COURT OF APPEALS
DECISION
DATED AND FILED

December 20, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2017AP603-CR **Cir. Ct. No. 2016CT44**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RYAN L. SCHULTZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Fond du Lac County: PETER L. GRIMM, Judge. *Affirmed*.

¶1 GUNDRUM, J.[1] Ryan Schultz appeals from a judgment of conviction for operating a motor vehicle with a prohibited alcohol concentration,

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

second offense, and the circuit court's denial of his motion to suppress evidence. Schultz asserts that the results of his blood test should have been suppressed because the search warrant authorizing the blood draw was not supported by probable cause. Because we conclude the warrant-issuing judge had "a substantial basis" for concluding probable cause existed, we affirm.

Background

¶2 Schultz was arrested for operating a motor vehicle while intoxicated, second offense. Because he refused to submit to a chemical test of his blood, the arresting officer, Deputy Laura Halfmann, sought a telephonic search warrant authorizing the drawing of Schultz's blood for chemical testing purposes.

¶3 Prior to seeking the warrant, Halfmann completed a fill-in-the-blank document titled "Affidavit in Support of OWI Search Warrant." Halfmann read this affidavit over the phone to the warrant-issuing judge,[2] Judge Dale English, after taking an oath as to the truth of her testimony. She indicated that at the time she sought the warrant, she had been a law enforcement officer with the Fond du Lac County Sheriff's office for nine and one-half years. Based upon her personal observations and the observations and verbal reports of fellow officer Lieutenant Borgen—whose reports and conclusions Halfmann had "found to be truthful and reliable in the past"—Halfmann stated that Schultz operated a motor vehicle on Lone Elm Road in the Town of Eldorado, in Fond du Lac County, Wisconsin, "at or about" 2 a.m. on January 19, 2016. Halfmann swore that through her and Borgen's investigation she learned the following facts: (1) Schultz had a prior

[2] Deputy Laura Halfmann read the affidavit verbatim with the exception of two instances which we address later.

OWI conviction; (2) he was operating a motor vehicle on Lone Elm Road, based on the fact that a vehicle crashed and he had injuries consistent with him operating the vehicle; (3) Schultz's vehicle was observed in an accident, and (4) he admitted to consuming intoxicants.[3] Halfmann further swore that she observed Schultz's speech to be incoherent, slurred and slow; his attitude to be confused; his balance to be falling, unsteady, swaying and in need of support; and his eyes to be bloodshot and glassy, all consistent with impairment by the use of intoxicants or drugs. Halfmann also smelled the odor of intoxicants.[4] Halfmann conducted field sobriety tests on Schultz and observed six out of six "possible indicators of impairment" through administration of the Horizontal Gaze Nystagmus test, six out of eight possible indicators during the walk-and-turn test, and three out of four possible indicators during the one-leg-stand test.

¶4 Judge English issued the search warrant, based on "all of the observations [Halfmann] testified to." Schultz's blood was drawn, and Schultz was subsequently charged with operating a motor vehicle with a prohibited blood alcohol concentration, second offense.

¶5 Schultz moved to suppress the results of the blood test on the basis that the information provided to Judge English in support of the warrant failed to establish probable cause or, alternatively, the officer omitted facts that, if included,

[3] While the affidavit also includes the fact that Schultz admitted he "drank at a gas station bar," Halfmann did not relay that information to the warrant-issuing judge.

[4] The affidavit itself did not indicate that Halfmann observed an odor of intoxicants. However, in her telephonic testimony to Judge English, Halfmann included as a fact that an odor of intoxicants was detected. In finding probable cause, Judge English found as facts "all of the observations that the deputy testified to." The odor of intoxicants was one of the observations to which Halfmann testified, and Schultz does not challenge the warrant-issuing judge's finding of this fact.

would have negated probable cause. Following a hearing on the motion, the circuit court concluded that the information provided to Judge English sufficiently supported his probable cause determination, and even if Halfmann had informed Judge English of the information Schultz claimed was wrongly omitted, this additional information would only have strengthened the probable cause determination. The court denied Schultz's suppression motion, and Schultz subsequently pled to the charge and was sentenced. He appeals.

Discussion

¶6 "A search warrant may issue only on a finding of probable cause by a neutral and detached magistrate." ***State v. Higginbotham***, 162 Wis. 2d 978, 989, 471 N.W.2d 24 (1991). Probable cause is determined by considering the totality of the circumstances. ***State v. Ward***, 2000 WI 3, ¶21, 231 Wis. 2d 723, 604 N.W.2d 517. For there to be probable cause, "the warrant-issuing judge must be 'apprised of sufficient facts to excite an honest belief in a reasonable mind that the objects sought are linked with the commission of a crime, and that the objects sought will be found in the place to be searched.'" ***Higginbotham***, 162 Wis. 2d at 989 (citations omitted).

¶7 On review we must determine whether the warrant-issuing judge "had a substantial basis for concluding that the probable cause existed." ***Id.*** In determining whether a warrant is supported by probable cause, we look only to the record that was before the warrant-issuing judge. ***State v. Kerr***, 181 Wis. 2d 372, 378, 511 N.W.2d 586 (1994). The warrant-issuing judge's determination of probable cause is "accord[ed] great deference"; a deference which a defendant may overcome only if he or she "establishes that the facts are clearly insufficient to support a finding of probable cause." ***State v. Romero***, 2009 WI 32, ¶18, 317 Wis. 2d 12, 765 N.W.2d 756 (quoting ***Kerr***, 181 Wis. 2d at 380). This deferential

standard of review "further[s] the Fourth Amendment's strong preference for searches conducted pursuant to a warrant." ***Id.*** (citation omitted). Our supreme court has "rejected taking an overly technical and formalistic approach to" the information presented to a warrant-issuing judge in an application for a search warrant, ***Ward***, 231 Wis. 2d 723, ¶32, and has established the policy "that the resolution of doubtful or marginal cases regarding a warrant-issuing judge's determination of probable cause should be largely determined by the strong preference that law enforcement officers conduct their searches pursuant to a warrant," ***Higginbotham***, 162 Wis. 2d at 990.

¶8 In the present case, the circuit court correctly determined at the suppression hearing that, based on the information presented, Judge English "had a substantial basis for concluding that the probable cause existed." After being sworn in by Judge English, Halfmann read from the standard form affidavit she had filled out. As relevant here, in the moments before 4:58 a.m. on January 19, 2016,[5] Halfmann informed Judge English that based upon their own observations during their investigation, she and lieutenant Borgen learned: Schultz "did drive or operate a motor vehicle" "[o]n the 19th day of January, 2016, at or about 2:00 a.m.," which vehicle was in an accident; they knew that Schultz was driving or operating the vehicle because "the person's [Schultz's] vehicle was observed in [the] accident" and Schultz's injuries were consistent with "him operating the vehicle"; and Schultz "[a]dmitted to consuming intoxicant[s]." Halfmann then informed Judge English of significant, detailed facts observed during contact with Schultz, including Schultz's poor performance on field

[5] The transcript indicates that Halfmann provided sworn testimony to Judge English in support of the search warrant in the moments before the judge directed Halfmann to sign the warrant, on both Halfmann's behalf and Judge English's behalf, "us[ing] January 19th at 4:58 a.m. as the time."

sobriety tests, that indicated Schultz was intoxicated.[6] Based upon the totality of the circumstances presented by Halfmann's testimony to Judge English, Judge English had a substantial basis for concluding Schultz had been operating a motor vehicle while intoxicated and/or with a prohibited alcohol concentration, justifying his issuance of the search warrant authorizing a draw and testing of Schultz's blood.

¶9 In addition to asserting that the information provided to Judge English did not demonstrate probable cause, at the suppression hearing Schultz also presented the circuit court with numerous "facts" that he claimed would have led Judge English to conclude there was no probable cause for issuing the warrant had they been presented to him. He claims Halfmann omitted these "facts" intentionally or with "reckless disregard for the truth." The "facts" are:

> 1. Lt. Borgen wrote no report by which he records his observations.
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> 2. Deputy Halfmann in her report does not relate any injury observations by Lt. Borgen.
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> 3. Deputy Halfmann reports that she was advised by dispatch that Lt. Borgen had arrived on the scene and he had requested a tow and the driver was not under the overturned vehicle.
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> 4. There is nothing in Deputy Halfmann's report suggesting that Mr. Schultz was found at the scene of the accident.
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> [5]. Deputy Halfmann reports that Mr. Schultz was found at his residence in bed.
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> [6]. The only injuries Deputy Halfmann reports seeing on Mr. Schultz when she first came in contact with him was an abrasion to his nose and blood in his nose.

[6] Schultz does not contest on appeal that Halfmann had probable cause to believe Schultz was intoxicated at the time Halfmann interacted with him.

[7]. Undersigned counsel has reviewed 162 photographs taken and the injury described above is a small scrape of the left side nostril which is red. (It should be noted that all photographs were taken after Mr. Schultz was arrested and conveyed to the Fond du Lac County Sheriffs Department.)

[8]. Deputy Halfmann reports that when she asked Mr. Schultz how he had gotten the "injury" to his nose that he responded that he had scratched himself.

[9]. Deputy Halfmann reports that when she asked Mr. Schultz if he had any injuries, besides the nose injury sustained in the crash that he stated he was not in a crash.

[10]. Deputy Halfmann reports that when she spoke with Mr. Schultz that he denied more than once that he was operating the vehicle.

[11]. Deputy Halfinann reports that when she had Mr. Schultz get out of his bed that she observed he had boxer shorts on and what she characterized as fresh abrasions on in [sic] lower back and blood on his boxer shorts in the upper area of the buttocks.

[12]. Undersigned has reviewed the photographs of the above and sees what appear to be very minor scratches from an unknown cause.

[13]. Deputy Halfmann does not report that she pointed out this "injury" described in paragraph 10 above to Mr. Schultz and ask him to explain the specific source or sources of that "injury."

[14]. Deputy Halfmann reports that when she told Mr. Schultz that she believed he had been operating the motor vehicle and that Mr. Schultz responded that he had gotten a ride home from another individual.

[15]. Nowhere in Deputy Halfmann's report does she describe why any injuries that she observed are consistent with Mr. Schultz being the operator of the motor vehicle.

[16]. Nowhere in Deputy Halfinann's report does she opine how any injuries she observed were sustained in or created by a motor vehicle accident.

[17]. Nowhere in Deputy Halfmann's report does she describe even stopping at the scene of the accident much less inspecting the motor vehicle at the scene of the

> accident to determine what thereat could have caused any of the above "injuries" which she observed.
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> [18]. Further, undersigned has reviewed the squad video from Deputy Halfmann's squad which shows her initiating her response to the scene of the accident but not stopping anywhere until she arrived at a location which undersigned infers was the location at which she found Mr. Schultz because after stopping thereat, exiting her squad, looking in an open shed or barn door to the right she crosses the camera view right to left and is off scene until Mr. Schultz is seen being led, handcuffed, by Deputy Halfmann and another Deputy from the left of the camera angle in front of the squad to the right, passenger side and, apparent by sound, being put into the squad.
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> [19]. In fact, nowhere in Deputy Halfmann's report does she relate that she inspected the motor vehicle involved in the accident before her arrest of Mr. Schultz.
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> [20]. The squad video does not show Deputy Halfmann returning to any accident scene to inspect the vehicle before applying for the search warrant. In fact, she and her squad remained in the apparent driveway where her squad is after Mr. Schultz was led to the squad as described in 17 above and until she applied for the search warrant.
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> [21]. Deputy Halfmann's report and the squad video reflect that she read the Informing the Accused form to Mr. Lewis[7] in the squad while still at the location described in 17 above, received a "no," telephonically applied for a search warrant, went to the hospital and then to the Sheriff's Department where Mr. Lewis informs undersigned that all of the photographs were taken.

¶10 Halfmann's report was not presented to the circuit court at the suppression hearing, so the court was left to make its determination based upon Schultz's representations in his motion. The court considered these additional "facts" and determined that had they been presented to Judge English at the time

[7] We assume the reference to "Mr. Lewis" is an error and that Schultz is really referring to himself.

Halfmann applied for the warrant, the totality of these facts would have made the probable cause finding stronger, not weaker. We agree.

¶11 The additional facts from Halfmann's report, as represented by Schultz, indicate that the vehicle had been "overturned" in the accident; however, Schultz was not actually found at the scene, but was instead "found at his residence in bed." The report indicates that Halfmann observed an abrasion to Schultz's nose and blood "in" his nose. When Halfmann asked Schultz how he injured his nose, Schultz responded that he "had scratched himself." "[M]ore than once" Schultz denied operating the vehicle, and when Halfmann asked Schultz if he sustained any other injuries in the crash, Schultz "stated he was not in a crash." According to Schultz, Halfmann reported that when she had Schultz get out of bed, she observed fresh abrasions on his lower back "and blood on his boxer shorts in the upper area of the buttocks."[8] Halfmann told Schultz "that she believed he had been operating the motor vehicle" and "Schultz responded that he had gotten a ride home from another individual." There is no indication either in the testimony presented by Halfmann to Judge English or in the "facts" presented by Schultz in his suppression motion as to where Schultz would have been indicating he received a ride home *from* other than from the crash site.[9]

[8] In Schultz's suppression motion, Schultz's counsel indicates he personally reviewed photographs of the injuries to Schultz's nose and lower back, and counsel represents that the injury to Schultz's nose "is a small scrape of the left side nostril which is red" and the injury to Schultz's back "appear[s] to be very minor scratches from an unknown cause." At no time during the suppression hearing were the photographs themselves presented to the circuit court. Additionally, the particular characterization of the injuries by Schultz's counsel was not information available to Halfmann at the time she applied for the search warrant and thus was not information that she could have intentionally or recklessly kept from Judge English.

[9] As previously indicated, in Halfmann's affidavit, she indicated Schultz admitted that he "drank at gas station bar." When she read the affidavit to Judge English, however, Halfmann did not include this "gas station bar" information, and thus Judge English could not have considered this reference as part of his probable cause determination.

¶12 Schultz's motion represents that Halfmann's report indicates she never stopped to directly inspect the rolled-over vehicle before heading to Schultz's residence and locating him there; however, when Halfmann found Schultz intoxicated in bed, he had blood in his nose, "fresh abrasions" to his lower back, and blood on his boxer shorts in the area of his lower back. Although Schultz denied having been in a crash, in light of the totality of the circumstances, the fact that Schultz was found in bed in this condition would have suggested otherwise to Judge English. And as the circuit court noted at the suppression hearing, Schultz's denials as to having been in the crash at all, which would have seemed contrary to his physical appearance, would have indicated Schultz was conscious of his guilt and therefore strongly suggested Schultz was driving the vehicle himself. This is so especially due to the fact there was no indication anyone else might have been in the vehicle at the time of the crash. Had Halfmann represented to Judge English that Schultz denied having been in a crash or operating the vehicle, Judge English likely would have viewed such denials similarly to how the circuit court viewed them at the motion hearing, as being "self-serving." *See* ***State v. Nieves***, 2007 WI App 189, ¶14, 304 Wis. 2d 182, 738 N.W.2d 125 (concluding that one "is not required to draw a reasonable inference that favors innocence when there also is a reasonable inference that favors probable cause").

¶13 It is Schultz's burden on appeal to convince us the circuit court erred in denying his motion to suppress. ***Gaethke v. Pozder***, 2017 WI App 38, ¶36, 376 Wis. 2d 448, 899 N.W.2d 381 ("on appeal 'it is the burden of the appellant to demonstrate that the [circuit] court erred'" (citation omitted)). Schultz has not met that burden.

By the Court.—Judgment affirmed.

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