COURT OF APPEALS
DECISION
DATED AND FILED

May 13, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

Nos. 97-2132-CR
97-3336-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ANTHONY W. QUATTROCHI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: ROBERT J. KENNEDY, Judge. *Affirmed.*

SNYDER, P.J. Anthony W. Quattrochi appeals from a judgment of conviction entered after his no contest plea to a charge of operating a motor vehicle while under the influence of an intoxicant and from an order revoking his

license for unreasonably refusing a chemical test.[1] On appeal, Quattrochi argues that: (1) the officer did not have probable cause to arrest; (2) his refusal was reasonable because he was supplied with misleading information relating to the penalties for a refusal; and (3) he was erroneously prevented from effectively cross-examining the arresting officer on this issue. We are not persuaded by any of Quattrochi's appellate arguments and therefore affirm the judgment and the order.

At approximately 2:00 a.m. on April 30, 1997, Deputy Cheryl Schmidt of the Walworth County Sheriff's Department was traveling southbound when she saw a white pickup truck approaching in the northbound lane, signaling a right turn. She observed that as the truck turned right, it hit a curb. Schmidt then turned at the intersection and followed the truck. For the next several miles she observed the truck weave "approximately four to five times" between the fog and center lines of the roadway. Schmidt also testified that she paced the speed of the truck; it was traveling 72 miles per hour in a 55 miles per hour zone.

Schmidt then turned on the lights of her squad and pulled over the truck. The truck did not stop immediately, but pulled over after approximately four-tenths of a mile. Schmidt approached the vehicle and asked the driver for his driver's license. She testified that the driver "just kind of stared and acted as if he had no concept of what I was asking him." She also observed that he had bloodshot eyes. Schmidt repeated her request for his driver's license; the driver eventually pulled out his wallet and produced his license.

[1] The judgment and order were appealed separately. Because both appeals arose from the same traffic incident, they were consolidated by this court's order dated November 21, 1997.

The driver was identified as Anthony Quattrochi. Schmidt asked Quattrochi to exit the vehicle in order to perform some field sobriety tests. She testified that as he stepped to the rear, he held on to the side of the truck and "he was staggering at the time." Schmidt testified that in her experience, Quattrochi's staggering was consistent with the behavior of someone who had been drinking alcohol.[2]

At the rear of the truck, Schmidt attempted to have Quattrochi perform field sobriety tests. She asked him if he had any balance problems, and he said that he had been disabled by a head injury "[a] long time ago" and therefore could not perform any balance tests. When Schmidt attempted to explain the one-leg stand test, Quattrochi claimed that he could not perform that test. Schmidt then asked if Quattrochi was familiar with the English alphabet, but he told her that he was not and that he could not recite it. While Schmidt had noticed that Quattrochi's speech was "slurred and kind of slow," she had not noticed any accent to Quattrochi's speech. Schmidt then attempted to have Quattrochi perform the horizontal gaze nystagmus (HGN) test which requires that the subject follow an object with his or her eyes while the officer observes the eyes' movement. Quattrochi stated that he could not perform this test because he could not see the object, a pen. Quattrochi ultimately agreed to take a preliminary breath test (PBT). The result of that test was 0.27%.

Schmidt placed Quattrochi under arrest and transported him to Lakeland Medical Center for a blood test. Schmidt testified that this was done

[2] She also testified that she had observed Quattrochi move around the courtroom on the day of the hearing and did not see him staggering or needing to rely on anything to help him balance the way he had done the night of the stop.

because "[Quattrochi] had indicated several times that he was disabled; and I did not … know what his disability was, if he would be able to take the Intoxilyzer test, so I felt the blood test would be the easiest to take." Schmidt stated that when they arrived at the hospital, she filled out the citation and read Quattrochi the Informing the Accused form. Quattrochi then marked an "X" above the "yes" box, and Schmidt asked him whether that meant he would take the test at that time. Quattrochi responded that "he was scared and didn't want to be stabbed" and that he would not take the test. Another deputy who was present explained a refusal to Quattrochi and told him that his license would be revoked for "one to three years" if he did not take the test. Schmidt then marked the "no" box, initialed it and also had the other deputy initial Quattrochi's refusal as well.

Quattrochi now appeals his conviction and the order of revocation, claiming that the officer did not possess the requisite probable cause to support the arrest. He claims that because at the time of his arrest the officer did not have evidence from any field sobriety tests and that a preliminary breath test alone cannot support a probable cause determination, his arrest is constitutionally infirm. He also contends that the officer failed to comply with the requirements of the implied consent law in that he was misinformed about possible penalties that he might face, and as a result his refusal was reasonable. In a related claim, he argues that he was prevented by the trial court from establishing that the "misinformation" to which he was subjected made his refusal reasonable. We reject each of these contentions and affirm the judgment and the order. We begin with consideration of Quattrochi's lack of probable cause argument.

A determination of whether a police officer has probable cause to arrest a suspect is a question of law which we review without deference to the trial court. *See* ***State v. Drogsvold***, 104 Wis.2d 247, 261-62, 311 N.W.2d 243, 250 (Ct.

App. 1981). In making this determination, we must look to the totality of the circumstances to determine if the arresting officer's knowledge at the time of the arrest would lead a reasonable officer to believe that the defendant was operating a motor vehicle while under the influence of an intoxicant. *See* ***State v. Nordness***, 128 Wis.2d 15, 37, 381 N.W.2d 300, 309 (1986). Probable cause to arrest is to be judged by "the factual and practical considerations of everyday life on which reasonable and prudent persons, not legal technicians, act." ***State v. Truax***, 151 Wis.2d 354, 360, 444 N.W.2d 432, 435 (Ct. App. 1989).

We consider the totality of the circumstances the arresting officer was confronted with at the time of Quattrochi's arrest. The officer had observed Quattrochi's vehicle strike a curb while attempting to make a right turn and weave four or five times between the center and fog lines of the roadway. Quattrochi was traveling 72 miles per hour in a 55 miles per hour zone. When his vehicle was stopped, the officer observed a driver who seemed confused by her questions and had bloodshot eyes, slowed and slurred speech and a smell of intoxicants on his breath. She observed Quattrochi hold on to the door to steady himself as he exited the vehicle and hold on to the side of the vehicle as he walked. The officer testified that Quattrochi's behavior was consistent with the behavior of someone who was intoxicated. Schmidt also testified that although she requested that Quattrochi perform several different field sobriety tests, he offered various reasons for his inability to perform any of the suggested tests.

An officer's conclusions which are based on his or her investigative experience may be considered when determining guilt. *See* ***State v. Wille***, 185 Wis.2d 673, 683, 518 N.W.2d 325, 329 (Ct. App. 1994). At the time of Quattrochi's arrest, Schmidt had observed Quattrochi's car weave several times, an odor of intoxicants, physical indications that are often associated with alcohol

consumption (bloodshot eyes, slow speech and confusion with questions) and that Quattrochi staggered when he walked. When coupled with Quattrochi's seeming unwillingness to perform any of the suggested field sobriety tests, we conclude that probable cause existed to arrest Quattrochi.[3]

Quattrochi next claims that the State failed to substantially comply with the refusal law because he was provided with misleading information that did not fairly state the applicable penalties. He argues that a deputy's comment that he was subject to revocation of his license for "one to three years" if he refused to take a chemical test was "further or additional information which … affected [his] ability to make a choice about chemical testing."

Quattrochi's claim requires us to construe § 343.305(4), STATS., to determine whether the officer's actions substantially complied with the statutory guidelines. *See* ***State v. Sutton***, 177 Wis.2d 709, 713, 503 N.W.2d 326, 328 (Ct. App. 1993). The test of substantial compliance is whether there is "'actual compliance in respect to the substance essential to every reasonable objective of the statute.'" *See* ***State v. Wilke***, 152 Wis.2d 243, 250, 448 N.W.2d 13, 15 (Ct. App. 1989) (quoted source omitted). The legislature has clearly expressed its intent that a person be informed of all of the information contained in § 343.305(4), STATS., if the individual's license is to be revoked for a refusal. *See* ***Wilke***, 152 Wis.2d at 251, 448 N.W.2d at 16.

[3] Quattrochi relies on ***State v. Swanson***, 164 Wis.2d 437, 475 N.W.2d 148 (1991), for his contention that an officer must first perform field sobriety tests in order to establish probable cause. However, as we explained in ***State v. Wille***, 185 Wis.2d 673, 684, 518 N.W.2d 325, 329 (Ct. App. 1994), the supreme court's statement in ***Swanson*** does not mean that an officer must perform a field sobriety test under all circumstances before deciding whether to arrest. In the instant case, as in ***Wille***, the arresting officer had probable cause to arrest apart from the administration of a field sobriety test. *See* ***Wille***, 185 Wis.2d at 684, 518 N.W.2d at 329.

In the instant case, it is undisputed that Quattrochi was read the Informing the Accused form. Therefore, substantial compliance with the statutory mandates is assured. The question presented relates to the effect of the deputy's additional statements that Quattrochi would be subject to revocation for one to three years[4] if he refused to take the test and that charges would be dropped if the test came back with a result that did not indicate intoxication.

Section 343.305, STATS., and case law require that an individual be informed that by refusing to submit to a chemical test the individual will be subject to penalties. Quattrochi was so informed. The officer then exceeded his duty when he furnished Quattrochi with the additional information. The Informing the Accused form does not specify what additional penalties may be imposed, nor does § 343.305 require that the officer inform the individual of exactly what penalties may be imposed. Moreover, under our analysis in ***State v. Ludwigson***, 212 Wis.2d 871, 876, 569 N.W.2d 762, 765 (Ct. App. 1997), a party who claims to have been misled must "present the trier of fact with enough evidence to make a prima facie showing of a causal connection between the misleading statements and the refusal to submit to chemical testing."

Quattrochi has not presented any evidence that the extra information he was given by the deputy caused him to refuse to take the test. In fact, the only comment he made to the officer before refusing the test indicated that "he was scared and didn't want to be stabbed." Quattrochi has a duty to put forth credible evidence that the oversupply of information caused him to refuse to take the test.

[4] Quattrochi states that he was facing a two-year loss of license because this was his second offense. *See* § 343.305(10)(b)3, STATS.

See ***id.*** at 876-77, 569 N.W.2d at 765. He has not done so, and we affirm the trial court's finding that his refusal was unreasonable.

In a final claim, Quattrochi argues that the trial court erroneously exercised its discretion when it prevented defense counsel from cross-examining the deputy with regard to the misinformation that Quattrochi was supplied with. However, it is clear from the record that defense counsel was permitted to elicit from the deputy the information that had been relayed to Quattrochi. Only when counsel attempted to question the deputy about his personal knowledge of applicable penalties and dismissal policies did the trial court sustain an objection and restrict that line of questioning.

The general rule is that a trial court's decision as to the relevance of proffered evidence is one of discretion. *See* ***Johnson v. Kokemoor***, 199 Wis.2d 615, 635, 545 N.W.2d 495, 503 (1996). Evidence is relevant when it tends to make the existence of a material fact more or less probable than it would be without the proffered evidence. *See* ***id.*** A material fact is one that is of consequence to the merits of the litigation. *See* ***id.*** The trial court determined that inquiry into the deputy's knowledge of potential penalties faced by individuals charged with OWI was not material. The deputy was cross-examined with regard to what he told Quattrochi; that is the material issue. We conclude that the trial court's ruling with regard to this line of questioning was a proper exercise of its discretion. *See* ***id.***

In sum, we conclude that Quattrochi's arrest was supported by probable cause. Quattrochi has not put forth any credible evidence to show that he refused the blood test because of the oversupply of information that he received. Furthermore, the trial court properly exercised its discretion when it prohibited

defense counsel from exploring the extent of the deputy's knowledge of potential penalties faced by intoxicated drivers.

By the Court.—Judgment and order affirmed.

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