COURT OF APPEALS
DECISION
DATED AND FILED

April 16, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2398 **Cir. Ct. No. 2014CV1795**

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

VILLAGE OF DEFOREST,

PLAINTIFF-RESPONDENT,

V.

MICHAEL BRAULT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: STEPHEN E. EHLKE, Judge. *Affirmed and cause remanded for further proceedings*.

¶1 LUNDSTEN, J.[1] Michael Brault appeals the circuit court's judgment convicting Brault, after a bench trial, of a municipal ordinance violation

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(b). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

for operating a motor vehicle while under the influence of an intoxicant. Brault's sole argument is that the evidence is insufficient because the circuit court relied on the arresting officer's experience and the officer's opinion of Brault's intoxication. This argument lacks merit, and I agree with respondent Village of DeForest that Brault's appeal is frivolous. I therefore affirm the judgment and grant the Village's motion for costs and fees as allowed under WIS. STAT. RULE 809.25(3). I remand to the circuit court for an assessment of those costs and fees.

The Trial Evidence

¶2 At trial, the officer was the only witness, and he testified as follows. The officer had considerable experience making arrests for intoxicated driving, as well as training that was specific to detecting persons under the influence of intoxicants. At approximately 9:20 p.m. on the night of Brault's arrest, the officer observed a blue truck fail to stop at a stop sign. The officer initiated a traffic stop and made contact with the driver, identified as Brault. The officer asked Brault if Brault knew why the officer had stopped him, and Brault answered that he did not know.

¶3 While the officer was speaking with Brault, the officer smelled a moderate odor of intoxicants coming from Brault and observed that Brault had bloodshot, watery eyes. The officer asked if Brault had been consuming any intoxicants, and Brault replied that he had consumed two glasses of wine. The officer observed a bottle opener in a cup holder in the center of the truck, and asked Brault if Brault had any open intoxicants in the vehicle. Brault claimed that he did not.

¶4 The officer testified that, at this point during the stop, the officer "believed that [Brault] was under the influence." The officer testified that he

asked Brault to perform field sobriety tests. Brault's performance on each of the tests showed further signs of impairment. The officer asked Brault to submit to a preliminary breath test (PBT), which showed a .097 blood alcohol content. The officer testified that, at this point in time during the stop, the officer formed an opinion that Brault was "too impaired to be operating a motor vehicle."

¶5 The officer placed Brault under arrest, and subsequently discovered a nearly full open bottle of beer in Brault's truck, along with a six-pack of the same type of beer with two bottles missing. The officer transported Brault to the police station, where Brault refused to submit to further chemical testing of his breath.[2]

¶6 In ruling, the circuit court summarized the circumstances as described in the officer's testimony. As part of this summary, the circuit court briefly referred to the officer's experience and the officer's opinion of Brault's intoxication. The court stated that it was finding Brault guilty based on the "totality of the evidence."

Brault's Argument

¶7 Brault argues that the evidence was insufficient, citing the standard in ***State v. Poellinger***, 153 Wis. 2d 493, 451 N.W.2d 752 (1990). As Brault correctly asserts, the applicable standard under ***Poellinger*** can be summarized as whether the evidence is "so lacking in probative value and force that no trier of

[2] Brault appears to confuse this request for further chemical testing of his breath with the PBT. Brault asserts that he refused to take a PBT, and that the officer "oddly" testified that there was a PBT result of .097 despite Brault's refusal. But the transcript shows that the test Brault refused was the further chemical test of his breath at the station.

fact, acting reasonably, could have found guilt." *See* ***id.*** at 507. A more complete statement of the standard as applicable here is as follows:

> [I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the [government] and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt …. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

Id. (citation omitted).

¶8 Turning to Brault's supporting argument, it is based solely on the circuit court's brief references, during the court's three-page oral ruling, to the officer's experience and the officer's opinion of Brault's intoxication. As stated in his principal brief, Brault's entire supporting argument is:

> [The officer] testified at the Bench Trial that he believed Brault was intoxicated and unable to operate his motor vehicle in accordance with the law when he first spoke to Brault. At this point, Brault had performed no Field Sobriety Tests nor taken any tests for intoxication.
>
> Judge Ehlke found Brault guilty of Operating While Intoxicated as a First Offense. In doing so, Judge Ehlke placed emphasis on [the officer]'s training and experience. Yet, [the officer] came to the conclusion that Brault was intoxicated prior to any corroborating tests or information other than two scant and very general observations. Given that [the officer] formulated his opinion far before corroborating evidence was available to bolster it, Judge Ehlke erred in relying on [the officer]'s opinions as one of his bas[es] of conviction. Therefore, Judge Ehlke as the trier of fact came to a conclusion based off of the available evidence which was completely lacking in probative value.

(Record citations omitted.) Brault adds to this argument in his reply brief only slightly, asserting that "Judge Ehlke erred by placing emphasis on [the officer]'s training and experience." Brault contends that this was error because the officer "seemed to 'jump the gun' a bit when he came to a conclusion [that] Brault was intoxicated before performing any Field Sobriety Tests."

¶9 As this verbatim recitation of Brault's supporting argument shows, Brault badly misapplies the sufficiency of the evidence standard. Even if the officer's experience and opinion lacked probative value—a proposition that Brault does not support—there was plenty of *other* evidence with undeniable probative value. Brault ignores the following obvious and common-sense indicators of intoxicated driving, when considered in their totality:

- Brault ran a stop sign.
- Brault seemed not to know, or at least claimed not to know, why he was stopped.
- Brault smelled like intoxicants.
- Brault admitted to drinking two glasses of wine.
- Brault had a PBT result of .097.
- Brault had a bottle opener within reach in his vehicle.
- Brault had an open bottle of beer in his vehicle and a six-pack of the same kind of beer missing two bottles.

Thus, Brault is obviously incorrect when he concludes his argument by asserting that the "available evidence ... was completely lacking in probative value." Viewing the evidence most favorably to the circuit court's finding of guilt, it is easily sufficient to support Brault's conviction.

¶10 Moreover, Brault's apparent complaint that the circuit court placed undue reliance on the officer's experience or opinion is doubly flawed. First, regardless how much weight the circuit court might have placed on the officer's experience and opinion, such reliance would not affect whether the trial evidence is sufficient to support a finding of guilt. Second, Brault's apparent assertion of undue reliance is plainly false. No reasonable reader could read the circuit court's oral decision, set forth in three pages of transcript, as placing undue reliance on the officer's experience and opinion. Rather, the circuit court made passing reference to these factors as part of the totality of the evidence, which included all of the objective indicators of Brault's intoxicated driving as summarized above.

Village's Motion For Sanctions

¶11 The Village moves under WIS. STAT. RULE 809.25(3) for sanctions for a frivolous appeal. An appeal is frivolous under RULE 809.25(3)(c)2. if "[t]he party or the party's attorney knew, or should have known, that the appeal … was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law."

¶12 Brault makes no suggestion that he has sought extension, modification, or reversal of existing law, nor does he suggest that there is some equitable basis for his appeal. Thus, the only question is whether Brault or his attorney knew or should have known that Brault's appeal has no reasonable basis in law.

¶13 Brault's response to the Village's motion adds nothing to the arguments I have already discussed. On the contrary, Brault's response underscores his clear misapplication of the sufficiency of the evidence standard. Brault asserts: "Should this Court find that appealing a verdict based on the

sufficiency of the evidence is frivolous because an Appellant questions *one portion* of the evidence provided[,] then nearly all appeals so based become frivolous." (Emphasis added.) The precise problem here is that Brault has questioned only "one portion" of the evidence, while ignoring other, probative evidence that supports the circuit court's finding of guilt. This is a clear and obvious misapplication of the sufficiency of the evidence standard to the trial evidence.

¶14 For all of the reasons discussed, I conclude that Brault's attorney should have known there was no reasonable basis in law for Brault's appeal based on sufficiency of the evidence. The appeal is therefore frivolous, and I remand to the circuit court for an assessment of costs and fees as allowed by WIS. STAT. RULE 809.25(3).

By the Court.—Judgment affirmed and cause remanded for further proceedings.

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