COURT OF APPEALS
DECISION
DATED AND FILED

January 25, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP406-CR **Cir. Ct. No. 2012CT159**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL CHOUGH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County: MARY KAY WAGNER, Judge. *Affirmed.*

¶1 HAGEDORN, J.[1] Michael Chough appeals from his conviction for operating a motor vehicle while intoxicated (OWI). He contends that a blood test

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

revealing an alcohol concentration above the legal limit should have been excluded on two grounds. First, he argues that police lacked probable cause to arrest him, and consequently, the blood draw was fruit of an illegal arrest. Second, he claims that the circuit court improperly admitted the expert testimony laying the foundation for the test. We reject both arguments and affirm.

Background

¶2 On the morning of February 26, 2012, police found a vehicle in a ditch on the side of the highway. Chough was found looking for shelter nearby in a trailer court. After learning Cough was the driver of the crashed vehicle and observing signs of intoxication, police arrested him for OWI. After his arrest, Chough submitted to a blood test at 8:05 a.m. that revealed a blood alcohol concentration (BAC) of .094g/100mL. The State charged Chough with OWI and operating with a prohibited alcohol concentration (PAC), both third offenses.

¶3 Chough moved to suppress the blood test. He argued it was the fruit of an unlawful arrest because the police lacked probable cause to arrest him. At the suppression hearing, Deputy Eric Klinkhammer testified that around 6:00 a.m. or 7:00 a.m., he was advised that a vehicle had crashed in a ditch near Interstate 94 and KR. He was also informed by dispatch that police began receiving calls that someone was trying to seek shelter in a nearby trailer court "minutes" after reports of the accident. Based on these reports, Klinkhammer went out to investigate. When he arrived on scene, Klinkhammer went straight to the trailer court, which was about one-quarter mile from the accident. He believed that the person reportedly looking for shelter "may be the driver as there was no driver in the vehicle." Upon entering the trailer court, Klinkhammer observed that person—Chough—walk to the end of one of the driveways with another deputy who was

already there. Although he did not trip or fall, Chough exhibited an unsteady gait, and Klinkhammer explained, "He wasn't walking like a sober person does. He was slightly swaying, just the … typical intoxicated person walk." Klinkhammer testified that Chough smelled of intoxicants[2] and "had slightly thick tongue sounding speech."

¶4 Klinkhammer asked Chough about the accident, and Chough admitted he had been driving the vehicle and fell asleep at the wheel. Chough said he was returning from Chicago where he had a few drinks the night before. Klinkhammer asked Chough multiple times to perform the standard field sobriety tests, and each time Chough asked for his attorney and did not complete any of the tests.[3] Even without the field sobriety tests, Klinkhammer explained he was still able to conclude Chough was intoxicated based on his training and experience. Klinkhammer then arrested Chough for OWI.[4] After Chough was in custody, Klinkhammer went to the scene of the crash to assist with traffic while a tow truck removed the vehicle. Based on Klinkhammer's testimony, the circuit court denied Chough's suppression motion, concluding that Klinkhammer had probable cause to arrest Chough for OWI.

[2] Klinkhammer informed Chough that "he smelled like a brewery."

[3] Although Chough did not verbally decline to perform the field sobriety tests, he refused to perform the tests. Klinkhammer testified that "he stood there and did nothing" and answered each of Klinkhammer's questions with a new request to speak to his attorney. Klinkhammer did attempt to perform a horizontal gaze nystagmus test after he handcuffed Chough, but the attempt failed because Chough refused to follow Klinkhammer's finger with his eyes.

[4] In rebuttal, Chough also called three residents of the trailer court who had observed Chough on the morning of his arrest. Although two of the witnesses stated they observed no signs of intoxication, a third testified that Chough "smelled of alcohol, that his speech was somewhat impaired … and that he stumbled a little." The court concluded this third witness "corroborated" Klinkhammer's testimony.

¶5 Because of uncertainty regarding the precise time of driving, Chough moved that the test result be stripped of its automatic admissibility and any presumptions as to its reliability. *See* WIS. STAT. §§ 343.305(5)(d); 885.235(3). The State agreed and stipulated accordingly.[5] However, the State still sought to introduce the results by laying the necessary foundation with expert testimony. Based on Chough's blood test result, the State's expert, Carlton Cowie, made a report detailing a "retrograde extrapolation" of the results to estimate what Chough's BAC was at the time of the accident.

¶6 Chough filed a motion to suppress the blood test and the State's expert testimony on the grounds that the testimony did not meet the reliability standards laid out by WIS. STAT. § 907.02 and ***Daubert v. Merrell Dow Pharm., Inc.***, 509 U.S. 579 (1993). In his motion, Cough argued that Cowie did not have "sufficient facts or data" to opine on what Chough's BAC might have been at the time of the accident. The motion averred that without a specific time of driving, among other missing details, Cowie could not offer a reliable opinion concerning Chough's BAC. Chough did not, at this point, challenge the method of retrograde extrapolation as unreliable.

¶7 The court observed two separate issues concerning Cowie's testimony: (1) the underlying scientific methodology of retrograde extrapolation and (2) the application of that theory to Chough's case. As to the theory, the court concluded "there's nothing wrong with the science." Citing our decision in ***State v. Giese***, 2014 WI App 92, 356 Wis. 2d 796, 854 N.W.2d 687, Chough's counsel

[5] Although the State initially stipulated that the test result should be stripped of automatic admissibility, it later moved the circuit court for reconsideration, which the court denied.

acknowledged the legitimacy of retrograde extrapolation "in certain circumstances," but insisted that a special hearing was necessary to determine whether there were sufficient facts and data to apply the method in Chough's case. The court declined to order a special hearing, but postponed making a ruling on whether Cowie could reliably apply retrograde extrapolation to the facts of Chough's case. The court explained, "I don't know the facts [the State has] yet," and stated "if the facts aren't in the record [prior to Cowie's testimony]…. You can make your objection at that time." The court clarified that such inquiry would be conducted outside the presence of the jury in the form of an offer of proof.

¶8 On the day of jury selection, Chough again requested the court conduct "a ***Daubert*** hearing or at least voir dire [Cowie] outside the presence of the jury to see what data he relied on." He reiterated his position that Cowie lacked sufficient data to opine on Chough's level of intoxication. He further complained that without a pretrial ***Daubert*** hearing, he did not know what articles and studies Cowie relied upon in forming his opinion. The court again rejected any challenge to the underlying methodology:

> We're not getting into that. As … in ***Giese***, extrapolation is accepted .... There is legal basis for it …. [U]nless [Cowie] used some different kind of method than what's normally done, which is repeated here year after year after year after year after case after case after case….
>
> So we will have an opportunity to ask him what method he applied. And if he applied the method[] that's been used for years in the courts I'm going to let him do it, and I'm going to find it's scientifically valid….
>
> So I'm not having a ***Daubert*** hearing separate and distinct from the trial. And I'm not going into articles and all the rest of it.

Chough's counsel asked if he would be limited in cross-examination of Cowie, and the court responded that he would not.

¶9 At trial before Cowie testified, the court ordered a recess, and Chough renewed his objection to the blood test and Cowie's testimony. The State made its offer of proof explaining that Cowie would testify that despite the various unknowns, he could still provide an estimate of Chough's BAC at various times prior to his arrest. Chough continued to object that the blood test and testimony was not relevant because "there is literally no evidence as to when [Chough] drove." The court rejected this argument. Given that the trial testimony established that Chough called a tow truck at 6:03 a.m. the morning of his arrest, the court concluded that "ordinary experience in life would say [Chough] drove [the] car that morning because it's in the ditch and he says to [the officers] I had an accident."

¶10 Chough's attorney then switched gears and requested a ***Daubert*** hearing outside the presence of the jury to see what facts Cowie relied upon and questioned the theory of retrograde extrapolation. He explained that "I have literature that says retrograde extrapolation is junk science." The court also rejected this argument. It reasoned that retrograde extrapolation had "been shown to be valid" and was "accepted in Wisconsin courts." Based on the offer of proof and oral arguments, the court allowed Cowie's testimony with the proviso that Chough remained free to question Cowie about his credentials and the factual basis for his opinions. The court also stated that any further probing of Cowie's testimony would occur in the presence of the jury.

¶11 Cowie testified at trial and was subjected to cross-examination by Chough's counsel. Based on Chough's result of .094g/100mL at 8:05 a.m., Cowie estimated that Chough's BAC would have been over the legal limit of .08g/100mL

at 6:00 a.m., 5:30 a.m., and 5:00 a.m. the morning of his arrest.[6] After the close of evidence, the jury convicted Chough of OWI and PAC. Upon the State's motion, the PAC charge was dismissed, and the court sentenced Chough to forty-five days in jail on the OWI charge. Chough appeals this conviction.

Discussion

¶12 Chough challenges the admissibility of the blood test through two principal arguments: (1) police lacked probable cause to arrest him, and (2) the State's expert should not have been allowed to testify. We address and reject both arguments below.

A. Probable Cause

¶13 A warrantless arrest is unlawful unless it is supported by probable cause. ***State v. Blatterman***, 2015 WI 46, ¶34, 362 Wis. 2d 138, 864 N.W.2d 26.

> Probable cause to arrest for operating while under the influence of an intoxicant refers to that quantum of evidence within the arresting officer's knowledge at the time of the arrest that would lead a reasonable law enforcement officer to believe that the defendant was operating a motor vehicle while under the influence of an intoxicant.

State v. Lange, 2009 WI 49, ¶19, 317 Wis. 2d 383, 766 N.W.2d 551. Probable cause is a flexible commonsense standard that looks at the totality of the circumstances in any given case. ***Id.***, ¶20. Whether probable cause to arrest exists is a question of law we review de novo. ***Id.***

[6] Cowie estimated Chough's BAC would have been between .113 and .152 at 6:00 a.m., between .118 and .167 at 5:30 a.m., and between .123 and .182 at 5:00 a.m.

¶14 Chough does not contest that Klinkhammer had reason to believe he was intoxicated, nor does the record suggest otherwise.[7] Chough's argument is simply that Klinkhammer lacked evidence that he was driving in his admittedly intoxicated state. Without being able to connect intoxication with the time of driving, Chough reasons that Klinkhammer did not have probable cause to arrest him. We disagree.

¶15 Chough was found a mere quarter mile from the accident exactly as the reports indicated: looking for shelter in a trailer court. Chough even admitted to police that he had been driving the car and offered the explanation that he fell asleep at the wheel. It is true that Chough did not tell Klinkhammer exactly when he had been driving, but—as the circuit court observed—common sense dictates that the accident was recent. The vehicle had not been towed away at that point, and Klinkhammer observed Chough soon after hearing reports of a man looking for shelter. Nothing indicates that Chough sat in the crashed vehicle or wandered around for hours after the crash. Nor is it plausible that Chough stopped for a drink between crashing his car and seeking shelter and became intoxicated after the accident. Furthermore, Chough's refusal to cooperate with the sobriety tests is indicative—though certainly not dispositive—of his consciousness of guilt. And, it is worth stating again, Chough admitted he had been driving the crashed vehicle. A reasonable law enforcement officer would, as Klinkhammer did, believe Chough had been driving while intoxicated. Therefore, Klinkhammer had probable cause to arrest Chough for OWI.

[7] Walking with an unsteady gait, smelling like a "brewery," speaking in a thick-tongued manner, and admitting to drinking alcohol is more than enough for a reasonable law enforcement officer to conclude that Chough was intoxicated.

B. Expert Testimony

¶16 Chough next claims that the circuit court improperly admitted Cowie's testimony—the necessary foundation for the test results. We review the circuit court's decision to admit expert testimony for an erroneous exercise of discretion and must affirm it as long as "it has a rational basis and was made in accordance with accepted legal standards in view of the facts." ***Giese***, 356 Wis. 2d 796, ¶16.

¶17 Chough accuses the court here of failing to conduct any analysis under WIS. STAT. § 907.02, complaining that "[t]he circuit court received no evidence" to support its decision to admit the testimony. He specifically faults the circuit court for declining his requests to order a separate ***Daubert*** hearing and instead determining the issue at trial. Although he grudgingly admits that the retrograde extrapolation testimony we allowed in ***Giese*** was "[p]erhaps" admissible, he insists "[t]here is no basis in the record in the present case to conclude that Mr. Cowie's [testimony] met the standards of WIS. STAT. § 907.02(1)."[8]

¶18 WISCONSIN STAT. § 907.02 governs the admissibility of expert testimony and provides:

> **(1)** If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to

[8] Chough also raises a cursory claim that he was denied the ability to effectively cross-examine Cowie. It is unclear whether this is a constitutional claim. In any event, Chough does not explain or develop the argument in any meaningful way. Therefore, we will not address it further. ***Cemetery Servs., Inc. v. DOR***, 221 Wis. 2d 817, 831, 586 N.W.2d 191 (Ct. App. 1998) ("A one or two paragraph statement that raises the specter of [constitutional] claims is insufficient to constitute a valid appeal."); *see also* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals need not address undeveloped arguments).

> determine a fact in issue, a [qualified] witness … may testify thereto … if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.

This statute adopts the reliability standards established by the United States Supreme Court in ***Daubert***. ***Giese***, 356 Wis. 2d 796, ¶17. Under these standards, the circuit court performs the function of "gate-keeper … to ensure that the expert's opinion is based on a reliable foundation and is relevant to the material issues." ***Id.***, ¶18.

¶19 This standard is flexible. ***Id.***, ¶19. The circuit court may consider a variety of factors, and courts have eschewed imposing strict formulaic standards. *See, e.g.*, ***Kumho Tire Co. v. Carmichael***, 526 U.S. 137, 150 (1999) (declining to create a formulaic standard because "[t]oo much depends upon the particular circumstances of the particular case at issue"). Critically, circuit courts have discretion not only in deciding whether to admit expert testimony, but also in the method used to determine reliability. *See* ***id.*** at 152 (explaining that trial courts have "considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable"). A separate pretrial hearing is not required, nor is it always desirable in light of judicial economy.

> The trial court must have the same kind of latitude in deciding *how* to test an expert's reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides *whether or not* that expert's relevant testimony is reliable.… Otherwise, the trial judge would lack the discretionary authority needed both to avoid unnecessary "reliability" proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises.

Id.; *see also* ***United States v. Alatorre***, 222 F.3d 1098, 1099 (9th Cir. 2000) (holding that a separate ***Daubert*** hearing outside the presence of the jury was unnecessary); ***United States v. Nichols***, 169 F.3d 1255, 1263 (10th Cir. 1999) ("There is nothing prejudicial to the defendant in reserving ruling on the admission of [expert testimony] until it is offered at trial.") (citation omitted).

¶20 We see no problem in the court's summary rejection of Chough's intimations that retrograde extrapolation is "junk science." The method is well-established in our courts. *See* ***Giese***, 356 Wis. 2d 796, ¶22 (explaining that "retrograde extrapolation is a generally accepted scientific method" and "[w]e are not aware of any court that has determined that the general methodology of … retrograde extrapolation fails the ***Daubert*** standard"). Of course, retrograde extrapolation is subject to "certain doubts and disagreements." ***Giese***, 356 Wis. 2d 796, ¶23. But "[t]he mere fact that some experts may disagree about the reliability of retrograde extrapolation does not mean that testimony about retrograde extrapolation violates the ***Daubert*** standard." ***Giese***, 356 Wis. 2d 796, ¶23. We think the established history of retrograde extrapolation—revealed in appellate decisions and the circuit court's experience—was fair game for the court to rely on. *See* ***State v. Cameron***, 2016 WI App 54, ¶25, 370 Wis. 2d 661, 885 N.W.2d 611 (relying on previous court decisions holding that "cell phone location technology" was reliable); *see also* ***County of Marathon v. DeBuhr***, No. 2011AP2959, unpublished slip op. ¶14 (WI App Oct. 2, 2012) (affirming the circuit court's decision to admit testimony on retrograde extrapolation based upon its use "by litigants in Wisconsin courtrooms for decades").

¶21 Furthermore, Chough's objections are not new. They very closely mirror the arguments in ***Giese*** that retrograde extrapolation analysis could not be performed because the time of driving was unknown.[9] ***Giese***, 356 Wis. 2d 796, ¶9. The defendant in ***Giese*** even cited the same expert—Kurt Dubowski—for the proposition that "no forensically valid forward or backward extrapolation … is ordinarily possible in a given subject … solely on the basis of time and individual analysis results." ***Id.***, ¶10.[10] We rejected those arguments and held that "Giese's questions go to the weight of the evidence, not to its admissibility." ***Id.***, ¶28.[11]

¶22 The circuit court here was clearly motivated in part by concerns for judicial economy. This is a perfectly legitimate consideration; a court is not obligated as a matter of course to spend precious judicial time and resources to conduct a full ***Daubert*** hearing every time an objection is made. *See* ***Kumho***, 526 U.S. at 152-53 (explaining that trial courts have the discretion "to avoid unnecessary 'reliability' proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted").

[9] As in this case, Giese sought to exclude a blood test and expert testimony concerning retrograde extrapolation. ***State v. Giese***, 2014 WI App 92, ¶9, 356 Wis. 2d 796, 854 N.W.2d 687. Giese argued that the testimony had no probative value because the time of driving was not established. ***Id.*** Giese additionally argued that the expert had insufficient facts and data to render an opinion contending that "'the State cannot prove the facts underlying the expert's opinion,' i.e., the time of the driving, the time of the drinking, and that no drinking occurred between the time of driving and the time of the blood test." ***Id.***, ¶10.

[10] Chough's motion cited an article by "Kurt M. Dubowski" with a quote identical to the quote referenced in ***Giese***.

[11] We also observed that "Giese's real dispute is not with the science the expert relied upon in his case but with the assumptions the expert made." ***Id.***, ¶28. Again, Chough's objections track those in ***Giese***. Chough initially conceded the reliability of the method of retrograde extrapolation. Even when he later referred to the method as "junk science," his objections still centered on the assumptions embedded in Cowie's opinion.

¶23 In lieu of a formal hearing, the circuit court exercised its discretion and fashioned a process to assess the reliability of Cowie's testimony through cross-examination. The main thrust of Chough's argument was that Cowie had insufficient data to render a reliable opinion. After hearing the trial testimony and the State's offer of proof, the circuit court concluded that Cowie's testimony was sufficiently reliable and any deficiencies were best dealt with by allowing Chough to explore its factual basis and limitations on cross-examination. Chough identifies no legal authority requiring the circuit court to stop the trial and order a separate ***Daubert*** hearing any time a challenge is raised. In fact, we reasoned in ***Giese*** that similar deficiencies in an expert's data could be probed on cross-examination, and the defendant remained free to "propose competing scenarios" of the time of alcohol consumption and driving. ***Giese***, 356 Wis. 2d 796, ¶28. The circuit court's decision to deal with these uncertainties by finding the underlying method reliable under WIS. STAT. § 907.02, and allowing cross-examination on its factual application here, was a reasonable exercise of discretion.

Conclusion

¶24 We agree with the circuit court that Klinkhammer had probable cause to arrest Chough for OWI, and we find no error in the court's discretionary decision to admit the blood test based upon Cowie's testimony. Accordingly, we must affirm.

By the Court.—Judgment affirmed.

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