COURT OF APPEALS
DECISION
DATED AND FILED

November 27, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1719 **Cir. Ct. No. 2011TR10794**

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

IN THE MATTER OF THE REFUSAL OF RANDAL B. HOPPER:

FOND DU LAC COUNTY,

PLAINTIFF-APPELLANT,

V.

RANDAL B. HOPPER,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Fond du Lac County: ROBERT J. WIRTZ, Judge. *Affirmed*.

¶1 GUNDRUM, J.[1] Fond du Lac County appeals the trial court's dismissal of the County's charge that Randal B. Hopper unlawfully refused to submit to a breath alcohol test under Wisconsin's implied consent law. Specifically, the County claims that the court erred in concluding that the arresting deputy did not have probable cause to arrest Hopper for operating a motor vehicle while intoxicated. The County further contends the court erred in excluding certain evidence at the refusal hearing. We find no error in the rulings of the trial court and affirm.

Background

¶2 By stipulation of the parties, the refusal hearing at issue was held contemporaneously with a jury trial on charges of OWI and operating left of center which were also brought by the County against Hopper and were related to the same incident. The jury found Hopper not guilty of the OWI and operating left of center charges, which are not at issue on appeal. The following undisputed facts are from the joint hearing-trial held on the refusal, OWI and operating left of center charges, and relate to the sole charge before us on appeal—the refusal.

¶3 In the late afternoon of October 16, 2011, a citizen made a 911 call to the Fond du Lac County Sheriff's Department to report a person operating his motor vehicle in a concerning manner. According to the citizen's testimony at the refusal hearing, the citizen informed dispatch that "the guy should be talked to about his driving." While the citizen testified as to specific concerning acts of driving he observed, the transcript does not reveal what specifically the citizen

[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.

told dispatch about the operator's driving, except for the citizen's confirmation of a segment of his 911 call that was played in court, in which he informs dispatch that "[n]ow he's passing a bunch of cars."[2]

¶4 A sheriff's deputy was dispatched to Festival Foods to investigate the "reckless driver." The deputy testified that before he spoke with the driver, identified as Hopper, in the Festival Foods parking lot, he did not suspect intoxication, but when he approached Hopper, the deputy smelled an odor of intoxicants. The deputy asked Hopper if he had been drinking, and Hopper responded "no." When the deputy asked him again, Hopper mentioned the Packer game and indicated he had had two drinks, which the deputy believed were drinks of beer.

[2] Upon request by the jury and agreement of the parties, the trial court permitted the portion of the 911 call which was played during the trial to be replayed for the jury during deliberations. During discussion regarding the jury's request, Hopper's counsel noted that "only … 5 seconds" of the call had been played during the hearing-trial. The court agreed that the segment that had been played was "short" and that this segment "was the section of evidence from the 911 call." The County did not dispute Hopper's "5 seconds" statement, but did state its recognition that "[i]t's not the whole tape, obviously." On appeal, the County suggests for the first time that a segment longer than five seconds must have been played because in cross-examination of the citizen, Hopper's counsel challenged the citizen regarding using terms such as "he," "him," and "this guy" "more than 8 times on this call." To begin, it is not clear if the reference by Hopper's counsel to the citizen using such terms more than eight times "on this call" is a reference to only the segment of the call played in court or is a reference to the entire call, including portions not played in court. Further, the County points to nothing in the record suggesting what, if any, additional segments of the 911 call may actually have been played for the court and jury. Thus, we hold the County to its failure to challenge before the trial court the representation of Hopper's counsel that only five seconds of the 911 call were played in court. On appeal, the County cites to other portions of the call which do not appear to have been played at the hearing-trial. The County does not suggest and the record does not reveal that the County ever requested that the trial court listen to and consider these other portions of the 911 call nor does it appear from the record as if the court in fact did hear or consider such other portions. Thus, we consider only the segment of the 911 call which was clearly under consideration by the trial court. To do otherwise would require us to act as a fact finder, which is not our role. *See* ***Wildman v. State***, 69 Wis. 2d 610, 614, 230 N.W.2d 809 (1975) (where party did not present matter to trial court, or request trial court to review relevant materials, it is too late to ask appellate court to take the first look).

¶5 The deputy testified that he was on the scene observing Hopper for about forty minutes. He testified that, during this time, he observed no problems with Hopper's speech and "didn't observe him do anything out of the ordinary." The deputy testified that he did not recall Hopper having any difficulty with balance or coordination or with extracting his driver's license from his wallet. He did not recall observing Hopper's movements as being slow or lethargic.

¶6 The deputy testified regarding Hopper's performance on field sobriety tests, stating that he observed no indicators ("clues") of impairment during the one-legged stand test[3] and observed one clue during the walk-and-turn test.[4] Although the deputy testified that he does not use "pass/fail" designations in describing a suspect's performance on field sobriety tests, he also testified that Hopper "passed" both of these tests. The deputy testified that he instructed Hopper to recite the alphabet from "F" to "V" and observed that Hopper instead recited the alphabet from "F" to "Z," but testified that this was not a "clue." Following the field sobriety tests, the deputy placed Hopper under arrest and transported him to jail where Hopper refused the breath alcohol test at issue in this case.

¶7 The County charged Hopper with unlawfully refusing to submit to a breath alcohol test under Wisconsin's implied consent law, in addition to charging him with OWI and operating left of center. After the joint hearing-trial, the trial

[3] The deputy described this test as one in which the suspect, here Hopper, holds his or her foot approximately six inches off the ground until the deputy tells the suspect to stop.

[4] The deputy described the walk-and-turn test as a suspect "tak[ing] a series of 9 steps heel-to-toe, turn, and 9 steps returning." While the deputy initially testified that he observed two clues on this test, he ultimately corrected himself and acknowledged observing only one clue, as the trial court subsequently found.

court concluded that the deputy did not have probable cause to arrest Hopper and dismissed the refusal charge. The County appeals.

Discussion

Dismissal of Refusal Charge

¶8 As relevant to this case, the issues to be considered at a refusal hearing are (1) "[w]hether the officer had probable cause to believe the [defendant] was … operating a motor vehicle while under the influence of alcohol," (2) whether the officer properly informed the defendant of his or her rights and responsibilities under the implied consent law, and (3) whether the defendant refused to permit the test. *See* WIS. STAT. § 343.305(9)(a)5. The parties agree that, of these, the sole issue before us on appeal is whether the deputy had probable cause to believe Hopper had been operating a motor vehicle while under the influence of alcohol.

¶9 Whether an arresting officer had probable cause to believe a defendant operated a motor vehicle while under the influence of an intoxicant is a question of law we review de novo. *See* ***State v. Woods***, 117 Wis. 2d 701, 710, 345 N.W.2d 457 (1984). "Probable cause exists where 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, in this case, that the defendant was operating a motor vehicle while under the influence of an intoxicant." ***State v. Nordness***, 128 Wis. 2d 15, 35, 381 N.W.2d 300 (1986). As argued by the County, in determining whether probable cause exists, the "collective knowledge" of the law enforcement department may be considered. *See* ***State v. Rissley***, 2012 WI App 112, ¶19, 344 Wis. 2d 422, 824 N.W.2d 853 (quoting ***State v. Mabra***, 61 Wis. 2d 613, 625-26, 213 N.W.2d 545 (1974)) ("The police force is considered as

a unit and where there is police-channel communication to the arresting officer and he [or she] acts in good faith thereon, the arrest is based on probable cause when such facts exist within the police department.").

¶10 Considering the collective knowledge of dispatch and the arresting deputy at the time the deputy arrested Hopper, the law enforcement agency was aware that a citizen called in to report concerns about another driver's operation of his or her motor vehicle. The deputy dispatched to investigate the "reckless driver" encountered Hopper and smelled an odor of intoxicants. After first denying drinking, Hopper admitted consuming two drinks, which the deputy believed were drinks of beer. Significantly, the deputy testified that he did not recall observing any problems with Hopper's balance or coordination and that, during the entire forty minutes he personally observed Hopper, he observed no problems with Hopper's speech and "didn't observe [Hopper] do anything out of the ordinary." Although the deputy did not normally use "pass/fail" terminology with regard to field sobriety tests, he nonetheless indicated that Hopper "passed" the one-legged stand and walk-and-turn tests and that he observed no indicia of intoxication on the one-legged stand test and only one clue on the walk-and-turn test. Although the deputy observed that Hopper recited the alphabet from "F" to "Z" instead of "F" to "V" as instructed, the deputy testified that this was not an indicator of impairment.

¶11 As the County points out in citing to the jury instructions, a person has operated a motor vehicle while under the influence of an intoxicant if the person's "ability to safely control the vehicle" is impaired by the consumption of alcohol. WIS JI—CRIMINAL 2663A. Based on the evidence presented at the hearing as to law enforcement's knowledge at the time of Hopper's arrest, we agree with the trial court's conclusion that the deputy did not have probable cause

to believe Hopper had operated his motor vehicle while under the influence of alcohol.

Exclusion of Evidence

¶12 Prior to the hearing-trial, the trial court granted Hopper's motions in limine to preclude the County from introducing evidence related to a horizontal gaze nystagmus (HGN) test the arresting officer administered to Hopper and evidence related to Hopper's alleged refusal to submit to a preliminary breath test (PBT) prior to his arrest. The County argues that the court erred in granting the motions. Whether to admit or exclude evidence is within the broad discretion of a trial court, and we will uphold such a decision unless the court has erroneously exercised that discretion. ***State v. James***, 2005 WI App 188, ¶8, 285 Wis. 2d 783, 703 N.W.2d 727. We conclude the trial court did not err.

¶13 The County asserts that "[w]hatever may be said about the use of the HGN test at trial on the substantive charge," police officers should at least be permitted to use this test "for the purpose of allowing a police officer to determine probable cause to arrest." To begin, in reviewing the record, we have failed to uncover any indication that the County suggested to the trial court, as it now suggests to us on appeal, that the court should have considered the admissibility of the HGN evidence differently for the refusal hearing than for the jury trial. We further note that the County agreed to have the refusal hearing held contemporaneously with the jury trial on the OWI and operating left of center charges, necessarily conceding that evidentiary rulings related to the jury trial might well control the refusal hearing. Relatedly, the County has not directed us to, nor have we found, anything in the record indicating the County ever suggested to the trial court that the court should hear the arresting officer's HGN testimony

outside of the presence of the jury, so the court could consider such evidence for purposes of its refusal decision without the evidence influencing the jury's decision regarding the OWI and operating left of center charges. Additionally, the County cites no controlling authority supporting its intimation that the trial court properly could utilize a different standard for the admissibility of HGN testimony at a refusal hearing than it would use for admissibility at trial.

¶14 The County cites to us, as it did the trial court, ***State v. Zivcic***, 229 Wis. 2d 119, 598 N.W.2d 565 (Ct. App. 1999), for the proposition that a police officer trained in the use of the HGN test is competent to testify concerning HGN. As the County pointed out in its brief opposing Hopper's motion in limine before the trial court, the ***Zivcic*** court admitted the HGN test results because they were "accompanied by the expert testimony of [the deputy] who was trained in administering the test and evaluating the results." ***Id.*** at 128. The County further contended to the trial court that "***Zivcic*** remains binding precedent" and argued that "[g]enerally, the foundational requirements of admissibility [of HGN evidence] are satisfied when an officer can testify regarding proper education and experience in administering the test and showing that the procedure was properly administered in the particular case." ***Zivcic*** is of no assistance to the County.

¶15 As the County indicates, in ***Zivcic***, HGN evidence was admitted because the trial court found the officer who administered the HGN test in that case to be qualified as an expert witness to provide expert testimony regarding that test. ***Id.*** at 127-28. On appeal, we concluded that there was evidence in the record that the officer was trained in administering and evaluating the test and, thus, the trial court had a "reasonable basis" for its evidentiary ruling and did not err in admitting the testimony. ***Id.*** at 128. Consistent with ***Zivcic***, here the trial court essentially ruled that the County could present HGN evidence, but only through a

qualified expert. On this issue, discussion prior to the start of trial went as follows:

> [COUNTY]: … You pretty much indicated how you're going to rule. We accept that except that as to the HGN question only, we're trying to get a witness, training officer, in here. We're not a hundred percent sure we've arranged that.… We understand it doesn't come in unless we also have another witness other than [the arresting officer].
>
> THE COURT: Yeah, my comments to you in chambers were that the field sobriety tests are observational tools apart from the HGN, which requires expert testimony. If you don't have an expert, it's not going to come in. I don't believe, based on what I've been told, that [the arresting officer's] a sufficient expert to address that.
>
> [COUNTY]: That's correct, Your Honor.

¶16 On appeal, the County does not challenge the trial court's determination that the arresting officer lacked the expertise necessary to testify as an expert regarding his administration of the HGN test to Hopper and its results. Further, the County made no offer of proof on the record regarding testimony the arresting officer might have provided regarding his qualifications or observations related to the HGN test. *See* WIS. STAT. § 901.03(1)(b), (2). The County has failed to convince us that the trial court erred in excluding testimony regarding the HGN test administered to Hopper.

¶17 The County also contends the trial court erred in excluding evidence of Hopper's alleged refusal to submit to a PBT. We reject the County's challenge to the trial court's ruling because it makes its arguments for the first time on appeal.

¶18 Hopper moved in limine for "[e]xclusion of any evidence or testimony related to Mr. Hopper's alleged refusal to submit to a [PBT] in the

parking lot of Festival Foods prior to his arrest," and provided supporting arguments for this motion. In its response to the motion, the County stated: "The defendant has agreed that the refusal hearing be part of the trial. Consequently, the testing concerning Hopper's refusal will be part of the overall testimony." To begin, it is not clear if the County's response was referring to Hopper's refusal to take the breath alcohol test that was the subject of the refusal hearing or if it related to the alleged earlier refusal to take the PBT, which was the subject of Hopper's motion. Further, the County provided no supportive reasoning or argument on this issue either in briefing or at the related hearing on the matter prior to the joint hearing-trial. On appeal, the County cites to various cases and argues that the trial court should have considered evidence of Hopper's alleged refusal to take a PBT as part of the "totality of the circumstances" the court needed to consider in making its probable cause determination. Because the County failed to make its appellate argument before the trial court, it forfeited the argument.[5] *See* ***State v. Bollig***, 222 Wis. 2d 558, 564, 587 N.W.2d 908 (Ct. App. 1998) ("Arguments that are raised for the first time on appeal by an appellant are deemed [forfeited].").[6]

[5] As with the issue of admissibility of the HGN test evidence, the County also made no offer of proof regarding what evidence the arresting officer might have provided on the issue of the alleged refusal of the PBT, nor did the County propose that the trial court hear the arresting officer's testimony regarding the alleged PBT refusal outside of the presence of the jury, so the court could consider the evidence for purposes of the refusal decision without it influencing the jury's decision regarding the OWI and operating left of center charges.

[6] The County also argues that the refusal charge was valid because the deputy had grounds to arrest Hopper on other charges not related to OWI. This argument is directly at odds with the refusal statute, which states in relevant part that "the issues of the [refusal] hearing are *limited to*: a. Whether the officer had probable cause to believe the person was … *operating a motor vehicle while under the influence of alcohol*." WIS. STAT. § 343.305(9)(a)5. (emphasis added). Thus, for refusal hearing purposes, the inquiry is not "[w]hether the officer had probable cause to believe" the person committed *any* offense. Further, reviewing the record, it appears the County also makes this argument for the first time on appeal.

¶19 For the foregoing reasons, we affirm.[7]

By the Court.—Order affirmed.

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

[7] Hopper suggests this court may not be competent to hear the County's appeal because the County's second amended appellate brief was filed under the signature of another attorney in the special prosecutor's law firm, rather than by the special prosecutor himself. Hopper contends that if the attorney who signed the County's second amended brief-in-chief "was not properly appointed as a special prosecutor, then this Court lacks competency to proceed with this appeal." Hopper cites to ***State v. Bollig***, 222 Wis. 2d 558, 587 N.W.2d 908 (Ct. App. 1998), in support of his contention. We reject Hopper's competency challenge. To begin, Hopper fails to provide any analysis or further argument as to whether the signature by the attorney other than the special prosecutor constitutes a statutory defect, whether any such defect is central to the statutory scheme, or whether any defect is prejudicial to Hopper—considerations the ***Bollig*** court deemed significant to the competency question. *See* ***id.*** at 569, 571. More substantively, we note that the notice of appeal was signed by the special prosecutor, s*ee* ***Jadair Inc. v. United States Fire Ins. Co.***, 209 Wis. 2d 187, 212, 562 N.W.2d 401 (1997), and we further observe that all other documents for the County in this appeal, including the reply brief, were signed by the special prosecutor. Hopper also raises various other arguments and filed a motion on appeal. In light of our holding herein, we need not address these matters.