v. Smalley***, 2007 WI App 219, ¶7 n.3, 305 Wis. 2d 709, 741 N.W.2d 286. In any event, Officer Hill

did issue a citation for a violation of WIS. STAT. § 346.18(2) after conducting the field sobriety and Intoximeter tests. Meyer points to no requirement that the citation must be issued immediately upon arrest, or, for that matter, to any authority suggesting that compliance with § 345.23 affects the validity of an arrest under § 345.22. *See* ***State v. King***, 142 Wis. 2d 207, 213, 418 N.W.2d 11 (Ct. App. 1987) (["WISCONSIN STAT. § 345.23] deals only with postarrest release and has no effect on the validity or lawfulness of the arrest itself.").

¶15 Because I conclude that Meyer's arrest was lawful as an arrest for a traffic violation, I affirm the circuit court.

By the Court.—Judgment affirmed.

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