COURT OF APPEALS
DECISION
DATED AND FILED

May 7, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 97-3610

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

CITY OF WAUPUN

PLAINTIFF-RESPONDENT,

V.

TROY G. HERMANS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dodge County: ANDREW P. BISSONNETTE, Judge. *Affirmed.*

VERGERONT. J.[1] Troy Hermans appeals a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant (OWI) and operating with a prohibited alcohol concentration in violation of

[1] This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

§ 346.63(1)(a) and (b), STATS. He contends that the police officers did not have probable cause to arrest him, and therefore the trial court erred in denying his motion to suppress evidence. We conclude the trial court correctly denied the motion and we affirm the convictions.

The convictions arose out of an incident that occurred on November 3, 1996, after Lori Saunders went to the police station in the City of Waupun and reported that Troy Hermans was at her residence and had slashed his wrists.[2] Saunders stated to Officer Mark Jahnke that Hermans had been drinking, had slashed his wrists, she was afraid of him, and he had a knife when she ran out of the house. Officer Jahnke told Officer Nolan Schmidt of this information and they went to Saunders' residence in separate cars. As Officer Jahnke approached the residence, he observed a vehicle that was stopped in its lane of traffic in the road. The vehicle then accelerated faster than normal, turned into the driveway of the residence, and drove straight into the garage. Officer Jahnke heard the vehicle strike something in the garage. He got out of his squad car and ran to the garage and saw Hermans in the vehicle. Just at that time, Officer Schmidt arrived. Officer Jahnke gave several commands for Hermans to get out of the vehicle, but Hermans did not initially do that. Officer Jahnke saw Hermans in the driver's seat reaching around, towards the back and towards the passenger's seat. This made Officer Jahnke suspicious that Hermans might be reaching for a weapon.

When Hermans stepped out of the car, Officer Jahnke noticed an open wound that was bleeding on the inside of Hermans' wrist. Officer Schmidt observed that Hermans' balance was impaired when he got out of the vehicle; that

[2] The facts are based on the testimony of Officer Mark Jahnke and Officer Nolan Schmidt at the hearing on the motion to suppress.

he could not carry on a conversation; that his clothes were bloody; and there was some sort of cloth or bandage on his wrist that looked as though he himself had put it on. The officers ordered Hermans to stop, but Hermans continued walking toward the house. Hermans was trying to force his way between the officers to get into the house. Officer Jahnke put his hand on Hermans' arm to detain him and Hermans became upset, said it was none of their business, and started struggling with the officers. The officers decided at that point to place him in custody for his own protection. They had made no decision at that time to arrest him for OWI. Officer Jahnke's police report stated that they advised Hermans that he was under arrest. Since Hermans continued struggling, they had to take him to the ground and handcuff him. An ambulance arrived at the residence and they took him to the ambulance. The ambulance took Hermans to Waupun Memorial Hospital, and Officer Schmidt rode in the ambulance with Hermans.

Officer Jahnke had not noticed an odor of intoxicants from Hermans before he made the decision to place him in custody for his protection. He did, however, observe that Hermans had a "glazing stare" in his eyes which might lead one to believe he was intoxicated. Officer Jahnke's observation was that Hermans, at the residence, was not comprehending or interacting with the officers in a rational way. He was not responding to their questions.

Officer Jahnke remained at the residence and spoke to Saunders. She said that she and Hermans had both been working at Dodge Correctional Institution; they had a disagreement; he left work and then called her. He appeared to her to be intoxicated and depressed. Officer Jahnke saw a twelve pack of Miller beer bottles on the counter in the residence, which Saunders stated had not been there when she left for work. Hermans resided in the house with

Saunders. After talking to Saunders and investigating the residence, Officer Jahnke went to the hospital.

Before Officer Jahnke arrived at the hospital, Officer Schmidt tried talking to Hermans. Hermans would not tell Officer Schmidt his name; his speech was incoherent and slurred; his eyes were glassy and bloodshot; and Officer Schmidt detected a strong odor of intoxicants. Hermans was restrained in a hospital bed, so Officer Schmidt did not perform any field sobriety tests. When Officer Jahnke arrived at the hospital, he told Officer Schmidt that he found a lot of beer bottles in the residence that indicated that someone had consumed a lot of beer. Officer Schmidt related his observations of Hermans at the hospital and his view that Hermans should be arrested for OWI. Officer Schmidt then arrested Hermans for OWI.

The trial court denied the motion to suppress. The court concluded that there was probable cause to arrest Hermans for OWI when Officer Schmidt arrested him at the hospital. The court found that when the officers placed him in handcuffs and put him in the ambulance at the residence, neither of the officers were arresting him then for OWI. The officers did not need to have probable cause to believe he had committed a crime at that time, the court ruled, because they were responding to a call for help, and based on what Saunders told them at the station and what they observed when they arrived at the residence, they had adequate grounds to take take him to the hospital for treatment.

On appeal, Hermans argues that the court erroneously concluded that it was irrelevant whether an arrest had occurred at the residence. A more accurate way to describe the court's ruling on this point is that, because the officers had adequate grounds to take Hermans to the hospital for his own protection, their

actions in taking him into custody at the residence without probable cause to believe he had committed a crime were not unlawful even if those actions constituted an arrest under Fourth Amendment case law. Hermans disagrees, contending that an arrest occurred when Hermans was handcuffed and taken to the hospital, and the officers did not at that time have the necessary probable cause to believe he had committed a crime.[3]

Hermans interprets the trial court's decision as relying on the "emergency" or "community caretaker" doctrine, which Hermans views as requiring that the officers are solely motivated by the desire to render aid, citing ***State v. Boggess***, 115 Wis.2d 443, 340 N.W.2d 516 (1983).[4] This doctrine is not applicable, Hermans contends, because the record does not support that that was the officers' sole motivation.

The State responds that under § 51.15(1)(a)1 and (b), STATS., the officers had cause to believe that Hermans was mentally ill and that there was a substantial probability of physical harm to himself as manifested by the recent suicide attempt.[5] Hermans, in reply, argues that we cannot consider this statutory authority because the State did not cite it before the trial court.

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[3] Hermans does not challenge the trial court's conclusion that there was probable cause to arrest Hermans for OWI when he was arrested at the hospital.

[4] ***State v. Boggess***, 115 Wis.2d 443, 340 N.W.2d 516 (1983), holds that a warrantless entry into someone's home does not violate the Fourth Amendment if the officer reasonably believes that a person within is in need of immediate assistance. This requires proof that the officer is actually motivated by the need to render immediate assistance, not a need or desire to obtain evidence for a possible prosecution; and proof that a reasonable person would have thought that an emergency existed. ***Id.*** at 450-51, 340 N.W.2d at 521.

[5] Section 51.15(1)(a)1 and (b)1 and 2, STATS., provides:

> Emergency detention. (1) BASIS FOR DETENTION. (a) A law enforcement officer or other person authorized to take a

(continued)

We do not agree with Hermans that we may not consider the State's argument based on § 51.15, STATS. The cases Hermans cites are for the proposition that appellate courts do not reverse cases on appeal based on theories of law never argued to the trial court. *See* ***Leon's Frozen Custard, Inc. v. Leon Corporation***, 182 Wis.2d 236, 246 n.2, 513 N.W.2d 636, 641 n.2 (Ct. App. 1994). However, the State is the respondent, not the appellant, and seeks affirmance of the trial court's order. A respondent may advance for the first time on appeal any argument that will sustain the trial court's ruling. *See* ***State v. Holt***, 128 Wis.2d 110, 124-25, 382 N.W.2d 679, 687 (Ct. App. 1985). Moreover, although the State did not cite to § 51.15 in its argument to the trial court, the substance of its argument below is the same as that made on appeal: The State argued that the officers did not need probable cause to take Hermans to the hospital because that was for the protection of Hermans as a result of the suicide attempt. Even if the State were advancing an entirely new legal theory on appeal, if it were

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> child into custody under ch. 48 may take an individual into custody if the officer or person has cause to believe that such individual is mentally ill, drug dependent or developmentally disabled, and that the individual evidences any of the following:
>
> 1. A substantial probability of physical harm to himself or herself as manifested by evidence of recent threats of or attempts at suicide or serious bodily harm.
>
> ….
>
> (b) The officer's or other person's belief shall be based on any of the following:
>
> 1. A specific recent overt act or attempt or threat to act or omission by the individual which is observed by the officer or person.
>
> 2. A specific recent overt act or attempt or threat to act or omission by the individual which is reliably reported to the officer or person by any other person, including any probation and parole agent authorized by the department of corrections to exercise control and supervision over a probationer or parolee.

meritorious, we could properly affirm on that ground. *See* ***Holt***, 128 Wis.2d at 124-25, 382 N.W.2d at 687.[6] However, in this case we do not consider the State's position a new legal theory, but rather, a citation to authority not presented to the trial court. There is no bar to our consideration of that authority.

Hermans does not respond on the merits to the State's argument that the requirements of § 51.15(1)(a)1 and (b), STATS., were met and does not raise any argument that the officers' acts were unconstitutional even if in compliance with the statute.

We conclude the requirements of § 55.15(1)(a)1 and (b), STATS., were met. The application of a statute to undisputed facts presents a question of law that we review de novo. ***Minuteman, Inc. v. Alexander***, 147 Wis.2d 842, 853, 434 N.W.2d 773, 777 (1987). Saunders informed the officers that Hermans slashed his wrist; they observed a wound on his wrist; and his behavior was irrational. He insisted on trying to go into the house, away from the officers, who, the trial court found, wanted to help him. This, noted the trial court, gave the officers two choices: "Either let him go in [to the house] and finish the job; or lets get control of him and make sure he gets medical care." We conclude the officers had cause to believe that Hermans was mentally ill and that there was a substantial probability of harm to himself based on the recent attempt at suicide or serious bodily harm, and that this cause was based on an overt act reliably reported to the officers by Saunders, as well as on the officers own observations. The officers

[6] This assumes, of course, that there is an adequate factual basis in the record for the new legal theory and this court does not need to find facts in order to apply the new legal theory. Both propositions are true here.

therefore had the authority to take Hermans into custody and transport Hermans to the hospital. The trial court correctly denied Hermans' motion.

By the Court.—Judgment affirmed.

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