COURT OF APPEALS DECISION DATED AND FILED

March 31, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 04-1618-CR **Cir. Ct. No. 03CT000094**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT

V.

DONALD J. MCGUIRE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Crawford County: MICHAEL KIRCHMAN, Judge. *Affirmed.*

¶1 DYKMAN, J.[1] Donald McGuire appeals from a judgment of conviction for operating while intoxicated (OWI)—second offense. McGuire pleaded guilty after the circuit court rejected his motions to suppress evidence gathered during a traffic stop. McGuire contends that the arresting officer lacked

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

reasonable suspicion to continue to detain him for an OWI investigation after the initial reason for the traffic stop was resolved. McGuire also argues that the officer conducted an illegal search by opening his truck's door during the stop, obtaining evidence that the trial court should have suppressed. McGuire finally asserts that the officer lacked probable cause to perform a preliminary breath test (PBT).

¶2 We hold that the facts known to the officer justified the continued detention and investigation. We agree with McGuire that the officer's opening of the door was an illegal search. However, the evidence uncovered by the search is admissible under the inevitable discovery doctrine. We conclude that the officer had probable cause to conduct the PBT, and that the conviction must be affirmed.

Background

¶3 On the night of November 5, 2003, while heading east on Highway 60 in Wauzeka, Wisconsin State Patrol Trooper Terry Armentrout saw a pickup truck approaching in the westbound lane. When the truck was about 200 feet from his squad car, its headlights switched from low to high beams. Armentrout turned his car around and activated its emergency lights. The truck turned down a side road, and pulled over after traveling a short distance. Armentrout activated an audio and video device to record the stop. The videotape of the stop is a part of the record before us and we have reviewed it.

¶4 Armentrout exited his squad car and approached the driver's side window of the truck, which was open approximately five inches, and began to speak with the driver, Donald McGuire. Throughout the conversation, McGuire did not look at Armentrout, but kept his eyes facing forward. Armentrout noticed

that McGuire's eyes and nose were red. Armentrout asked for McGuire's drivers license, which McGuire handed to him through the open window.

¶5 Armentrout returned to his squad car and ran a computer check on McGuire's license, which showed that McGuire lived on a road that intersected the highway about two miles further west. Armentrout can be heard to say on the recording that it appeared to him that the McGuire had been drinking, but that he could not smell any intoxicants because the truck's window was rolled up.

¶6 Armentrout walked back to the truck and returned McGuire's license. Armentrout then opened the truck's door, simultaneously asking McGuire to exit the vehicle. It was at this time that Armentrout first smelled intoxicants. Seeing that McGuire had a cane, Armentrout told him that he could remain in his seat as Armentrout performed a horizontal gaze nystagmus (HGN) test. Armentrout explained the test and began to perform it, before again requesting that McGuire exit the vehicle. McGuire did so, and the trooper performed the full test, detecting all six possible clues of intoxication.

¶7 Armentrout then asked McGuire to recite the alphabet and to count backward, which McGuire did successfully after some hesitation. Armentrout searched the truck, telling McGuire that he had the right to do so, finding an empty beer can that the officer did not believe had been consumed recently.[2] Next, Armentrout administered a PBT, which registered a blood alcohol concentration (BAC) of .141. Armentrout then placed McGuire under arrest for OWI. McGuire

[2] We agree with the circuit court's determination that this search was unlawful and that the beer can was therefore inadmissible; we also agree that this fact does not affect the result of the case.

later refused to submit samples of his blood or breath for additional BAC testing, resulting in the revocation of his license under WIS. STAT. § 343.305(10). The State subsequently obtained a blood sample by executing a search, which showed a BAC of .132.

¶8 McGuire filed motions to suppress all evidence Armentrout acquired after opening the door to McGuire's truck. McGuire also contended that when he refused to take the requested blood test, he was not properly informed of the consequences, as required by statute. The circuit court rejected both motions, and McGuire pleaded guilty. He now appeals.

Discussion

¶9 The Fourth Amendment protects "[t]he right of the people ... against unreasonable searches and seizures." U.S. CONST. amend. IV. In ***Terry v. Ohio***, 392 U.S. 1, 22, 88 S. Ct. 1868 (1968), the U. S. Supreme Court declared that detention need not rise to the level of a formal arrest to constitute a seizure for Fourth Amendment purposes. Brief investigatory detentions must be justified by an officer's reasonable suspicion of criminal activity. ***Id.*** at 20. Reasonable suspicion must be present at the inception of an investigatory stop, and must continue to exist throughout. ***Id.*** Since ***Terry***, courts have developed a range of standards specifying the amount and type of suspicion required for different forms of detention and investigation. Wisconsin's statutes and case law recognize multiple variations of reasonable suspicion and probable cause, several of which are relevant to this case. ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 308, 603 N.W.2d 541 (1999).

¶10 To lawfully conduct a traffic stop, an officer must have reasonable suspicion that the motorist has committed a violation. ***State v. Rutzinski***, 2001 WI

22, ¶14, 241 Wis. 2d 729, 737, 623 N.W.2d 516. If, during a traffic stop, the officer gains additional information creating a reasonable suspicion that the driver is intoxicated, the officer may administer field sobriety tests. ***State v. Colstad***, 2003 WI App 25, ¶19, 260 Wis. 2d 406, 659 N.W.2d 394. To search a vehicle during a stop, the officer must meet the higher standard of probable cause to believe that the vehicle contains contraband or evidence of a crime. ***State v. Pallone***, 2000 WI 77, ¶58, 236 Wis. 2d 162, 613 N.W.2d 568. To administer a PBT, the officer must also, by statute, have "probable cause to believe" that the operator of a vehicle is intoxicated. WIS. STAT. § 343.303. This probable cause is not, however, the same level of suspicion required to make an arrest or search a vehicle; it is an intermediate level of suspicion, greater than "reasonable suspicion" but less than some other forms of "probable cause." ***Renz***, 231 Wis. 2d at 316.

¶11 In criminal prosecutions, courts generally remedy an unreasonable search or seizure by suppressing evidence that the search or seizure recovers. ***Mapp v. Ohio***, 367 U.S. 643, 655, 81 S. Ct. 1684 (1961). There are exceptions to this rule, however; one of them is the doctrine of inevitable discovery. This doctrine permits the introduction of unlawfully gathered evidence when that evidence would inevitably have come to light by other lawful means. ***State v. Schwegler***, 170 Wis. 2d 487, 500, 490 N.W.2d 292 (Ct. App. 1992).

¶12 In determining whether Fourth Amendment violations have occurred, we give deference to the trial court's findings of fact, upholding them unless they are clearly erroneous. ***State v. Richardson***, 156 Wis. 2d 128, 137, 456 N.W.2d 830 (1990). However, whether these facts meet the constitutional and statutory standards of probable cause and reasonable suspicion are questions of law that we review de novo. ***Id.*** at 137-38.

The initial detention

¶13 McGuire does not contend that Armentrout lacked reasonable suspicion to pull him over. He instead argues that, after he explained to Armentrout that his headlights were malfunctioning, Armentrout's reasonable suspicion dissipated and he should have terminated the stop. McGuire argues that detention after this point was based only upon Armentrout's "hunch," and was therefore illegal. ***Terry***, 392 U.S. at 22 (rejecting search or seizure "based on nothing more substantial than inarticulate hunches").

¶14 While it is true that Armentrout testified that he had a "hunch" McGuire had been drinking, he also articulated specific facts that gave rise to his suspicion: McGuire's redness of eye and nose, his hesitancy to look at the trooper, his keeping the window rolled most of the way up, and his turning down a side road.[3] While each of these facts might have an innocent explanation, taken as a whole, they are sufficient to give rise to a reasonable suspicion that the defendant was intoxicated. ***State v. Waldner***, 206 Wis. 2d 51, 59, 556 N.W.2d 681 (1996) ("Police officers are not required to rule out the possibility of innocent behavior before initiating a brief stop.") (citation omitted). Armentrout's continuation of the stop to investigate further was thus not unlawful.

[3] Defendant's brief argues that redness is the normal condition of Mr. McGuire's nose. This fact is not relevant to a determination of reasonable suspicion, however, since the inquiry concerns only the information available to the officer at the time of the stop. ***Terry v. Ohio***, 392 U.S. 1, 21-22, 88 S. Ct. 1868 (1968).

The Search

¶15 McGuire next contends that by opening the door to his truck, Armentrout commenced an unlawful search. McGuire further argues that all of the evidence Armentrout obtained after opening the door was the fruit of this search and must therefore be suppressed. We agree that the opening of the door was a search, and that it was not justified by probable cause. However, we hold that the odor of intoxication that the search revealed would inevitably have been discovered; it is therefore admissible.

¶16 For the purposes of the Fourth Amendment, a search "occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." ***Soldal v. Cook County, Ill.***, 506 U.S. 56, 63, 113 S. Ct. 578 (1992) (citation omitted). An officer need not have a subjective intent to search in order for a search to occur. ***Soldal*** at 69. It is well settled that a driver has an expectation of privacy in the passenger compartment of his automobile. ***Pallone***, 236 Wis. 2d 162, ¶60. When Armentrout opened the door to McGuire's truck, he breached the passenger compartment and infringed upon McGuire's privacy. Though Armentrout may have opened the door to allow McGuire to get out or for some other reason, under ***Soldal***, it is the breach of McGuire's privacy interest and not Armentrout's motivation that is determinative.[4] We conclude that Armentrout

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[4] The State notes that an officer conducting a traffic stop does not violate the Fourth Amendment by ordering the occupants out of the stopped vehicle. ***Maryland v. Wilson***, 519 U.S. 408, 415, 117 S. Ct. 882 (1997). The State apparently means to suggest that it makes no difference whether an officer opens a vehicle's door, or orders the driver out, requiring the driver to open the door in the process. We disagree. Courts in other jurisdictions have reached differing conclusions on this issue. Some have upheld door opening based upon officer safety concerns specific to the particular case. ***State v. Matthews***, 748 A.2d 1125, 1128 (N.J. Super. Ct. App. Div. 2000); ***U.S. v. Stanfield***, 109 F.3d 976, 981-82 (4th Cir. 1997). Others have adopted a bright-line rule in favor of door opening. ***State v. Ferrise***, 269 N.W.2d 888, 890 (Minn.1978);

(continued)

commenced a search in opening McGuire's door; we must therefore examine whether that search was unreasonable.

¶17 To lawfully search an automobile during a traffic stop, an officer must have probable cause to believe that it contains contraband or evidence of a crime. ***Pallone***, 236 Wis. 2d 162, ¶¶75-77. Probable cause exists when "trustworthy facts and circumstances within the officer's personal knowledge would cause a reasonably prudent man to believe that the vehicle contains contraband" ***U.S. v. Cooper***, 949 F.2d 737 (5th Cir. 1991).

¶18 We do not believe that the facts known to Armentrout before he opened the truck's door were sufficient to create probable cause. Armentrout knew that McGuire had flashed his brights, that his eyes and nose appeared red, that he had not rolled his window all of the way down, and that he had not looked directly at Armentrout while speaking. Though this information was enough to justify a reasonable suspicion that McGuire had been drinking, there is little in these facts to support the inference that his truck held contraband or evidence of a crime. Armentrout's search was thus unlawful under the Fourth Amendment.

Smith v. State, 623 So.2d 382, 386 (Ala.Crim.App.1993). We take the view articulated by the New Jersey Superior Court of Appeals in ***State v. Woodson***, 566 A.2d 550, 552 (1989):

> There is a significant difference between ordering one out of a car and opening a car door without warning. In the former case, the occupant has an opportunity, before opening the door and leaving the car, to safeguard from public view matters as to which he has a privacy interest. Suddenly opening a car door is unconstitutionally intrusive because the police officer thereby surprises the occupant when the latter is entitled to consider his private affairs secure from outside scrutiny.

¶19 Armentrout detected the odor of intoxicants immediately upon opening the door; the odor is therefore the fruit of the search. While the exclusionary rule generally bars the evidentiary use of such improperly gathered evidence, we believe that this case falls within the inevitable discovery exception.

¶20 The inevitable discovery doctrine, first recognized by the U.S. Supreme Court in ***Nix v. Williams***, 467 U.S. 431, 443, 104 S. Ct. 2501 (1984), seeks to put the State in the *same* position they would occupy had a violation not occurred, but not a *worse* one. It strikes a balance between the deterrent function of the exclusionary rule and the social cost of suppressing probative evidence in criminal trials. ***Id.*** Because the doctrine has the potential to abrogate fundamental constitutional rights, it must be applied with restraint. ***State v. Kennedy***, 134 Wis. 2d 308, 318, 396 N.W.2d 765 (Ct. App. 1986).

¶21 The doctrine requires three elements to be shown by a preponderance of the evidence: (1) a reasonable probability that the evidence in question would have been discovered by lawful means but for the police misconduct; (2) that the leads making the discovery inevitable were possessed by the government at the time of the misconduct; and (3) that prior to the unlawful search the government also was actively pursuing some alternate line of investigation. ***Schwegler,*** 170 Wis. 2d at 500 (citation omitted).

¶22 Here, Armentrout opened the truck's door while simultaneously ordering McGuire to exit the vehicle. Had Armentrout not opened the door, McGuire would still have been required to exit the vehicle under ***Maryland v. Wilson***, 519 U.S. 408, 415, 117 S. Ct. 882 (1997). At this point Armentrout, standing near the door and preparing to conduct field sobriety tests, would have detected the odor. This is not the only possible sequence of events after

Armentrout's order; McGuire might have refused to exit the truck. It is difficult to imagine, though, that Armentrout would have been satisfied with this state of affairs; one way or another, he would very likely have extracted McGuire. Or, McGuire's refusal would have provided enough additional evidence to reach a probable cause determination. It is thus more than reasonably probable that, regardless of the search, Armentrout would have detected the odor of intoxicants.

¶23 At the time that he opened the door, Armentrout possessed several pieces of evidence pointing toward McGuire's intoxication. This information constituted the lead that made Armentrout's subsequent investigation inevitable, satisfying the second prong.

¶24 Finally, at the time he opened the door, Armentrout was pursuing an OWI investigation which included the questioning of McGuire as well as the administration of field sobriety tests. The third ***Schwegler*** prong is thus satisfied, and the odor of intoxicants was admissible against McGuire.

The PBT

¶25 McGuire finally argues that Armentrout lacked probable cause to administer the PBT. By this point in the investigation, Armentrout knew of the same facts that justified the initial OWI investigation, as well as the fact that McGuire smelled of intoxicants and had displayed all six indicators of intoxication during the HGN test.[5] It is true that McGuire completed the alphabet and counting

[5] Defendant notes that the officer's emergency lights were flashing during the test, and that under some circumstances, flashing lights can cause nystagmus. While this may be the case, in determining whether probable cause exists, a court looks to facts available to the officer and to the inferences the officer could reasonably derive. ***Terry***, 392 U.S. at 21-22. Here, the fact that Armentrout observed all six possible clues could reasonably have led Armentrout to infer that McGuire was intoxicated.

tests. However, his hesitations and evasive behavior before the tests limit the persuasive power of this fact. We conclude that the facts known to Armentrout, taken as a whole, are sufficient to meet the lower probable cause standard applicable to PBTs. ***Renz***, 231 Wis. 2d at 316.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.