STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2018AP1388-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

MICHAEL R. MCGINNIS,

Defendant-Respondent.

ON APPEAL FROM AN ORDER SUPPRESSING EVIDENCE, ENTERED IN THE EAU CLAIRE COUNTY CIRCUIT COURT, THE HONORABLE WILLIAM M. GABLER, SR., PRESIDING

REPLY BRIEF OF THE PLAINTIFF-APPELLANT

BRAD D. SCHIMEL
Attorney General of Wisconsin

TIFFANY M. WINTER
Assistant Attorney General
State Bar #1065853

Attorneys for Plaintiff-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-9487
(608) 266-9594 (Fax)
wintertm@doj.state.wi.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Page

ARGUMENT

Officer Bell had probable cause to arrest Michael McGinnis before he entered the home, thus the court could admit evidence that Bell obtained outside of the home under *New York v. Harris* and *State v. Felix*.

Probable cause is a totality of the circumstances assessment. *State v. Kutz*, 2003 WI App 205, ¶ 11, 267 Wis. 2d 531, 671 N.W.2d 660. "Police have probable cause to arrest if they have 'information which would lead a reasonable police officer to believe that the defendant probably committed a crime.'" *State v. Felix*, 2012 WI 36, ¶ 28, 339 Wis. 2d 670, 811 N.W.2d 775 (citation omitted). Police need more than a possibility or suspicion that the defendant committed an offense, but "the evidence need not reach the level of proof beyond a reasonable doubt or even that guilt is more likely than not." *State v. Secrist*, 224 Wis. 2d 201, 212, 589 N.W.2d 387 (1999). "Probable cause is a flexible, commonsense standard" that concerns "probabilities, not hard certainties." *State v. Nieves*, 2007 WI App 189, ¶ 14, 304 Wis. 2d 182, 738 N.W.2d 125.

Furthermore, a police officer is "permitted to formulate certain commonsense conclusions about human behavior." *Nieves*, 304 Wis. 2d 182, ¶ 14. And "an officer is not required to draw a reasonable inference that favors innocence when there also is a reasonable inference that favors probable cause." *Id.*

A. Officer Bell had probable cause to arrest McGinnis for a prohibited alcohol concentration violation before Bell stepped into the doorway.

Officer Bell had sufficient information and inferences drawn from that information to conclude that: (1) McGinnis

had probably recently driven his vehicle and (2) he did so with a prohibited alcohol concertation (PAC).

First, Officer Bell could rely on the common sense inference that the man he was investigating was McGinnis and that McGinnis had recently driven his yellow Jeep. The following facts support that inference:

Officer Bell learned from dispatch of a hit-and-run in the Happy Hollow Tavern parking lot at approximately 3:55 p.m. (R. 1:2; 23:4; A-App. 102, 108.) Bell learned that the suspect was driving a yellow Jeep and received the license plate number. (R. 1:2; 23:5; A-App. 102, 109.) Bell ran the license plate number and discovered that the Jeep was registered to McGinnis, who lived in an apartment complex near the Happy Hollow Tavern. (R. 1:2; 23:5–7; A-App. 102, 109–11.) Bell went directly to McGinnis's address and arrived within a minute of the dispatch. (R. 1:2; 23:7–8; A-App. 102, 111–12.) When he arrived, he saw the yellow Jeep parked outside of McGinnis's apartment and knocked on McGinnis's front door, which a man answered. (R. 1:2; 23:8–9; A-App. 102, 112–13.) There did not appear to be anyone else inside McGinnis's apartment. (R. 23:10, A-App. 114.)

Officer Bell could rely on the common sense inference that McGinnis opened the door even though he refused to provide identification. Officer Bell was at McGinnis's residence. The Jeep registered to McGinnis was parked outside. And it appeared to Bell that there was only one person in that residence. For those same reasons, Bell could reasonably infer that McGinnis had just driven the Jeep that was registered to him and that was parked outside his apartment.

Second, Officer Bell could infer from the facts available to him that McGinnis had operated the Jeep with a prohibited alcohol concentration.

Before contacting McGinnis, Officer Bell knew that he had six prior OWI convictions and was subject to a .02 PAC restriction. (R. 24:4, A-App. 150.) By all appearances, McGinnis was above a .02 when he opened his door: Bell observed that McGinnis had slow, slurred speech and glassy, bloodshot eyes. (R. 23:10–11, A-App. 114–15.) Bell knew that McGinnis's vehicle, which was parked outside his apartment, had minutes ago reportedly been involved in a hit-and-run at a nearby tavern. (R. 23:5–9, A-App. 109–13.) Thus, Bell could reasonably infer McGinnis had driven the Jeep home from the tavern while over the .02 threshold.

Thus, when Officer Bell entered McGinnis's home, he had probable cause to arrest McGinnis for a suspected PAC violation. Given that, McGinnis would only be entitled to exclusion of evidence Bell discovered in the home. *New York v. Harris*, 495 U.S. 14 (1990); *Felix*, 339 Wis. 2d 670. But there was "no compelling reason to go further and suppress" the lawfully obtained intoxication evidence and statements that Bell discovered outside of McGinnis's home. *See Felix*, 339 Wis. 2d 670, ¶ 40.

B. McGinnis's arguments to the contrary are unpersuasive.

McGinnis isolates facts and suggests that Officer Bell needed a description of McGinnis, more information about his living arrangements, and further proof that McGinnis had driven the vehicle with a PAC before he could believe that the man who answered the door was McGinnis, that he had just driven his car, and that he probably committed a PAC violation. (McGinnis's Br. 12–15.) McGinnis's arguments ignore that probable cause is flexible, and that prior case law is not helpful in determining whether probable cause exists in a particular case. Rather, in each individual case, this Court reviews the totality of the circumstances. The supreme court has repeatedly cautioned

that probable cause is a case-specific standard, "measured by the facts of the particular case." *State v. Blatterman*, 2015 WI 46, ¶ 35, 362 Wis. 2d 138, 864 N.W.2d 26.

1. Officer Bell could reasonably infer that the man who answered McGinnis's door was McGinnis and that he had recently driven his Jeep.

McGinnis asserts that Officer Bell did not have probable cause because the registration information for the Jeep was insufficient to establish that McGinnis was the man who answered the door of McGinnis's apartment and had driven the Jeep. (McGinnis's Br. 11–14.) McGinnis emphasizes that Bell did not have a description of McGinnis, and that Bell did not know whether anyone else lived with McGinnis. (McGinnis's Br. 11–14.) But that Officer Bell did not have that information does not detract from the probable cause calculus. Probable cause concerns "probabilities, not hard certainties." *Nieves*, 304 Wis. 2d 182, ¶ 14. Based on the information available to Bell, and detailed above, it was reasonable for Bell to infer that McGinnis was McGinnis and that he had probably driven his Jeep home from the Happy Hollow Tavern.

First, probable cause is not deduced from the sole fact that the Jeep was registered to McGinnis. (*See* McGinnis's Br. 12.) That was just one piece of the calculus. The other significant pieces were that the Jeep was very recently involved in a hit-and-run at the Happy Hollow Tavern, the Jeep involved in the hit-and-run was then parked right outside of McGinnis's residence, and no one else appeared to be at the residence. Additionally, the person who answered the door showed signs that he had been drinking. Someone who had been drinking, possibly intoxicated, would be more likely to hit a vehicle and take off to avoid prosecution for OWI. Viewing those facts and inferences together, the man that answered the door of McGinnis's apartment was most

likely McGinnis. If Bell had a description of McGinnis that McGinnis matched, that fact may have strengthened that inference, but its absence does not make the inference unreasonable.

Second, Officer Bell did not have to be certain that no one else was in McGinnis's apartment for that inference to be reasonable. Bell could hear music and "somebody moving inside the residence" and after McGinnis opened the door, Bell could see inside the residence and did not see anyone else. (R. 23:9–10, A-App. 113–14.) From those observations, Bell could infer that McGinnis was alone in his apartment. The question is not whether there were other reasonable inferences, only whether the inference drawn was reasonable. *Nieves*, 304 Wis. 2d 182, ¶ 14. It was.

2. Officer Bell did not need evidence that proved that McGinnis had committed a PAC violation.

McGinnis argues that Bell did not know whether he was intoxicated and exactly when the hit-and-run occurred. (McGinnis's Br. 14–15.) Neither detract from a probable cause finding.

To start, intoxication is not an element of a PAC violation and thus, not necessary to conclude that a PAC violation had probably been committed. "[T]he ordinary physical indications of intoxication are not typically present in a person with [a .02] blood alcohol content." *State v. Goss*, 2011 WI 104, ¶ 27, 338 Wis. 2d 72, 806 N.W.2d 918. Evidence of intoxication will add to a probable cause calculus, but the absence of evidence of intoxication does not detract from it. *State v. Lange,* 2009 WI 49, ¶ 37, 317 Wis. 2d 383, 766 N.W.2d 551. To that end, Officer Bell did not need to smell an odor of intoxicants in order to reasonably conclude that it was probable that McGinnis had driven his Jeep with a PAC.

Next, the precise timing of the hit-and-run and McGinnis's alcohol consumption may be issues for trial, but those things do not preclude a finding of probable cause to arrest. Here, Bell *had* evidence that McGinnis had been drinking, and also had knowledge that McGinnis's Jeep was very recently involved in a hit-and-run at a tavern. That is sufficient to conclude that it was *probable* that McGinnis had committed a PAC violation.

In all, Officer Bell had information available that was not so ambiguous as to preclude him from drawing the reasonable inference that McGinnis had probably committed a PAC violation. Bell knew that McGinnis had six prior OWI convictions. He knew that a Jeep registered to McGinnis was reportedly involved in a hit-and-run at a tavern. Bell arrived at McGinnis's known address near the tavern one minute after learning of the hit-and-run. McGinnis's yellow Jeep was parked outside of McGinnis's front door. The man that answered the door to McGinnis's apartment, which otherwise appeared to be unoccupied, had glassy eyes and slurred speech. Based on those facts, Bell could reasonably infer that the man was McGinnis and that he had committed a PAC violation. Based on that known information and those reasonable inferences, Bell had probable cause to arrest McGinnis. And with probable cause to arrest before he entered McGinnis's home, there is no basis to exclude the evidence police discovered outside of McGinnis's home.

CONCLUSION

For the above reasons, this Court should reverse, in part, the circuit court's order suppressing the evidence and remand with directions that the evidence police discovered outside of McGinnis's home is not subject to exclusion.

Dated this 19th day of December, 2018.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General of Wisconsin

TIFFANY M. WINTER
Assistant Attorney General
State Bar #1065853

Attorneys for Plaintiff-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-9487
(608) 266-9594 (Fax)
wintertm@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 1,748 words.

Dated this 19th day of December, 2018.

_____
TIFFANY M. WINTER
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 19th day of December, 2018.

_____
TIFFANY M. WINTER
Assistant Attorney General