COURT OF APPEALS
DECISION
DATED AND FILED

January 28, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1268-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WALTER P. VANDEMORTEL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Grant County: JOHN R. WAGNER, Judge. *Affirmed.*

Before Eich, Vergeront and Deininger, JJ.

VERGERONT, J. Walter VanDeMortel appeals from a judgment of conviction for homicide by intoxicated use of a vehicle in violation of § 940.09(1)(a), STATS. VanDeMortel argues the trial court erred in denying his motion to suppress the blood test results because: (1) probable cause for his arrest did not exist; (2) even if the arrest were valid, he was no longer in custody after he

was transferred to a hospital in Iowa where the blood was drawn; (3) he was not advised of his rights and obligations under the implied consent law; and (4) the State failed to properly authenticate the blood samples because the chain of custody included a period of several hours when the blood was unattended. We conclude that the blood was drawn incident to a valid arrest supported by probable cause; VanDeMortel was in custody at the time the blood was drawn; the implied consent law did not apply; and the evidence was sufficient to render it improbable that the blood had been tampered with. We therefore affirm.

BACKGROUND[1]

At about 11:00 p.m. on December 21, 1996, VanDeMortel was the driver of a van involved in a two-vehicle collision in which the driver of the other vehicle was killed. Officer James Kopp was the first officer to arrive at the scene. Officer Kopp found VanDeMortel lying on his back, complaining of a back injury. Officer Kopp observed that VanDeMortel's eyes were bloodshot and his speech was "real slurred" and hard to understand. In response to Officer Kopp's questions, VanDeMortel stated that "he was just driving along and the accident happened," that his van "had a tendency of floating as it was going down the road" and that he had been drinking. When asked how much, VanDeMortel said "maybe a couple of beers." Officer Kopp noticed a moderate-to-strong odor of intoxicants coming from VanDeMortel.

Officer Kopp covered VanDeMortel with a blanket and instructed him to stay lying down until the ambulance arrived, at which time the EMTs placed VanDeMortel on a backboard and, with Officer Kopp's help, put him in the

[1] The facts are undisputed except where noted.

ambulance. While VanDeMortel was in the ambulance, Officer Kopp told him that he was placing him under arrest for operating a motor vehicle while intoxicated. VanDeMortel indicated that he did not understand, so Officer Kopp repeated that he was placing him under arrest. The ambulance then transported VanDeMortel to a nearby hospital in Dubuque, Iowa, and Officer Kopp remained at the scene.

After VanDeMortel arrived at the hospital, Deputy William Brietsbrecker from the Grant County Sheriff's Department arrived at the Iowa hospital to speak to VanDeMortel and gather evidence. Deputy Brietsbrecker reminded VanDeMortel that he had been placed under arrest, told him that he would be taking some blood samples, and questioned him about the accident.

At 1:25 a.m. on December 22, the medical technologist at the hospital drew three vials of blood from VanDeMortel, sealed them and gave them to Deputy Brietsbrecker, who put them in a styrofoam container that was pre-addressed to the State Laboratory of Hygiene. Deputy Brietsbrecker sealed the container and kept it locked in the trunk of his squad car until two or three o'clock in the morning on December 23, when he placed the sealed container in a tray for outgoing mail in the secretary's area of the Grant County Sheriff's Department and locked the door to the office.[2] Eleven people who worked for the Sheriff's Department had keys to the office. The secretary in the Sheriff's Department testified that she arrived at work at 9:00 a.m. on December 23 and, although she does not remember the specific package, she routinely mails packages left in the

[2] On appeal, VanDeMortel asserts that Deputy Brietsbrecker actually left the package in the office the previous day, December 22, and the package sat in the locked office for over thirty hours rather than seven or eight. The State contends that this assertion is not supported by the record. We need not address this factual dispute because it does not affect our conclusion.

tray. A chemist from the State Laboratory of Hygiene testified that he received the sealed vials of blood on December 26, tested them and determined the blood-alcohol content to be .205.

VanDeMortel filed motions to suppress the test results on the grounds that: (1) Officer Kopp had not established probable cause for the arrest in that he did not inquire as to whether VanDeMortel could perform field sobriety tests and therefore the subsequent blood draw was invalid; (2) Deputy Brietsbrecker did not ask VanDeMortel's permission before having blood drawn and therefore the Implied Consent Law was not followed; and (3) the police did not properly handle the blood samples to guarantee their authenticity in that they sat unattended in the Sheriff's Department for several hours and there is no verification that they were mailed to the testing lab.[3]

After a hearing on these issues, the trial court denied the motions and ruled: (1) probable cause was established and it was reasonable for Officer Kopp not to administer field sobriety tests to a suspect who was lying down and complaining of a back injury; (2) Deputy Brietsbrecker did not need VanDeMortel's consent to draw blood under ***State v. Zielke***, 137 Wis.2d 39, 403 N.W.2d 427 (1987), and ***Schmerber v. California***, 384 U.S. 757 (1966); and (3) since there was no evidence that the blood samples had been tampered with, the alleged problems in the chain of custody go to the weight of the evidence, not to admissibility.

[3] The transcript of the suppression hearing indicates that two separate motions were filed. The first one, which presumably included the first two arguments listed above, is not a part of the appellate record. However, it is clear from the transcripts of the suppression hearing that VanDeMortel made all three arguments in the trial court.

ANALYSIS

On appeal VanDeMortel renews these arguments and also argues that, even if the arrest made in Wisconsin were valid, VanDeMortel was no longer under arrest in the Iowa hospital and Deputy Brietsbrecker did not have the authority to have blood drawn.

Validity of Arrest

VanDeMortel contends Officer Kopp did not have probable cause to place him under arrest, and the blood samples were therefore taken in violation of his Fourth Amendment rights. In order for a search incident to arrest to be valid, the arrest must be supported by probable cause. *See* ***Schmerber***, 384 U.S. at 768-69. Probable cause to arrest is a constitutional question, which we review de novo. *See* ***State v. Koch***, 175 Wis.2d 684, 700, 499 N.W.2d 152, 160 (1993); ***State v. Babbitt***, 188 Wis.2d 349, 356-57, 525 N.W.2d 102 (Ct. App. 1994). Probable cause exists when 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 that the defendant probably committed the offense. *See* ***Babbitt***, 188 Wis.2d at 356-57, 525 N.W.2d at 104.

In this case Officer Kopp knew the following about VanDeMortel: he was driving a van involved in a serious two-vehicle collision, he admitted he had been drinking, his speech was very slurred and hard to understand, his eyes were bloodshot, he emitted a moderate-to-strong odor of alcohol, he commented that he did not know how the accident happened and that his van tends to "float," and he was lying on his back complaining of a back injury. Field sobriety tests are not always necessary to establish probable cause. *See* ***State v. Kasian***, 207 Wis.2d 611, 622, 588 N.W.2d 687, 692 (Ct. App. 1996). In this case, even without field

sobriety tests, all the circumstances within Officer Kopp's knowledge were sufficient to lead a reasonable officer to believe that VanDeMortel was probably operating a motor vehicle while under the influence of an intoxicant.

Alternatively, VanDeMortel argues that, even if the arrest in Wisconsin were valid, VanDeMortel was nevertheless no longer under arrest or in custody when the blood was drawn in Iowa. When the facts are undisputed, "custody" is a question of law, which we decide de novo. *See* ***State v. Swanson***, 164 Wis.2d 437, 445, 475 N.W.2d 148, 152 (1991). In ***Swanson***, the supreme court adopted an objective test that assesses the totality of the circumstances to determine the moment of arrest for Fourth Amendment purposes: "whether a reasonable person in the defendant's position would have considered himself or herself to be 'in custody,' given the degree of restraint under the circumstances." ***Id.*** at 447, 475 N.W.2d at 152. The court went on to state: "The circumstances of the situation including *what has been communicated by the police officers*, either *by their words* or actions, shall be controlling under the objective test." ***Id.*** (emphasis added).

Officer Kopp specifically told VanDeMortel twice at the scene of the accident that he was under arrest for operating a motor vehicle while under the influence of an intoxicant. After the emergency transport to the hospital in Iowa, and while VanDeMortel was still being evaluated by the medical staff, Deputy Brietsbrecker arrived and told him that Officer Kopp had placed him under arrest.

Nevertheless, VanDeMortel argues that, despite the officers' statements, the fact that he was transferred to a hospital without police accompaniment and a police officer was not waiting for him when he arrived, discontinued the arrest. We recently considered a similar argument in ***State v.***

Buck, 210 Wis.2d 115, 565 N.W.2d 168 (Ct. App. 1997). In ***Buck***, the defendant was arrested at the scene of the accident, transferred by ambulance to a hospital and then transferred by helicopter to a regional medical center. The next day an officer questioned the defendant about the accident without advising him of his ***Miranda*** rights. We rejected the State's argument that the arrest had been discontinued with the transfers and therefore ***Miranda*** warnings were unnecessary. *See* ***id.*** at 124-25, 565 N.W.2d at 172. We concluded that, based on the officer's actions, the defendant was in custody despite the fact that the interview took place at least a day and a half later and after two unaccompanied transfers to hospitals.[4] ***Id.*** In this case the blood was drawn less than two-and-one-half hours after the arrest, after one unaccompanied transfer to a hospital.

VanDeMortel attempts to distinguish this case from ***Buck*** because the ambulance in this case traveled to another state. He contends, in a brief and undeveloped argument, that Deputy Brietsbrecker lacked the authority to continue the arrest or conduct any law enforcement acts (including the seizure of blood) in the state of Iowa and therefore the results of the blood test should be suppressed. The only case VanDeMortel cites, ***Rodriguez v. City of Milwaukee***, 957 F. Supp. 1055 (E.D. Wis. 1997), bears little resemblance to either the facts or the legal issues of this case. That was a suit under 42 U.S.C. § 1983 alleging liability of the City of Milwaukee for the death of a bouncer at an Illinois bar killed by two off-duty Milwaukee police officers who were customers at the bar. The trial court concluded that the Milwaukee Police Department regulations did not compel

[4] Although we decided the "in custody" issue in ***Buck*** in the context of a ***Miranda*** question, the same test has been used to determine "in custody" questions relating to Fourth Amendment issues. *See* ***State v. Swanson***, 164 Wis.2d 437, 449-55, 475 N.W.2d 148, 153-56 (1991) (applying the "in custody" test from ***Miranda*** cases to the Fourth Amendment issue of whether a search was incident to an arrest).

officers to act as police officers outside the City of Milwaukee and the department did not authorize them to leave the city for official business. *See* ***id.*** at 1062, 1064. The court also stated that § 175.40(6)(a), STATS.,[5] allows police officers to act outside their territorial jurisdiction in certain circumstances, "but that is limited to other jurisdictions within the State of Wisconsin." ***Id.*** at 1064.

VanDeMortel may be suggesting that § 175.40(6)(a), STATS., supports his position because it refers to "anywhere in the state." However, he overlooks § 175.46(2)(b), STATS., which provides law enforcement agencies whose jurisdictions are physically adjacent to another state with the option of entering into a mutual aid agreement that authorizes Wisconsin law enforcement officers to act with police authority (including arrest) while in that bordering state's jurisdiction.[6] VanDeMortel does not contend there is no such agreement in

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[5] Section 175.40(6)(a), STATS., provides:

> (6) (a) A peace officer outside of his or her territorial jurisdiction may arrest a person or provide aid or assistance anywhere in the state if the criteria under subds. 1. to 3. are met:
>
> 1. The officer is on duty and on official business.
>
> 2. The officer is taking action that he or she would be authorized to take under the same circumstances in his or her territorial jurisdiction.
>
> 3. The officer is acting to respond to any of the following:
>
> a. An emergency situation that poses a significant threat to life or of bodily harm.
>
> b. Acts that the officer believes, on reasonable grounds, constitute a felony.

[6] Section 175.46(2), STATS., provides:

> (2) Except as provided in sub. (8), a Wisconsin law enforcement agency may enter into a mutual aid agreement with a law enforcement agency of a physically adjacent state authorizing one or more of the following:

(continued)

place, nor does he present authority for the proposition that in the absence of such an agreement, crossing the state line somehow alters the ***Swanson*** "totality of the circumstances" objective test for whether a suspect is in custody, or strips a Wisconsin officer of the authority under state law to continue a valid arrest made in Wisconsin and to collect evidence pursuant to that valid arrest. We decline to develop this argument for VanDeMortel and do not consider it further. *See* ***State v. Gulrud***, 140 Wis.2d 721, 730, 412 N.W.2d 139, 142-43 (Ct. App. 1987).

We conclude that the analysis established in ***Buck***, 210 Wis.2d at 124-25, 565 N.W.2d at 172, controls this case and VanDeMortel's blood was drawn incident to a valid arrest while he was in custody.

Implied Consent Law

It is well established that an officer may lawfully have blood drawn from a suspect incident to a valid arrest if the officer reasonably suspects that the blood contains evidence of a crime. *See* ***State v. Seibel***, 163 Wis.2d 164, 179, 471 N.W.2d 226, 233 (1991). VanDeMortel contends that, even if the blood were drawn incident to a valid arrest while he was in custody, as we have concluded that it was, the blood results must be suppressed because Deputy Brietsbrecker did not comply with Wisconsin's Implied Consent Law, § 343.305, STATS., and

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> (a) Law enforcement officers of the law enforcement agency of the physically adjacent state to act with some or all of the arrest and other police authority of a law enforcement officer of the Wisconsin law enforcement agency while within the Wisconsin law enforcement agency's territorial jurisdiction and within a border county.
>
> (b) Law enforcement officers of the Wisconsin law enforcement agency to act with some or all of the arrest and other police authority of a law enforcement officer of the law enforcement agency of the physically adjacent state while within that agency's territorial jurisdiction and within a border county.

advise VanDeMortel of his rights and obligations under that law. There is no merit to this argument. In ***State v. Zielke***, 137 Wis.2d 39, 41, 403 N.W.2d 427, 428 (1987), the supreme court held that a blood sample that is constitutionally obtained, as in this case, is not rendered inadmissible due to noncompliance with the procedures set forth in the implied consent law.

Chain of Custody

VanDeMortel also argues that the blood test results should be suppressed because the State did not establish a proper chain of custody to authenticate the blood samples tested in that the samples were left unattended for thirty hours in a tray in a secretary's office. The State does need to establish a chain of custody before blood test results will be admitted, showing that it is improbable that the original item has been exchanged, contaminated or tampered with; but the degree of proof necessary is a matter of trial court discretion. ***B.A.C. v. T.L.G.***, 135 Wis.2d 280, 289-90, 400 N.W.2d 48, 53 (Ct. App. 1986). We will not overturn a discretionary determination if the court considered the relevant facts, applied the proper standard of law and, using a demonstrative rational process, reached a conclusion that a reasonable judge could reach. ***Rodak v. Rodak***, 150 Wis.2d 624, 631, 442 N.W.2d 489, 492 (Ct. App. 1989).

The trial court found that there was no "showing that there was some tampering of that package," and stated that the evidence showing that the vials were unattended and the mailing process lacked verification "goes to weight, not admissibility." The uncontroverted evidence was that Deputy Brietsbrecker left the sealed vials of blood in a container, packaged and addressed, in the secretary's tray and locked the office; only eleven people working for the Sheriff's Department had keys to the office, the secretary routinely mails packages left in

the tray; and the chemist received the sealed vials of blood. We conclude that the trial court did not erroneously exercise its discretion in determining that it was improbable that the samples of VanDeMortel's blood were tampered with or exchanged.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.