COURT OF APPEALS
DECISION
DATED AND FILED

March 23, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

Nos. 98-2385-CR, 98-2661-CR

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

v.

MELVIN H. VANZEELAND,

DEFENDANT-RESPONDENT.

APPEALS from orders of the circuit court for Outagamie County: MICHAEL W. GAGE and DEE R. DYER, Judges. *Affirmed.*

CANE, C.J. The State appeals portions of orders granting Melvin VanZeeland's motion to dismiss a count of resisting an officer, contrary to § 946.41(1), STATS., and his motion to suppress evidence regarding the resisting count. It also appeals an order denying the State's motion to amend the complaint to add a count of disorderly conduct. The State argues that: (1) the trial court erred by suppressing evidence regarding the resisting count because probable

cause existed to support VanZeeland's arrest; (2) the resisting count should not have been dismissed on grounds of collateral estoppel; and (3) the trial court erroneously exercised its discretion when it denied its request to amend the complaint. This court rejects these arguments and affirms the orders.

I. BACKGROUND

1. Facts

On September 14, 1996, Outagamie County sheriff's deputy Paul Langenberg was dispatched to Bruce VanZeeland's home to investigate an allegation that Bruce's father, Melvin, had violated a domestic abuse injunction. The injunction required Melvin to avoid his ex-wife, Doris VanZeeland, or any residence she temporarily occupied, and to avoid contacting her. Doris told Langenberg that Melvin had phoned Bruce's home three times on September 13 and once on September 14, but hung up each time when she answered the phone. Doris had been baby-sitting at Bruce's for a "couple of days," but Langenberg did not recall if he was told that Melvin knew that Doris would be there on September 14.

In addition, Doris told Langenberg that a camper had been removed[1] from Bruce's driveway and that Doris' car was parked in front of the camper. Although Doris did not see Melvin remove the camper, Doris believed Melvin had taken it because Melvin told Bruce that he was coming to get the camper. Langenberg was not aware that Melvin had attempted to make contact with anyone at Bruce's home when Melvin went to get the camper. After Doris showed

[1] The record reflects that Melvin had Bruce's permission to use the camper.

Langenberg a copy of the injunction, he called his staff sergeant, who told him to "make contact" with Melvin and arrest him for violating the injunction.

When Langenberg arrived at Melvin's residence, Melvin asked why he was there, and Langenberg told him that Doris complained he had violated the injunction. Langenberg told Melvin that he needed to come with him to the sheriff's department, but Melvin refused. Then Langenberg told Melvin that he was "going to be arrested" for violating the restraining order. Melvin refused to cooperate, so Langenberg grabbed Melvin's right arm and put him in a compliance hold, directing him to the squad car. Melvin resisted, and Langenberg again informed him that he was under arrest. Melvin continued to resist; the two struggled while Melvin insisted that he was not going to be arrested. With the help of backup officers, Melvin was handcuffed and placed in the squad car.

2. Procedural Posture

This case has a lengthy and confusing procedural history. On September 16, 1996, the State filed a criminal complaint against Melvin alleging that he had resisted an officer, contrary to § 946.41(1), STATS. On October 1, Judge Joseph Troy granted the State's motion to amend the complaint to include a charge of violating an injunction. On January 21, 1997, Judge Troy granted the State's motion to dismiss the complaint without prejudice; the State was not prepared for trial that day because it failed to issue subpoenas.

On January 29, the State filed another criminal complaint charging Melvin with resisting arrest and violating an injunction. In March, Melvin filed a motion to dismiss the resisting charge and to suppress evidence based on his contention that the officer had no probable cause to arrest. Melvin also filed an additional motion to dismiss the charge of violating an injunction based on his

contention that the complaint contained false information. On May 7, Judge Dee Dyer conducted a hearing on Melvin's motions and heard testimony from Langenberg and Melvin. In dismissing the violating an injunction charge, Judge Dyer concluded that no probable cause was established because the complaint failed to attach a copy of the injunction, and that in any event, there was no evidence that Melvin made contact with Doris. The court also found that Langenberg had acted without lawful authority and suppressed the evidence Langenberg attained after arriving at Melvin's.[2] The court then gave the State an opportunity to consider what it wanted to do regarding the resisting charge. Several days later, on May 14, the State filed a motion to dismiss the resisting count without prejudice because the "available evidence no longer support[ed] the charge." Judge Dyer granted the motion.

Almost a year later, on March 5, 1998, the State filed a new complaint, again charging Melvin with violating an injunction and resisting an officer. This new complaint contained a more complete probable cause statement and incorporated a copy of the injunction; the complaint was assigned a different file number. Melvin again filed motions to dismiss both charges and to suppress the evidence the State obtained as a result of an illegal arrest based on lack of probable cause. The State then requested leave to amend the complaint to add an additional count of "disorderly conduct over the telephone," contrary to § 947.012(1)(c), STATS.

[2] The trial court noted that if, consistent with testimony, the injunction required Melvin to have no contact with Doris, he complied with the injunction by saying nothing and hanging up when Doris answered Bruce's phone.

Judge Michael Gage ruled on the motions and concluded that under the doctrine of collateral estoppel, the motion to suppress the evidence leading to the resisting charge had been "fully litigated" before Judge Dyer and therefore had "preclusive effect." In his August order, Judge Gage dismissed the charge of resisting an officer, but denied the State's motion to amend the complaint and Melvin's motion to dismiss the charge of violating an injunction.

The record contains two notices of appeal, one on August 13, 1998, appealing Judge Gage's denial of the motion to amend the complaint and its dismissal of the resisting count, and a second on September 1, 1998, appealing Judge Dyer's decision to suppress evidence on the resisting charge. This court granted the State's motion to consolidate both appeals.[3]

II. ANALYSIS

The State argues that because Langenberg had probable cause to arrest Melvin on September 14, Judge Dyer erred by suppressing the evidence relating to the resisting charge.[4] This court disagrees.

Probable cause is the *sine qua non* of a lawful arrest. *See* ***State v. Mitchell***, 167 Wis.2d 672, 681, 482 N.W.2d 364, 367 (1992). Probable cause to

[3] The State's motion was granted November 4, 1998.

[4] After making its probable cause argument, the State contends that this court may reverse a circuit court's order "in either of two situations," and then discusses this court's powers of discretionary reversal, citing ***Vollmer v. Luety***, 156 Wis.2d 1, 15, 456 N.W.2d 797, 803 (1990). The State maintains that the real controversy was not fully tried because Judge Dyer did not have an opportunity to review all the relevant evidence, *i.e.*, a copy of the domestic abuse injunction, which states that Melvin must avoid any premises Doris temporarily occupies. Because this court concludes that, even considering the injunction, the State had no probable cause to arrest, this argument need not be considered. *See* ***Sweet v. Berge***, 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983) (only dispositive issues need be addressed).

arrest is the quantum of evidence within the arresting officer's knowledge at the time of arrest that would lead a reasonable police officer to believe the defendant probably committed or was committing a crime. *See* ***State v. Secrist***, No. 97-2476-CR, slip op. at 10 (Wis. Mar. 3, 1999). There must be more than a possibility or suspicion that the defendant committed an offense, although the evidence need not reach the level of proof beyond a reasonable doubt or even that guilt is more likely than not. *See* ***Mitchell***, 167 Wis.2d at 681-82, 482 N.W.2d at 367-68. Probable cause is a common sense concept judged by the factual and practical considerations of everyday life on which reasonable and prudent persons, not legal technicians, act. *See* ***State v. Truax***, 151 Wis.2d 354, 360, 444 N.W.2d 432, 435 (Ct. App. 1989). Whether probable cause exists turns on each case's facts. *See* ***id***. When the facts are undisputed, the question of whether probable cause exists is a question of law. *See* ***id***.

The parties dispute the facts, but even accepting Langenberg's testimony as true, no probable cause existed to arrest Melvin. First, it is undisputed that Melvin hung up each time Doris answered the phone at Bruce's home. By hanging up when Doris answered, Melvin was avoiding contact with Doris in compliance with the injunction. Second, Melvin's presence at Bruce's home to pick up his camper did not appear to violate the injunction's prohibition against avoiding any premises at which Doris temporarily resides. Doris was not residing at Bruce's home but was there to baby-sit. Therefore, this court affirms Judge Dyer's holding that no probable cause existed to arrest Melvin and that consequently, the evidence gathered after the arrest must be suppressed.

Next, the State argues that Judge Gage erred by applying the rule of collateral estoppel under ***State v. Kramsvogel***, 124 Wis.2d 101, 369 N.W.2d 145 (1985), the result of the suppression hearing before Judge Dyer, at which he

suppressed the evidence gathered after Melvin's arrest. Because this issue was dispositive of the resisting charge, Judge Gage then proceeded to dismiss that charge. The State argues that collateral estoppel "cannot be relied upon to bind one court's finding to an earlier court's finding on a motion to suppress hearing." In ***Kramsvogel***, our supreme court held that as applied in criminal cases, the doctrine of collateral estoppel "bars only the reintroduction or relitigation of facts already established against the government." ***Id***. at 122, 369 N.W.2d at 155. As Judge Gage noted, no Wisconsin case has addressed whether collateral estoppel applies to the situation this case presents. Because this court has determined that no probable cause existed to arrest, even considering the injunction, this issue need not be addressed to dispose of this appeal. *See* ***Sweet v. Berge***, 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983). Consequently, Judge Gage's order suppressing the evidence and dismissing the resisting charge is affirmed.

Finally, the State argues that the trial court erroneously exercised its discretion by denying its motion to amend the complaint under § 971.29, STATS. The State sought to add the charge of "disorderly conduct over the telephone," stemming from a series of phone calls Melvin was alleged to have made to Bruce's home on September 13.

Section 971.29, STATS., governs amendment of charges. Section 971.29(1) permits amendment of a complaint without leave of court any time before arraignment, but does not directly address amendment after arraignment and before trial. Our supreme court has held, however, that amendment is permitted before trial and within a reasonable time after arraignment, with leave of the court, provided the defendant's rights are not prejudiced. *See* ***Whitaker v. State***, 83 Wis.2d 368, 374, 265 N.W.2d 575, 579 (1978). The rights include the right to notice, speedy trial, and the opportunity to defend. *See* ***id***. Whether to

permit amendment is within the trial court's discretion, s*ee* ***State v. Frey***, 178 Wis.2d 729, 734, 505 N.W.2d 786, 788 (Ct. App. 1993), and this court will not reverse the trial court's decision absent an erroneous exercise of discretion. *See* ***id***.

Here, by denying the motion to amend the complaint, Judge Gage essentially concluded that the State's attempt to add a disorderly conduct charge at that late time, shortly before trial and after filing numerous complaints, was unreasonable. This court is satisfied that the trial court's rationale reflects a reasonable exercise of discretion.

This court notes that Melvin's brief is disorganized and incomprehensible. It contains a great deal of extraneous information and argument pertaining to matters not related to this appeal. Non-prisoner pro se appellants are bound by the same rules that apply to attorneys on appeal and must satisfy all procedural requirements. ***Waushara County v. Graf***, 166 Wis.2d 442, 452, 480 N.W.2d 16, 20 (1992). Melvin fails to meet the most basic requirement that his brief make a clear statement of the issues, provide facts necessary to understand them, and present an argument supported by cognizable reasoning. *See* ***id***.; *see also* RULE 809.19, STATS. In any event, because this court rejects the State's arguments, it is unnecessary to attempt to address Melvin's contentions as to why the trial court properly dismissed the resisting charge and suppressed evidence.

By the Court.—Orders affirmed.

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