COURT OF APPEALS
DECISION
DATED AND FILED

November 30, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP908 **Cir. Ct. No. 2016TR685**

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

WASHINGTON COUNTY,

PLAINTIFF-RESPONDENT,

V.

DANIEL L. SCHMIDT,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Washington County: JAMES K. MUEHLBAUER, Judge. *Affirmed*.

¶1 NEUBAUER, C.J.[1] Daniel L. Schmidt appeals from an order revoking his driving privileges for one year. He argues that he was stopped

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

without reasonable suspicion, arrested without probable cause, and did not improperly refuse to take a chemical test to determine the alcohol concentration in his blood. We disagree and affirm.

BACKGROUND

¶2 The Wisconsin Department of Transportation filed a notice to revoke Schmidt's driving privileges based on his refusal to submit to a chemical test of his breath, blood, or urine upon suspicion of operating a motor vehicle while under the influence. Schmidt requested a refusal hearing.

¶3 At the hearing, the sole witness, Peter Schultz, a deputy with the Washington County Sheriff's Office, testified that at 2:52 a.m., on February 26, 2016, he responded to a call near Interstate 41 and Highway 33. A driver had called complaining that another driver was swerving his vehicle in and out of his lane and had almost gone off the road. Schultz was south of that location and, thus, he proceeded north along Interstate 41. Before Schultz reached the location, dispatch advised him that the vehicle, a blue Ford F-150, had exited at Highway K. At the exit ramp off Interstate 41 to Highway K, on the shoulder, Schultz saw the Ford stopped. Meanwhile, the driver who had complained about Schmidt swerving had also continued off the exit ramp to Highway K and parked within "eye contact" of Schmidt's vehicle. At some later point, maybe five or ten minutes, another deputy took a statement from the complaining driver.

¶4 Schultz pulled behind the Ford and activated the emergency lights on his squad car. The driver, Schmidt, was already standing in front of the Ford, and he appeared to be inspecting it. Typically, Schultz explained, police procedure was to ensure that the vehicle was not disabled. Schultz walked toward the Ford while Schmidt entered it and sat in the driver's seat. Schultz asked

Schmidt why he had stopped on the side of the road and if the vehicle was okay. Schmidt answered that he had struck a guardrail. Schultz observed that Schmidt's eyes were glassy and bloodshot, and his speech was slurred. Schultz could smell a "strong odor of alcoholic intoxicants" while Schmidt was talking to him.

¶5 Based on the foregoing, Schultz asked Schmidt to take field sobriety tests. Schultz administered the horizontal gaze nystagmus, walk-and-turn, and one-leg stand tests, as he was certified to do. Based on those tests, Schultz thought Schmidt was impaired. Schultz requested that Schmidt submit to a preliminary breath test (PBT), telling him, when Schmidt asked, that the PBT would have no bearing on what happened next and that Schmidt was going to be arrested based on the results of the field sobriety tests. Schmidt refused to take a PBT. Schultz arrested Schmidt and transported him to the Slinger Police Department.

¶6 Once there, at 3:42 a.m., Schultz read to Schmidt from the "Informing the Accused" form.[2] Schultz read the form "word-for-word." Where the form asked, "Will you submit to an evidentiary chemical test of your _____?" and in parentheses underneath it had "breath, blood, urine," Schultz wrote in breath because "our test is primarily breath." Schmidt answered, "I'll do blood but only with … my lawyer present." Schultz said, on cross-examination, that it was "possible" that Schmidt asked a question about the form where it indicated that the police now wanted "to test one or more samples of your breath, blood or urine." After reading the form for himself, Schmidt said that he did not want to submit to a breath test without a lawyer present. Schmidt said his lawyer was in Kaukauna, near Green Bay. Schultz spoke with his supervisor who said

[2] The form was entered into evidence.

that the police would take Schmidt's blood if he consented, but that the police were not going to wait for his attorney. After receiving that clarification, Schultz spoke with Schmidt, and he refused again. For clarification, Schultz followed up with Schmidt, and Schmidt "probably" refused five or ten offers to submit to a chemical test of his breath. Schultz never specifically offered a blood test, but since Schmidt said he would only consent to one if his lawyer was present, the police considered Schmidt's request to be a refusal. Schultz told Schmidt "multiple times" that waiting for his lawyer "wasn't an option." Although unsure, Schultz did not believe that he told Schmidt that he was not entitled to a lawyer. Schultz recalled telling Schmidt that he did not have the right to require the police to wait while his lawyer traveled from Kaukauna so that Schmidt could give a blood or breath sample because "[t]hat would be unreasonable."

¶7 At the conclusion of evidence, Schmidt's counsel argued that Schultz did not have a basis to detain Schmidt, nor a sufficient basis to arrest him, and Schmidt's refusal was reasonable because Schultz's actions suggested that Schmidt had a right to an attorney but that the police would not wait for counsel.

¶8 The court concluded that Schultz did not initially detain Schmidt, that there was probable cause to arrest him, and that the "Informing the Accused" form was properly read to Schmidt and, without any legitimate basis, Schmidt refused to take the chemical test. In support of those conclusions, the court found that Schmidt had already stopped the Ford on the side of the road, and Schultz had the right to ask him "basic questions" such as what had happened. The fact Schultz turned on the emergency lights to his squad car was reasonable given the time of night so that no one would hit him. In terms of probable cause, Schultz had received a report of "bad driving." The caller was not anonymous, but pulled over near Schultz, and another deputy ended up talking to the caller. Schmidt told

Schultz that he had struck a guardrail. Schultz observed that Schmidt's eyes were glassy, his speech slurred, and he smelled of intoxicants. Under these circumstances, Schultz's request to conduct field sobriety tests was reasonable. While there was not much testimony on the field sobriety tests, even without them, Schultz had enough evidence to constitute probable cause to arrest. Finally, regarding the refusal, there was no right to choose which test would be administered if the primary test was breath, and Schmidt did not have the right to have a lawyer present because he preferred to have his blood tested. As a result of the foregoing, the court revoked Schmidt's driving privileges for one year.

¶9 The court entered an order consistent with its decision, which was stayed upon the filing of the notice of appeal.

ANALYSIS

Seizure

¶10 "Not all police-citizen encounters are seizures." ***State v. Kelsey C.R.***, 2001 WI 54, ¶30, 243 Wis. 2d 422, 626 N.W.2d 777. A seizure occurs "when an officer 'by means of physical force or show of authority, has in some way restrained the liberty of a citizen.'" ***State v. Young***, 2006 WI 98, ¶18, 294 Wis. 2d 1, 717 N.W.2d 729 (citation omitted). The test in this instance is whether a reasonable person would have believed he or she was free to disregard the police presence and go about his or her business. ***County of Grant v. Vogt***, 2014 WI 76, ¶30, 356 Wis. 2d 343, 850 N.W.2d 253; ***Young***, 294 Wis. 2d 1, ¶18.

¶11 Whether a person has been seized is a question of constitutional fact; thus, the circuit court's findings of fact will not be disturbed unless clearly

erroneous, but whether a seizure occurred is reviewed de novo. ***Young***, 294 Wis. 2d 1, ¶17.

¶12 The circuit court correctly concluded that Schmidt was not seized when Schultz initially encountered him and asked him "basic questions."[3] Schmidt had pulled over onto the exit ramp of his own volition and was outside inspecting the Ford when Schultz stopped behind him. Just as nothing prohibited another motorist from stopping to inquire of Schultz to see if he needed assistance, nothing prohibited Schultz from doing the same, so long as he did not seize Schmidt without reasonable suspicion. In fact, Schultz might have had an obligation to check on a stranded motorist. *See* ***State v. Goebel***, 103 Wis. 2d 203, 208, 307 N.W.2d 915 (1981) ("Contacts of this sort are not only authorized, but constitute an important duty of law enforcement officers.").

¶13 In this context, as the circuit court noted, the activation of the emergency lights on Schultz's squad car could be viewed as a normal safety precaution to make his own vehicle visible to traffic, for his safety and those of passing motorists, particularly when it was dark on the roadway. The act is consistent with the idea that Schultz was doing no more than checking on the welfare of the driver, which is what a reasonable person would have perceived. Once Schultz exited his squad car and approached Schmidt, Schmidt went back inside his Ford. Schultz asked Schmidt, "Why are you stopped on the side of the road? Is the vehicle okay?" Again, a reasonable person hearing these questions in this context would not think that he or she was being restrained and was not free to

[3] Schmidt does not adequately address this issue in his brief. Rather, he simply assumes there was a seizure when Schultz "effectuated the traffic stop" and proceeds to discuss whether reasonable suspicion existed.

leave. Schmidt, however, instead of leaving, responded that he had a struck a guardrail and, while speaking, Schultz observed that Schmidt's eyes were bloodshot and glassy, his speech was slurred, and he smelled of intoxicants.[4] By this point, Schultz had reasonable suspicion that Schmidt was operating his motor vehicle while intoxicated. Therefore, there was no seizure when Schultz initially encountered Schmidt.[5] *See* ***Vogt***, 356 Wis. 2d 343, ¶¶51-53.

Probable Cause

¶14 In determining whether probable cause exists, a court must look to the totality of the circumstances to determine whether "the arresting officer's knowledge at the time of the arrest would lead a reasonable police officer to believe … that the defendant was operating a motor vehicle while under the influence of an intoxicant." ***State v. Nordness***, 128 Wis. 2d 15, 35, 381 N.W.2d 300 (1986). A refusal hearing is not a forum to weigh evidence for and against probable cause or to determine the credibility of witnesses; rather, the State's burden of persuasion is only to show that the officer's account is plausible. ***Id.*** at 36.

[4] Notably, "[w]hile most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response." ***Immigration & Naturalization Serv. v. Delgado***, 466 U.S. 210, 216 (1984); *see* ***County of Grant v. Vogt***, 2014 WI 76, ¶31, 356 Wis. 2d 343, 850 N.W.2d 253 ("[A] person's consent is no less valid simply because an individual is particularly susceptible to social or ethical pressures."). In short, the fact that Schmidt answered Schultz's questions does not demonstrate that he was seized.

[5] In light of our determination, we do not address the parties' arguments regarding the applicability of the community caretaker function. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) ("An appellate court should decide cases on the narrowest possible grounds.").

¶15 On appeal, the circuit court's findings of fact will not be disturbed unless clearly erroneous, but whether probable cause existed is reviewed de novo. *See* ***State v. Richardson***, 156 Wis. 2d 128, 137-38, 456 N.W.2d 830 (1990).

¶16 Schultz was dispatched at 2:52 a.m. based on a complaint from a driver who observed Schmidt's blue Ford F-150 headed southbound on Interstate 41, swerving in and out of his lane and almost going off the road. When Schultz arrived at the scene, Schmidt's Ford was parked on the exit ramp, and he appeared to be inspecting his vehicle. Schultz questioned Schmidt, and Schmidt said he had struck a guardrail with the Ford. The details the caller provided, along with Schultz's observation of the vehicle the caller identified, at the updated location the caller gave, the fact that Schmidt admitted he struck a guardrail, and that the caller remained on the scene during the traffic stop made the caller's information reliable. *See* ***State v. Rutzinski***, 2001 WI 22, ¶¶18, 38, 241 Wis. 2d 729, 623 N.W.2d 516 (holding that anonymous tip was sufficiently reliable to justify investigative stop because the information the tipster provided exposed him to possible arrest, the tip contained contemporaneous and verifiable observations regarding erratic driving, the vehicle's location and description, and the officer verified many of those details).

¶17 While Schmidt was speaking, Schultz could smell the odor of intoxicants, he noticed that Schmidt's speech was slurred, and that his eyes were bloodshot and glassy. Schultz asked Schmidt to submit to field sobriety tests, and Schmidt's performance on them led Schultz to conclude that he was intoxicated. When considered in totality—the early morning hour, the reliable information the caller provided, Schmidt's admission of striking a guardrail, the physical signs of intoxication Schultz observed, and Schmidt's poor performance on the field sobriety tests—these facts and circumstances gave Schultz probable cause to arrest

Schmidt for operating a motor vehicle while intoxicated. Even though additional information about how Schmidt specifically performed on the field sobriety tests might have been helpful, it is not fatal to the question of probable cause for, again, the County had to show only that Schultz's account was plausible. *See* ***Nordness***, 128 Wis. 2d at 36; *see also* ***Washburn Cty. v. Smith***, 2008 WI 23, ¶33, 308 Wis. 2d 65, 746 N.W.2d 243 (stating that there is no general rule requiring field sobriety tests in all cases as a prerequisite to establishing probable cause to arrest a driver for operating a motor vehicle while intoxicated).

Refusal

¶18 The circuit court's decision that a refusal to take a chemical test is improper is a question of law which, on appeal, is reviewed de novo. ***State v. Ludwigson***, 212 Wis. 2d 871, 875, 569 N.W.2d 762 (Ct. App. 1997). The circuit court's findings of fact, however, will not be disturbed unless clearly erroneous. ***State v. Eckert***, 203 Wis. 2d 497, 507, 553 N.W.2d 539 (Ct. App. 1996).

¶19 Neither the implied consent statute, *see* WIS. STAT. § 343.305, nor constitutional due process requires the assistance of counsel for the accused before deciding whether to submit to a chemical test. ***State v. Neitzel***, 95 Wis. 2d 191, 205, 289 N.W.2d 828 (1980). Further, a police officer has no affirmative duty to inform the accused that there is no right to counsel in the implied consent setting. ***State v. Reitter***, 227 Wis. 2d 213, 242-43, 595 N.W.2d 646 (1999). Thus, "wanting to first consult with counsel before deciding whether to submit to a [chemical] test is not a valid reason to refuse and an officer is on solid grounds in marking a refusal if the custodial defendant relies on this explanation for not immediately agreeing to take the [chemical] test." ***State v. Verkler***, 2003 WI App 37, ¶8, 260 Wis. 2d 391, 659 N.W.2d 137. There exists, however, a "narrow

exception" to this rule: "If the officer explicitly assures or implicitly suggests that a custodial defendant has a right to consult counsel, that officer may not thereafter pull the rug out from under the defendant if he or she thereafter reasonably relies on this assurance or suggestion." ***Id.*** In other words, the first inquiry is whether the defendant was "told he has the right to consult with counsel before deciding to submit to chemical testing." ***State v. Kliss***, 2007 WI App 13, ¶13, 298 Wis. 2d 275, 728 N.W.2d 9 (2006). If so, then the second inquiry is whether the defendant "relied on the assurance or suggestion when responding to the request for a chemical test." ***Id.***

¶20 In this instance, the circuit court correctly determined that Schmidt improperly refused to submit to the chemical test. The court did not err in rejecting Schmidt's suggestion that his own statements to Schultz that he would not agree to the tests without his lawyer provided a basis to conclude that he was entitled to an attorney. Schultz unequivocally told him that the police were not going to wait for his attorney. This response communicated that Schmidt was not entitled to an attorney, not the opposite. Nothing about the fact that Schultz first checked with his supervisor suggests otherwise. To the extent that there was any question, Schultz then asked five to ten more times whether Schmidt would agree to take the test—each time Schmidt refused.

¶21 Even if Schultz's rejection of Schmidt's request to have a lawyer present could reasonably be construed as suggesting that Schmidt had the right to counsel, Schmidt did not rely on this suggestion. Rather, Schmidt had already refused at least two times before Schultz advised him that waiting was not an option. Specifically, after Schultz read the "Informing the Accused" form to Schmidt, he answered, "I'll do blood but only with … my lawyer present." Then, after reading the form for himself, Schmidt said that he did not want to submit to a

breath test without a lawyer present. As already noted, a defendant's desire to consult with counsel before deciding whether to submit to a chemical test is "not a valid reason to refuse and an officer is on solid grounds in marking a refusal if the custodial defendant relies on this explanation for not *immediately* agreeing to take the ... test." ***Verkler***, 260 Wis. 2d 391, ¶8 (emphasis added); *see* ***Neitzel***, 95 Wis. 2d at 205 ("The obligation of the accused is to take the test promptly or to refuse it promptly."). Consequently, Schmidt refused before Schultz gave any suggestion to him that he had the right to counsel, and Schmidt did not rely on anything Schultz told him.

¶22 Therefore, the circuit court correctly rejected Schmidt's arguments, and we affirm the order revoking his driving privileges for one year.

By the Court.—Order affirmed.

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