COURT OF APPEALS
DECISION
DATED AND FILED

August 27, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0956-CR **Cir. Ct. No. 01-CT-133**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEVEN W. ANDERSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for St. Croix County: EDWARD F. VLACK, Judge. *Affirmed.*

¶1 HOOVER, P.J.[1] Steven Anderson appeals a circuit court order denying a motion to suppress evidence and a subsequent judgment convicting him of operating a motor vehicle while intoxicated, contrary to WIS. STAT.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

§ 346.63(1)(a) and causing injury by operating a motor vehicle while intoxicated, contrary to WIS. STAT. § 346.63(2). Anderson contends that the circuit court erred when it found the investigating officer had probable cause to arrest him. This court concludes that the officer had probable cause and therefore affirms the order denying the suppression motion. Because the lack of probable cause is the basis for challenging the conviction, the conviction is also affirmed.

Background

¶2 On May 19, 2001, officer Dan Van Someren of the Woodville Police Department was dispatched to a two-motorcycle accident on U.S. Highway 12. Upon arrival, Van Someren saw marks on the roadway leading to Anderson and his motorcycle in the ditch. Van Someren detected a strong odor of intoxicants on Anderson's breath. He also noted bloodshot eyes and slurred speech. A medical team was dispatched to the scene, arriving promptly and assessing Anderson's apparent head injuries, but preventing Van Someren from conducting field sobriety tests or further investigation.

¶3 After the medical team arrived, Van Someren questioned Richard Bonte, the injured operator of the second motorcycle. Bonte told Van Someren that he and Anderson had just been at the Hilltop Bar. He also told Van Someren that he had been driving about forty-five miles per hour when Anderson suddenly accelerated and collided with him from behind.

¶4 Van Someren then went to Baldwin Hospital where Anderson was being treated. Van Someren again noticed Anderson's bloodshot eyes, slurred speech and odor of alcohol, and arrested him. At trial, Anderson moved to suppress the results of blood tests taken following the arrest, arguing that Van Someren lacked probable cause. The trial court denied the motion. Anderson now

makes the same argument on appeal—the blood test results should have been suppressed because Van Someren lacked probable cause.

Standard of Review

¶5 The question of probable cause to arrest is based in the Fourth Amendment to the United States Constitution, and parallels in article I, section 11 of the Wisconsin Constitution. ***State v. Paszek***, 50 Wis. 2d 619, 624, 184 N.W.2d 836 (1971). Thus, we are faced with a question of constitutional fact, which we review using a two-part standard. ***State v. Matejka***, 2001 WI 5, ¶16, 241 Wis. 2d 52, 621 N.W.2d 891. The trial court's findings of evidentiary or historical fact will be upheld unless they are clearly erroneous, but the application of those facts to the law will be reviewed de novo. ***State v. Williams,*** 2002 WI 94, ¶17, __ Wis. 2d __, 646 N.W.2d 834.

¶6 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.

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

Analysis

¶7 Anderson claims, "[t]he court of appeals and the supreme court have attempted to establish parameters regarding the necessary indicia of intoxication required to constitute probable cause." This is incorrect. Probable cause is not

easily reducible to a stringent, mechanical definition. ***State v. Nordness***, 128 Wis. 2d 15, 35, 381 N.W.2d 300 (1986). The information that constitutes probable cause is measured by the facts of each particular case. ***State v. Mitchell***, 167 Wis. 2d 672, 682, 482 N.W.2d 364 (1992).

¶8 Nonetheless, Anderson relies on ***State v. Swanson***, 164 Wis. 2d 437, 453, n.6, 475 N.W.2d 148 (1991), and argues that his case is similar.[2] In the footnote to ***Swanson***, the court held that unexplained erratic driving, odor of intoxicants and the fact that the accident coincided with "closing time" for the bars were insufficient to constitute probable cause for an arrest. Not only could the erratic driving be given an innocent explanation, but absent a field sobriety test the court found the facts inadequate.

¶9 Anderson argues that his accident could have been caused by any number of things, such as mechanical failure or environmental conditions, but Van Someren never investigated any of these possibilities and should not rely on the fact of the crash. The mere fact, however, that an innocent explanation of the driver's conduct—that is, mechanical failure—may be imagined is not enough to defeat probable cause. *See* 1 WAYNE R. LAFAVE, SEARCH & SEIZURE § 3.2(e), at 483-84 (1978). In a probable cause determination, the relevant inquiry is not whether the particular conduct is "innocent" or "guilty." ***United States v. Sokolow***, 490 U.S. 1, 10 (1989). Here, the facts did not include just the motorcycle accident, but a strong odor of alcohol emanating from Anderson,

[2] We note that the validity of the stop itself is not questioned. While it was one ground in the motion to suppress and the State addresses the issue in its brief, Anderson does not raise it here. An issue raised in the trial court but not briefed or argued before us is deemed abandoned. ***Reiman Assocs., Inc. v. R/A Adver., Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981).

bloodshot eyes, slurred speech, testimony that Anderson had just been at a bar drinking and testimony about how the accident occurred. Taken together, these factors are more than sufficient to constitute probable cause.[3]

¶10 Anderson additionally contends that under ***Swanson***, Van Someren was required to conduct field sobriety tests. However, Van Someren testified that he was unable to do so because medical personnel and equipment interfered. This court has held that the ***Swanson*** footnote does not require field tests in all circumstances. ***State v. Wille***, 185 Wis. 2d 673, 684, 518 N.W.2d 325 (Ct. App. 1994). Under the undisputed facts in this case especially, it would have been nearly impossible for Van Someren to conduct any tests.[4]

¶11 Anderson points out that Van Someren's observations about his speech and eyes were not included in the written report. This is immaterial—the officer testified under oath that he had observed such things. It is the trial court's responsibility to weigh the credibility of witnesses and evidence, not this court's. WIS. STAT. § 805.17(2). The trial court clearly accepted Van Someren's testimony at the suppression hearing as supplementary to the written report.

[3] Anderson also argues that his bloodshot eyes and slurred speech could have been caused by the head injuries. This, too, falls under the "innocent explanation" rule. Additionally, Anderson argues that because Van Someren was not a physician and could not rule out the possibility that the head injuries were causing these indicia, the officer should not have relied on them. We think this proposition works the other way—because Van Someren could not conclude that the head injuries caused the indicia, he should have continued to treat the indicia as suspect absent information to the contrary. We cannot expect police officers to be trained physicians.

[4] Anderson argues that ***State v. Wille***, 185 Wis. 2d 673, 518 N.W.2d 325 (Ct. App. 1994), conflicts with ***State v. Swanson***, 164 Wis. 2d 437, 475 N.W.2d 148 (1991), and that we are obligated to apply the supreme court case, not ours. However, this is true only when there is a conflict between our holding and the supreme court's. ***Wille*** limits ***Swanson*** to its facts, but does not otherwise contradict it. ***Wille***, 185 Wis. 2d at 684. Our application of ***Wille*** is therefore proper.

Because there is nothing in the record suggesting his testimony was incredible, this court will not upset the trial court's determination. ***Williams***, 2002 WI 94 at ¶17.

¶12 Anderson also suggests Van Someren should not have relied on Bonte's statements about the circumstances of the accident because Bonte had an interest in downplaying any involvement he may have had in causing the accident. However, "[a] *citizen who* purports to be a victim … *is a reliable informant even though this reliability has not theretofore been proved or tested* …." ***State v. Welsh***, 108 Wis. 2d 319, 331, 321 N.W.2d 245 (1982). "The rationale underlying this principle is that a person, as the observer of criminal activity, acts openly in aid of law enforcement when he reports the crime to the police." ***Id.*** (citation omitted).[5]

Conclusion

¶13 Probable cause is not reducible to a single test or list of factors, but instead relies on the totality of circumstances. In this case, Van Someren knew there had been a motorcycle crash; he observed the bloodshot eyes, slurred speech and alcoholic odor of Anderson; he had a statement that Anderson had just been at a bar; and he had a statement that Anderson suddenly accelerated and rear-ended Bonte. Taken as a whole, we are satisfied Van Someren had probable cause to arrest Anderson. The order denying the motion to suppress and subsequent conviction are affirmed.

[5] This does not necessarily mean that the statements will overcome reasonable doubt at trial, but it makes it reasonable for an officer at the scene of an accident or crime to rely on witness statements to form probable cause.

By the Court.—Judgment and order affirmed.

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