COURT OF APPEALS
DECISION
DATED AND FILED

July 1, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-0281-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

PATRICE M. EHRENBERGER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sauk County: VIRGINIA WOLFE, Judge. *Affirmed.*

EICH, J.[1] Patrice M. Ehrenberger pled to a (criminal) charge of operating a motor vehicle while intoxicated, reserving certain issues for appeal. We see those issues as: (1) whether ***State v. Swanson,*** 164 Wis.2d 437, 475 N.W.2d 148 (1991), requires a "formal" arrest before blood may be withdrawn

[1] This appeal is decided by a single judge pursuant to § 752.31(2)(f), STATS.

from a suspect, or whether it is sufficient that the officers had probable cause to arrest; and (2) if the latter, was there probable cause to arrest in this case. We conclude that, under the more recent case of ***State v. Bohling,*** 173 Wis.2d 529, 494 N.W.2d 399 (1993), and other cases, probable cause is sufficient; and we are satisfied that there was probable cause to arrest Ehrenberger for OWI. We therefore affirm her conviction.

I. Arrest or Probable Cause?

Ehrenberger was involved in a one-car accident in April 1997. She was taken to the hospital by police officers where, a short time later, blood was drawn by hospital personnel. It is undisputed that, though conscious, she was not asked, nor did she consent, to the withdrawal of her blood for testing. Nor had she been placed under arrest at the time the sample was taken.

In ***Bohling***, as here, blood was drawn from an OWI suspect without a search warrant—also without the defendant's consent. Considering a challenge to the taking of the blood sample, the supreme court held that, under the principles set forth in ***Schmerber v. California***, 384 U.S. 757 (1966), "the rapid dissipation of alcohol in the bloodstream alone constitutes a sufficient exigency for a warrantless blood draw to obtain evidence of intoxication following a lawful arrest for a drunk driving related crime." ***Bohling***, 173 Wis.2d at 539, 494 N.W.2d at 402. The court went on to explain the "arrest" requirement, stating that "[p]robable cause to arrest substitutes for the predicate act of lawful arrest." ***Id.*** at 534 n.1, 494 N.W.2d at 400.

The ***Bohling*** court cited ***State v. Bentley,*** 92 Wis.2d 860, 286 N.W.2d 153 (Ct. App. 1979), as authority for the quoted statement. ***Bentley***, too, involved a drunk-driving-related crime where a blood sample was taken from the

defendant without his consent, and without his having been arrested. Like Ehrenberger, he moved to suppress the results of the test, arguing that "taking the blood without a valid arrest is [unconstitutional]." ***Id.*** at 863, 286 N.W.2d at 154. Also as here, the State, conceding that no arrest had been made, contended that probable cause to arrest was sufficient to justify the "search." ***Id.*** The supreme court agreed with the State, holding as follows:

> The taking of the blood sample … is a search and seizure within the meaning of the United States and Wisconsin Constitutions. Such a search may be conducted if it is incident to arrest. Logic dictates that where there is probable cause for arrest, one need not perform the formalistic rituals of arrest in order to obtain a blood sample and thus preserve possible evidence of a crime.

Id. at 863-64, 286 N.W.2d at 155.[2] We reached a similar result in ***Milwaukee County v. Proegler***, 95 Wis.2d 614, 623, 291 N.W.2d 608, 612 (Ct. App. 1980), where, citing ***Bentley*** and ***Schmerber***, we said:

> While the taking of a breath sample is a search and seizure within the meaning of the United States and Wisconsin Constitutions, such a search can be conducted if incident to arrest *or if a police officer has probable cause to arrest* (emphasis added).

Ehrenberger argues that ***Swanson***—even though decided before ***Bohling***—throws ***Bohling*** and similar cases into a cocked hat. Specifically, she refers us to the following statement in ***Swanson***:

[2] Then, after noting that "[p]robable cause to arrest, standing alone, does not justify taking a blood sample … without first obtaining a search warrant," the ***Bentley*** court concluded—as the supreme court did in ***Bohling***, and as the trial court did in this case—that because alcohol rapidly metabolizes after a person ceases drinking, the "exigent circumstances" exception to the warrant requirement exists in such cases, justifying the taking of blood without a warrant. ***Id.***, 92 Wis.2d at 864, 286 N.W.2d at 156.

> In effect, the State requests this court to carve out an exception to warrantless searches based solely on probable cause with no resulting arrest. Presently, there exists no such exception to warrantless searches, and we decline to fashion one now.

Id., 164 Wis.2d at 453, 475 N.W.2d at 155.

We think the reference is unavailing. First, as we have noted, ***Bohling*** is a later case, and when we are confronted with inconsistent supreme court opinions, the most recent opinion controls. ***Hoffman v. Memorial Hosp. of Iowa County***, 196 Wis.2d 505, 513, 538 N.W.2d 627, 629 (Ct. App. 1995). Second, we are not at all sure that ***Bohling*** and ***Swanson*** are inconsistent. ***Bohling***, like ***Bentley*** and the instant case, is an "exigent circumstances" case—one in which a warrantless search will be upheld because of the elusive nature of the sought-after evidence. ***Swanson*** was not an exigent circumstances case. The defendant was charged with possession of marijuana which was discovered on his person by police while conducting a pat-down search after stopping him on suspicion of driving while intoxicated. The officers, intending to conduct a field sobriety test in the squad car, patted the defendant down in accordance with a department policy requiring such searches before placing a suspect in a police vehicle. Immediately after they found the marijuana, the officers were called to another crime scene. They immediately arrested the defendant, cuffed him, and placed him in the car to accompany them on their call. He escaped while left alone, and the issue in the case was whether his arrest was valid so as to support a charge of escape.

The court first held that the defendant was not under arrest for fourth amendment purposes at the time of the search because all he had been asked to do at that time was to submit to a field sobriety test. ***Swanson***, 164 Wis.2d at 444, 475 N.W.2d at 151. The court then stated that the search and seizure of the

marijuana "cannot be justified as incident to a formal arrest based on probable cause," because "Swanson was never arrested for any offense other than those related to the possession of marijuana." ***Id.*** In other words, the defendant in ***Swanson***: (1) was not under arrest for a traffic/drinking offense, because a reasonable person would not believe himself or herself to be in custody when the officer's only action was to request permission to administer a field sobriety test; and (2) was not validly under arrest for possession of marijuana because there was no probable cause to arrest him for that offense—and that was the only offense for which he had been arrested and put into the car from which he later fled. Thus, concluded the court, all that could be said was that the defendant's search had occurred pursuant to an "investigatory stop," and that, "under ***Terry***,[3] … if the search and discovery of marijuana occurred upon a stop, then the seizure of marijuana here was unlawful under the fourth amendment." ***Swanson*****,** 164 Wis.2d at 445, 475 N.W.2d at 151.

The comment of the ***Swanson*** court which Ehrenberger seizes upon in this case—that there is no exception to the rule prohibiting warrantless searches "based solely on probable cause with no resulting arrest"—was offered in response to the State's argument that the search leading to the discovery of marijuana on the defendant's person was justified because "he could have been arrested" for a variety of traffic offenses at the time. The court, noting that the defendant "was never arrested nor was an investigation undertaken for any of these offenses whether at the time of the search or at anytime thereafter," then stated that it was declining the defendant's invitation to create an exception to the

[3] ***Terry v. Ohio***, 392 U.S. 1 (1968).

ban against warrantless searches "based solely on probable cause." ***Id***. at 453, 475 N.W.2d at 155.

Bohling takes a much less convoluted path, specifically holding that, under the exigent-circumstances rule applicable in blood-test and similar cases, it is not necessary to establish in such cases that the defendant had been formally arrested: it is sufficient if probable cause exists to arrest him or her for the alcohol-related offense. Because it is later in time than ***Swanson*** and is factually and analytically distinguishable, we consider ***Bohling*** (and similar cases, such as ***Bentley*** and ***Proegler***) to govern, and we conclude that if probable cause existed to arrest Ehrenberger for the alcohol-related offense, the blood draw was permissible under the fourth amendment and related provisions of the Wisconsin Constitution.

II. The Existence of Probable Cause

> Probable cause ... is neither a technical nor a legalistic concept; rather, it is a "flexible, common-sense measure of the plausibility of particular conclusions about human behavior"—conclusions that need not be unequivocally correct or even more likely correct than not. It is enough if they are sufficiently probable that reasonable people—not legal technicians—would be justified in acting on them in the practical affairs of everyday life.[4]

State v. Pozo, 198 Wis.2d 705, 711, 544 N.W.2d 228, 231 (Ct. App. 1995) (citations and quoted sources omitted).

Probable cause to arrest exists where the officer, at the time of the arrest, has knowledge of facts and circumstances sufficient to warrant a person of reasonable prudence to believe that the person arrested is committing, or has

[4] We also recognize that an officer's experience-based conclusions may be considered in determining whether probable cause exists. ***State v. DeSmidt***, 155 Wis.2d 119, 134-35, 454 N.W.2d 780, 787 (1990).

committed an offense. As we have said—and as the very name implies—it is a test based on probabilities; and, as a result, the facts faced by the officer need only be sufficient to lead him or her to believe that guilt is more than a possibility. It is also a commonsense test. "The probabilities with which it deals are not technical: They are the factual and practical considerations of everyday life on which reasonable and prudent men and women, not legal technicians, act." ***Dane County v. Sharpee***, 154 Wis.2d 515, 518, 453 N.W.2d 508, 510 (Ct. App. 1990). The quantum of information which constitutes probable cause to arrest must be measured by the facts of the particular case, ***State v. Wilks***, 117 Wis.2d 495, 502, 345 N.W.2d 498, 501 (Ct. App. 1984), and in making that measurement, we look to the totality of the circumstances within the officer's knowledge at the place and time of the arrest. ***State v. Koch***, 175 Wis.2d 684, 701, 499 N.W.2d 152, 161 (1993).

In this case, the officers had the following information prior to directing the blood sample. Ehrenberger had been involved in an accident and, when Deputy Nora arrived at the scene, he noticed a "very strong" odor of intoxicants on her breath, her clothing, and emanating from her vehicle. According to Nora, Ehrenberger was belligerent, "very verbal and boisterous," and admitted drinking several beers that afternoon. She vomited at the scene, her speech was slurred and her eyes were "glossy" and bloodshot.

Ehrenberger, emphasizing that Nora's contact with her at the accident scene lasted only three or four minutes, likens her situation to that of the defendant in ***Swanson***, a case in which the supreme court recognized that, while a suspect's erratic driving, an odor of intoxicants on his breath, and the fact that the time of the incident coincided with the closing time for area taverns might constitute reasonable suspicion for an investigatory stop, they did not add up to probable

cause to arrest. ***Id.***, 164 Wis.2d at 453, 475 N.W.2d at 155. As just indicated, the indicia of intoxication were significantly greater here than in ***Swanson***. For that reason, we reject Ehrenberger's argument.

Because probable cause to arrest Ehrenberger for a drinking/driving offense existed, under ***Bohling*** and similar cases, we are satisfied that: (1) the fact that she was never formally placed under arrest prior to the blood draw is of no consequence; and (2) the circuit court did not err in denying her motion to suppress evidence of the test.

By the Court.—Judgment affirmed.

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