COURT OF APPEALS
DECISION
DATED AND FILED

October 24, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2767-CR **Cir. Ct. No. 2012CT155**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KARI L. SCHIEWE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Jefferson County: JACQUELINE R. ERWIN, Judge. *Affirmed*.

¶1 LUNDSTEN, J.[1] Kari Schiewe 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) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

an intoxicant, as a third offense. Schiewe argues that the circuit court erred when it denied her motion to suppress evidence of intoxication. Schiewe contends that the arresting officer lacked the probable cause required to arrest her for violating WIS. STAT. § 346.63(1)(a). Schiewe also contends that, since she was unlawfully arrested, the circuit court erred by failing to suppress the results of her blood test. I conclude that there was probable cause to arrest Schiewe, and that the circuit court did not err by refusing to suppress the results of her blood test. I therefore affirm the judgment.

Background

¶2 On April 23, 2012, at approximately 8:22 p.m., an officer of the Fort Atkinson Police Department was dispatched to Foster Street regarding a report that a woman was intoxicated and disorderly.

¶3 The officer responded to the call and arrived at Foster Street, where he interviewed two witnesses. The witnesses, who identified themselves, informed the officer that an unknown woman approached them on their property and started using vulgar language. The witnesses informed the officer that, after they asked the woman to leave, the woman drove away down the wrong side of the road, nearly hitting a parked car. The witnesses provided a description of the woman's vehicle and the vehicle's license plate number. The officer discovered the address associated with the vehicle and proceeded to that location.

¶4 The officer arrived at the address, where the vehicle matching the witnesses' description and license plate number was parked in the driveway. The officer noticed that the vehicle was not running and was unoccupied, even though the headlights were on and the keys were in the ignition.

¶5 The officer knocked on the front door, and a woman opened the door and identified herself as Kari Schiewe. The officer observed that Schiewe's speech was slurred, and that her breath had an odor of intoxicants. The officer asked Schiewe to turn the vehicle's headlights off and remove the keys from the ignition.

¶6 After several attempts, Schiewe was unable to remove the keys from the ignition. The officer questioned Schiewe on the driveway about visible scuff marks on the vehicle. Schiewe explained the marks, but became defensive and asked the officer to leave. Instead, the officer continued questioning Schiewe to gather more evidence. In response, Schiewe retreated into her garage. Without Schiewe's permission, the officer entered Schiewe's garage and arrested her.

¶7 After arresting Schiewe on suspicion for operating a vehicle while under the influence of an intoxicant, Schiewe was transported to the police station. The officer read Schiewe the Informing the Accused form, and Schiewe agreed to a chemical blood test.

¶8 Schiewe moved to suppress the results of her blood test, arguing that the officer lacked probable cause for the arrest and that she was unlawfully arrested in her home.

¶9 The circuit court denied the motion. The court concluded that there was probable cause to arrest Schiewe, and that the Wisconsin Supreme Court's decision in ***State v. Felix***, 2012 WI 36, 339 Wis. 2d 670, 811 N.W.2d 775, made the blood test results admissible even though Schiewe's warrantless arrest in her garage was unlawful.

¶10 Schiewe pled no contest to operating a motor vehicle while under the influence of an intoxicant, as a third offense. Schiewe appeals, challenging the circuit court's decision not to suppress the blood test results.

Discussion

Standard Of Review

¶11 When this court reviews a motion to suppress, the circuit court's findings of fact will be upheld unless those findings are against the great weight and clear preponderance of the evidence. *See* ***State v. Dubose***, 2005 WI 126, ¶16, 285 Wis. 2d 143, 699 N.W.2d 582. The application of constitutional principles to these facts is a question of law, which is reviewed de novo. ***Id.***

Probable Cause To Arrest

¶12 Schiewe argues that the officer lacked probable cause to arrest her. Schiewe's argument is that the evidence does not meet the probable cause standard and, as a result, there was no basis for her arrest.

¶13 "Probable cause to arrest is the sum of evidence within the arresting officer's knowledge at the time of the arrest which would lead a reasonable police officer to believe that the defendant probably committed or was committing a crime." ***State v. Nieves***, 2007 WI App 189, ¶11, 304 Wis. 2d 182, 738 N.W.2d 125. "Probable cause to arrest does not require 'proof beyond a reasonable doubt or even that guilt is more likely than not.' It is sufficient that a reasonable officer would conclude, based upon the information in the officer's possession, that the 'defendant probably committed [the offense].'" ***State v. Babbitt***, 188 Wis. 2d 349, 357, 525 N.W.2d 102 (Ct. App. 1994) (quoted sources omitted).

¶14 Schiewe's lack-of-probable-cause argument is based on what the officer did not do, rather than on what the officer knew at the time. In Schiewe's words, the arresting officer did not "determine whether there were other adults in the house prior to the arrest," did not establish that Schiewe "had been on Foster Street," and "did not ask Schiewe about the alcohol she had consumed that day." Additionally, in her words, the arresting officer "did not testify that he obtained a physical description of Schiewe from the witnesses," and Schiewe was never asked "whether she drank any alcohol after arriving home." Finally, Schiewe contends that a more thorough investigation was necessary since the officer did not conduct a field sobriety test.

¶15 Although Schiewe seems to argue that additional investigative steps might have led the officer to conclude that Schiewe had not been the driver, the question is not whether the officer should have performed a more complete investigation. Rather, the legal question is whether the information known to the officer constitutes probable cause. This point is well made in our decision in ***State v. Wille***, 185 Wis. 2d 673, 518 N.W.2d 325 (Ct. App. 1994).

¶16 In ***Wille***, we followed the supreme court case Schiewe relies on, ***State v. Swanson***, 164 Wis. 2d 437, 475 N.W.2d 148 (1991), *abrogated on other grounds by* ***State v. Sykes***, 2005 WI 48, ¶¶23-27, 279 Wis. 2d 742, 695 N.W.2d 277. *See* ***Wille***, 185 Wis. 2d at 684. In ***Swanson***, our supreme court concluded that, in the absence of a field sobriety test, probable cause was not present because the information known to police was insufficient. *See* ***Swanson***, 164 Wis. 2d at 453-54 n.6.

¶17 Schiewe may be suggesting that ***Swanson*** stands for the proposition that a failure to conduct a field sobriety test or to take other available investigatory

steps negates probable cause. If this is what Schiewe means to argue, I disagree. As we explained in ***Wille***, ***Swanson*** does not stand for the proposition that a field sobriety test is always necessary to establish probable cause. *See* ***Wille***, 185 Wis. 2d at 684. Sometimes a field sobriety test is necessary to establish probable cause, and other times it is not. *See* ***id.*** Accordingly, I do not focus on what the officer could have done but, like the circuit court, I focus on what the officer knew.

¶18 Here, police dispatch relayed a complaint to an officer that a woman was intoxicated and disorderly on Foster Street. That officer arrived at Foster Street, where two witnesses informed the officer that a woman approached them on their property and started using vulgar language. The witnesses told the officer that, after they asked the woman to leave, the woman drove away on the wrong side of the street and nearly hit a parked car. The witnesses provided the officer with a license plate number and description of the vehicle. The license plate number provided by the witnesses led the officer to Schiewe's address. After arriving at Schiewe's residence, the officer observed that the vehicle in the driveway matched the description given by the witnesses. The license plate number on the vehicle also matched the given plate number. Indeed, Schiewe does not argue that her vehicle was not driven by a drunk driver. Instead, Schiewe argues that the officer lacked probable cause to believe that she was the driver. I disagree.

¶19 First, there is the fact that Schiewe's vehicle was the vehicle reported by the witnesses on Foster Street, which makes her a likely suspect as the driver. Second, when the officer arrived at Schiewe's residence, her vehicle was there and a woman was at home, and the officer did not observe any other possible driver. Third, prior to the officer's entry into Schiewe's garage, the officer noticed that Schiewe's speech was slurred and that her breath smelled of intoxicants.

Fourth, the officer observed that Schiewe was unable to remove the keys from the ignition of her vehicle. Lastly, after asking the officer to leave, Schiewe became defensive when the officer continued asking questions, and retreated into her garage. Looking at all of the information known to the officer, there was probable cause for the officer to believe that Schiewe was the intoxicated driver on Foster Street.

Admissible Evidence After Unlawful Arrest

¶20 Schiewe argues that the results of her blood test were not admissible evidence because, even if the officer had probable cause to arrest her, the officer unlawfully entered her garage without a warrant to make the arrest. The State concedes that the arrest in her garage was illegal. In Schiewe's view, but for the illegal arrest, police would not have been able to obtain the incriminating blood test results. Schiewe argues that an attenuation analysis should apply, and her blood test results were inadmissible since the State failed to prove that the blood test was sufficiently attenuated from the unlawful arrest.

¶21 Assuming, without deciding, that Schiewe was arrested unlawfully because the officer illegally arrested her in her garage, I conclude that rejection of Schiewe's attenuation argument is required by our supreme court's recent holding in ***Felix***, 339 Wis. 2d 670.

¶22 In ***Felix***, our supreme court adopted the ***Harris***[2] rule, which provides, generally, that, when police have probable cause to arrest before an unlawful entry, evidence obtained outside the home may be admissible if it is not

[2] ***New York v. Harris***, 495 U.S. 14 (1990).

the product of the illegal entry. *See* ***Felix***, 339 Wis. 2d 670, ¶¶1, 4. In ***Felix***, police had probable cause to arrest the defendant for stabbing a man, but arrested him in his residence without a warrant. ***Id.***, ¶¶2, 44. Even though the defendant was unlawfully arrested, our supreme court applied the ***Harris*** rule and held that the defendant's clothing, a DNA sample, and a statement the defendant made after he received his ***Miranda*** warnings were admissible because the police had probable cause and, therefore, the defendant was lawfully in police custody at the police station when the evidence was collected. *See* ***Felix***, 339 Wis. 2d 670, ¶¶45-50.

¶23 Schiewe argues that ***Felix*** does not apply because her body, or, more specifically, the blood part of her body, is the physical evidence at issue, and her body was unlawfully obtained in her home. But this argument fails to take into account that ***Felix*** involved DNA evidence which is, similarly, part of the body. The question that remains is whether there is some reason why the blood test results here are not analogous to the DNA evidence in ***Felix***.

¶24 I find Schiewe's position on this question difficult to understand. Schiewe may be arguing that the blood test is distinguishable from the cheek swab in ***Felix*** because she did not "consent[] in fact" to the blood draw. Rather, her consent was under the implied consent statute, which she asserts "does not apply" unless there is a "lawful" arrest. For purposes of ***Felix***, this argument seems circular. Our analysis under ***Felix*** assumes the arrest was unlawful.

¶25 Moreover, it is not apparent what role consent played in ***Felix*** with respect to the DNA evidence. The court simply observed in reciting background facts that Felix "agreed to submit" to the swab for DNA. *See* ***id.***, ¶12. The court concluded, with essentially no analysis specific to the DNA evidence, that the

DNA evidence "is admissible under the ***Harris*** rule, because it was obtained from Felix while he was lawfully in police custody at the police station." ***Id.***, ¶45. The court's reference to Felix being "lawfully in police custody" appears to refer to nothing more than the fact that there was probable cause for his arrest. And, I have concluded that there was probable cause for Schiewe's arrest here.

¶26 For these reasons, Schiewe fails to persuasively distinguish ***Felix***. If there is some good reason why ***Felix*** should not apply, Schiewe has not identified it.[3]

¶27 Therefore, pursuant to ***Felix*** and the ***Harris*** rule, Schiewe's blood test results were admissible.

Conclusion

¶28 I conclude that the officer had probable cause to arrest Schiewe, and that the circuit court did not err in admitting Schiewe's blood test results even though she was unlawfully arrested. I affirm the judgment.

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[3] I note that Schiewe has framed the issue here as whether, despite ***State v. Felix***, 2012 WI 36, 339 Wis. 2d 670, 811 N.W.2d 775, the unlawful arrest "tainted" the blood test evidence such that suppression of that evidence should be the remedy. This framing of the issue invites an analysis under ***Felix***. Schiewe has not framed the issue as whether, regardless of ***Felix*** and other attenuation case law, the police lacked any valid basis on which to draw her blood. Although she asserts in places in her briefing that the Wisconsin implied consent statute is not a valid basis for a blood draw absent a "lawful" arrest, she does not raise this as an issue separate from an attenuation analysis. The State follows suit and does not address that issue. To the extent Schiewe could have raised the validity of her blood draw as a stand-alone issue, I consider it undeveloped and do not address it, particularly given the absence of adversarial briefing on the topic. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals need not consider inadequately developed arguments and cannot serve as both advocate and judge).

By the Court.—Judgment affirmed.

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