COURT OF APPEALS
DECISION
DATED AND FILED

August 21, 2001

Cornelia G. Clark
Clerk of Court of Appeals

Nos. 00-2900 & 01-0319-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEVEN W. BRYCKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and order of the circuit court for Milwaukee County: CARL ASHLEY, Judge. *Affirmed.*

¶1 FINE, J. Steven W. Brycki appeals from a judgment entered on a jury verdict convicting him of driving with a prohibited blood-alcohol concentration, *see* WIS. STAT. § 346.63(1)(b), and from the trial court's order revoking his privilege to drive an automobile for two years as a consequence of Brycki's refusal to submit to a blood-alcohol test of his breath, *see* WIS. STAT. § 343.305. He raises the following claims of trial-court error: 1) that the officer

who stopped Brycki while Brycki was driving did so unlawfully, and thus the trial court should have dismissed the charges against him; 2) that the results of the tests done on Brycki's blood should have been excluded because the State allegedly did not fully comply with Brycki's right to discovery; 3) that the trial court should not have received into evidence the results of the tests done on Brycki's blood because the State did not establish that the person who drew Brycki's blood was authorized to do so; and 4) that the trial court should not have received into evidence the results of the tests done on Brycki's blood because there was an insufficient chain of custody for the blood. We affirm.

I.

¶2 Brycki was driving a silver 1975 Oldsmobile shortly after 1:30 a.m. when a West Allis police officer stopped him. The officer testified that he was told that his department had received a call from an off-duty police officer that an older model, silver Oldsmobile was being driven recklessly and was squealing its tires. Shortly after receiving the complaint, the officer saw a car that matched the description. When he first saw the car, it was on South 64th Street on West Lincoln Avenue. The car then went northbound on South 64th Street, "cut through an east-west alley" where it "chirped" its tires but did not come to a complete stop. The car did, however, stop at a stop sign, and then cross Lincoln Avenue when it pulled over.

¶3 The police officer testified twice: once at a suppression hearing before the trial court that was also held to determine whether Brycki unlawfully refused to submit to a breath test; and once at Brycki's jury trial on the drunk-driving charges. Brycki erroneously argues on appeal that we may not consider the officer's testimony at the trial to determine whether the trial court properly

ruled that the officer lawfully stopped him. In assessing whether to affirm or reverse a trial court's suppression-of-evidence decision, however, "we are not limited to the facts as presented at the suppression hearing and may examine pertinent trial evidence as well." ***State v. Truax***, 151 Wis. 2d 354, 360, 444 N.W.2d 432, 435 (Ct. App. 1989).

¶4 At the suppression hearing, the officer testified that when he "saw the [Oldsmobile] started [*sic*] to pull over" he "activated [his] squad car -- marked squad car lights, and when [the Oldsmobile] was pulling over, both the passenger front and rear tire came up on the curb." At the trial, the officer testified:

> The [Oldsmobile] pulled over like it was going to park. As it was pulling over, what happened was the passenger's side tires, the front and rear tires went up over the curb. At that point I activated my squad car lights--red and blues--and the defendant and his friend exited the vehicle.

The officer told Brycki and his passenger to get back into the car. He then gave Brycki field sobriety tests, and, as a result of those tests, arrested him for drunk driving.

¶5 The officer took Brycki to West Allis Memorial Hospital where Brycki voluntarily submitted to having his blood drawn. He refused, however, to submit to a test of his breath. The tests on his blood revealed a blood-alcohol concentration of .206 grams per 100 milliliters of blood. Although, as noted, the jury convicted Brycki of driving with a prohibited blood-alcohol concentration, it also found him not guilty of drunk driving. We discuss in turn Brycki's claims of trial-court error.

II.

1. The Stop.

¶6 Law enforcement officers may stop a person to investigate when they reasonably suspect, considering the totality of the circumstances, that the person is or was involved in some type of unlawful activity. ***Terry v. Ohio***, 392 U.S. 1, 21–22 (1968). "Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause." ***Alabama v. White***, 496 U.S. 325, 330 (1990). *See also* ***State v. Rutzinski***, 2001 WI 22, ¶14, 241 Wis. 2d 729, 736–737, 623 N.W.2d 516, 520–521.

¶7 Although we accept the trial court's findings of fact unless they are "clearly erroneous," WIS. STAT. RULE 805.17(2), (made applicable to criminal proceedings by WIS. STAT. § 972.11(1)), whether an investigatory stop was legally justified is a question of law that we decide *de novo*. ***State v. Fields***, 2000 WI App 218, ¶ 9, 239 Wis. 2d 38, 42, 619 N.W.2d 279, 282.

¶8 Brycki claims that the officer did not have the requisite reasonable suspicion because the officer testified at the suppression hearing he saw Brycki drive up on the curb *after*, not before, he turned on his flashing lights. Thus, Brycki argues that his climbing the curb cannot be considered in assessing whether the stop was lawful. He contends that the officer's information was, up until that point, ambiguous at best. We disagree.

¶9 The officer had a report from a fellow police officer that the driver of an older model silver Oldsmobile had been driving recklessly and maneuvering his car so the tires squealed. On the scale of informant-reliability analyzed by ***Rutzinski***, 2001 WI 22 at ¶¶ 18–26, a report by an off-duty officer certainly is on the most reliable end of the spectrum. Further, it is unlawful in West Allis for a driver to "make unnecessary and annoying noise: (a) With a motor vehicle by squealing tires or by excessive acceleration of the vehicle or engine while on any street or alley." WEST ALLIS, WIS., REV. MUN. CODE Ch. VI, § 6.03(6)(a) (1998). Additionally, it is lawful in Wisconsin to arrest someone for violating a municipal ordinance. WIS. STAT. § 800.02(6) ("A person may be arrested without a warrant for the violation of a municipal ordinance if the arresting officer has reasonable grounds to believe that the person is violating or has violated the ordinance."); ***City of Milwaukee v. Nelson***, 149 Wis. 2d 434, 454–461, 439 N.W.2d 562, 569–572 (1989), *cert. denied*, 493 U.S. 858 (1989); *cf.* ***Atwater v. City of Lago Vista***, 121 S. Ct. 1536, 1542–1557 (2001) (Fourth Amendment not violated by warrantless arrest for crime that is punishable only by a fine).

¶10 When the officer stopped Brycki, the officer knew that the reckless driving and tire squealing was considered sufficiently serious by the off-duty officer for him to report it. Thus, on that report alone, the officer who stopped Brycki had reason to do so — especially at approximately 1:30 in the morning — because it was reasonable for him to believe that the early model, silver Oldsmobile, hardly a common sight either in the early morning or anytime, was the car reported by the off-duty officer. But there was more: the officer's suspicions that he had the right car were confirmed when he saw and heard Brycki driving in an erratic way, "chirping" his tires while driving through an alley. On

our *de novo* review, the trial court did not err in finding that the officer lawfully stopped Brycki.[1]

2. Discovery.

¶11 Brycki claims that the person who analyzed his blood for its alcohol-concentration level did not produce everything Brycki asked for in his demand for pre-trial discovery. Specifically, he claims that his generalized demand required the production of what was described in the transcript of his trial lawyer's cross-examination of the analyst as a strip showing the blood analysis of samples from "many" persons, including Brycki, that were run, together with a starting and ending calibration. This material was provided to him during his trial lawyer's cross-examination of the analyst.

¶12 Criminal-case discovery in Wisconsin is limited to that granted by the pertinent statute, WIS. STAT. § 971.23, ***State v. Miller***, 35 Wis. 2d 454, 474, 478, 151 N.W.2d 157, 166, 169 (1967), except where the disclosure of exculpatory evidence is required, ***Britton v. State***, 44 Wis. 2d 109, 117–118, 170 N.W.2d 785, 789–790 (1969). A generalized demand for "exculpatory evidence," which is all Brycki made in this case, is the same as "no" demand, and a defendant is denied due process for non-disclosure in the face of such a general demand "only if the

[1] Although it does not appear that the trial court relied on the West Allis ordinance in upholding the lawfulness of the officer's stop of Brycki, and the State has not cited the ordinance to us, we may take judicial notice of the ordinance, WIS. STAT. RULE 902.01(2)(b), *cf.* ***Sengstock v. San Carlos Apache Tribe***, 165 Wis. 2d 86, 95, 477 N.W.2d 312, 314 (Ct. App. 1991) (appellate court may take judicial notice of tribal law), and "[w]e may sustain the trial court's holding on a theory not presented to it, and it is inconsequential whether we do so *sua sponte* or at the urging of a respondent." ***State v. Truax***, 151 Wis. 2d 354, 359, 444 N.W.2d 432, 435 (Ct. App. 1989).

undisclosed evidence creates a reasonable doubt that did not otherwise exist." ***State v. Ruiz***, 118 Wis. 2d 177, 189, 347 N.W.2d 352, 358 (1984).

¶13 Before the trial, Brycki received before the trial the results and summary of the analyst's work in connection with this case. This was all the discovery to which he was entitled under WIS. STAT. § 971.23(1)(e). As noted, he now has the material that he contends should have been given to him before trial because, in his view, it was potentially exculpatory. He has not, however, shown that it *is* exculpatory; indeed, he does not even discuss in his brief on appeal the material he claims he needed so desperately at trial, beyond the merest of generalized description. *Cf.* ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343, 349–350 (Ct. App. 1994) (A defendant who alleges that his lawyer was ineffective because the lawyer did not do something, must show with specificity what the lawyer would have done and how that would have either changed things or, at the very least, how that made the result either unreliable or fundamentally unfair.). He has failed utterly to show that the evidence was important to his defense. The trial court did not err in rejecting Brycki's contentions that he was unlawfully denied discovery.

3. Person Who Drew Brycki's Blood.

¶14 Brycki claims that there was insufficient evidence to prove that the person who took his blood was authorized to do so under WIS. STAT. § 343.305(5)(b), which provides that blood for a blood-alcohol-concentration test "may be withdrawn from the person arrested" for drunk driving "only by a physician, registered nurse, medical technologist, physician assistant or person acting under the direction of a physician." He argues that the results of the blood test should thus be excluded because WIS. STAT. § 343.305(5)(d) provides, as

material here, that "the results of a test administered *in accordance with this section* are admissible on the issue of whether the person was under the influence of an intoxicant ... or any issue relating to the person's alcohol concentration." (Emphasis added.)

¶15 The evidence adduced at the trial, established through the testimony of the arresting officer, that the person who withdrew Brycki's blood at West Allis Memorial Hospital:

- was phlebotomist — someone who withdraws blood;
- was named Nellie Jenkins;
- was someone whom the officer had seen before;
- had an "ID card with her name and picture on it";
- used a "blood kit" to withdraw Brycki's blood into two vials;
- withdrew the blood without incident.

The reasonable inferences from the officer's testimony are: 1) Jenkins worked at the hospital; 2) it was her job to withdraw blood; and 3) she was under the general supervision of the hospital in doing her job.

¶16 Moreover, both the trial court and we can take judicial notice that: 1) West Allis Memorial Hospital is a reputable, well-regarded hospital in our community; and 2) hospital employees with medical responsibilities, such as patient care and the invasive taking of bodily fluids and tissues are under the general direction of at least one physician. *See* WIS. STAT. RULE 902.01(2)(a) (courts may take judicial notice of any fact "not subject to reasonable dispute"

because it is "generally known within the territorial jurisdiction of the trial court"); RULE 902.01(6) ("Judicial notice may be taken at any stage of the proceeding."). Although the extent of the general supervision was not proven by testimony here, as it was in ***State v. Penzkofer***, 184 Wis. 2d 262, 516 N.W.2d 774 (Ct. App. 1994), ***Penzkofer*** teaches that the "direction," as that term is used in WIS. STAT. § 343.305(5)(b), need not be over-the-shoulder supervision, ***id.***, 184 Wis. 2d at 265–266, 516 N.W.2d at 775–776. The trial court did not erroneously exercise its discretion when it overruled Brycki's objection to the admission of the test results. *See* ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498, 501 (1983) (trial court's decision to admit or exclude evidence is a discretionary determination that will not be upset on appeal if it has "a reasonable basis" and was made "'in accordance with accepted legal standards and in accordance with the facts of record.'") (citation omitted).

4. Chain of Custody.

¶17 Brycki argues that there was an insufficient chain of custody established by the evidence to prove that the blood that was taken from him by the West Allis Memorial Hospital phlebotomist was the same blood that was analyzed and testified to. We disagree.

¶18 Under WIS. STAT. RULE 909.01, a proponent of evidence establishes its authentication of identification if there is "evidence sufficient to support a finding that the matter in question is what its proponent claims." Stated another way, all that need be shown is that it is "improbable that the original item has been exchanged, contaminated or tampered with." ***B.A.C. v. T.L.G.***, 135 Wis. 2d 280, 290, 400 N.W.2d 48, 53 (Ct. App. 1986). There was such a showing here:

- The West Allis Memorial Hospital phlebotomist withdrew Brycki's blood into two vials, placed Brycki's name on the vials, put them in the blood-kit container, and sealed the container—all in the arresting officer's presence;

- The phlebotomist gave the sealed package to the arresting officer, who placed it in an evidence refrigerator at his police station;

- Brycki's blood package was sent by another officer to the analyst at the Wisconsin State Laboratory of Hygiene, and the arresting officer received the results after the blood was analyzed;

- The analyst testified that she received and opened Brycki's blood package, and did the analysis the following day;

- The analyst also testified that the package was properly sealed when she received it.

The trial court ruled that the State had satisfied its chain-of-custody burden. That decision is well founded in the facts and the law; the trial court did not erroneously exercise its discretion.

By the Court.—Judgment and order affirmed.[2]

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

[2] The State's brief has all its citations to authority in footnotes. The court acknowledges that some legal writing "experts" have recently suggested this as a "new" and more efficient way of legal writing. We disagree — putting citations to authority in footnotes makes reading extremely difficult because the eyes are constantly jumping from text to footnotes to text. In-text citations, on the other hand, are easy to skip over if close reference is not needed (the standard of review of a trial court's receipt or exclusion of evidence, for example). Citations in footnotes, like acronyms, hinder, rather than advance, effective advocacy.