

FILED
09-22-2023
CLERK OF WISCONSIN
COURT OF APPEALS

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
Case No. 2023AP000755

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JACOB KARL SCHINDLER,

Defendant-Appellant.

On Appeal from a Judgment of Conviction entered in Jefferson County Circuit Court, Case No. 2023TR000124, The Honorable Bennett J. Brantmeier, Presiding.

BRIEF OF PLAINTIFF-RESPONDENT

Respectfully submitted,

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STATEMENT ON PUBLICATION AND ORAL ARGUMENT

Plaintiff-Respondent (hereinafter “State”) agrees that this appeal, as a one-judge appeal, does not qualify for publication under Wis. Stat. §§ 752.31(2) and (3), 809.23(1)4. The State believes the briefs submitted in this matter fully present and meet the issues on appeal and fully develop the theories and legal authorities on each side so that oral argument would be of such marginal value that it does not justify the additional expenditure of court time or cost to the litigants.

STANDARD OF REVIEW

“Whether probable cause to arrest exists in a given case is a question of law that this court determines independently of the circuit court and court of appeals but benefiting from their analyses.” *In re Smith*, 2008 WI 23, ¶ 16, 746 N.W.2d 243, 308 Wis. 2d 65. (citing *State v. Woods*, 117 Wis.2d 701, 710, 345 N.W.2d 457 (1984) (“If the historical facts are undisputed, probable cause for an arrest is a question of law that is subject to independent review on appeal, without deference to the trial court's conclusion.”)).

ARGUMENT

I. MR. SCHINDLER’S ARREST FOR OPERATING WHILE INTOXICATED DID NOT OCCUR WHEN HE WAS HANDCUFFED. RATHER IT OCCURRED SOME TIME AFTER HE REFUSED TO PERFORM THE STANDARD FIELD SOBRIETY TESTS, AT WHICH POINT THERE WAS SUFFICIENT PROBABLE CAUSE TO ARREST HIM FOR OPERATING WHILE INTOXICATED.

A. The State Is Subject to A Lower Burden of Proof in Establishing There Was Probable Cause to Arrest at A Refusal Hearing.

At a refusal hearing, “ ‘[P]robable cause’ refers generally to that quantum of evidence that would lead a reasonable law enforcement officer to believe that the defendant was operating a motor vehicle while under the influence of an intoxicant.” *Smith*, 2008 WI 23, ¶ 15. The burden on the State in establishing probable cause at a Refusal Hearing is less than it would be at a suppression hearing. *State v. Pfaff*, 2004 WI App 31, ¶ 16, 676 N.W.2d 562, 269 Wis. 2d 786. The State “need only show that the officer’s account is plausible.” *Id.* This is different than a suppression hearing where the trial court “weighs the evidence, determines credibility and chooses between conflicting versions of the evidence.” *Id.* at ¶ 17.

B. Courts Have Found Probable Cause for An OWI Arrest Even When Law Enforcement Did Not Observe The Defendant Driving, And The Arrest Was Based on The Officer’s Personal Observations of Intoxication and The Fact That The Defendant Lost Control of The Vehicle.

In *State v. Pfaff*, the Waukesha County Sheriff’s Department received a report of an accident involving two vehicles on southbound I-43. *Id.* At ¶ 3. The officer

that arrived at the scene observed Pfaff standing on the right of the road approximately thirty feet into the ditch area. *Id.* Pfaff indicated that he was the only one in his vehicle and that he had been driving. *Id.* Pfaff also informed the officer that there was another vehicle involved. *Id.* The officer observed extensive front-end damage to Pfaff's vehicle and extensive rear-end damage to the other vehicle. *Id.* At ¶ 4. The officer, an accident reconstruction specialist, opined that the other vehicle was stopped on the right shoulder, approximately four feet off the traveled portion of the roadway, when it was struck by Pfaff's pickup truck. *Id.*

Another officer that responded to the scene observed that Pfaff's eyes were wet or "maybe glassy" and he noted an odor of intoxicant coming from Pfaff's person. *Id.* at ¶ 5. The officer was unable to conduct field sobriety testing because Pfaff was strapped on a "long-board." *Id.* The officer accompanied Pfaff to the hospital, where he issued Pfaff a citation for operating while intoxicated, read him the Implied Consent form, and requested that Pfaff submit to an evidentiary chemical test of his blood. *Id.* Pfaff refused to submit to the test. *Id.*

The Court of Appeals upheld the trial court's finding of probable cause at the Refusal Hearing and in doing so, the Court noted that the trial court applied the higher standard of probable cause required when an arrest is challenged. *Id.* at ¶¶ 21-22. In making this finding, the Court considered the basis for the trial court's decision:

Metzen's decision not to perform field sobriety testing was reasonable in light of

Pfaff's injuries. Metzen is an experienced officer and has processed many defendants for OWI. Metzen was at the scene of the accident and, at the hospital, Metzen observed Pfaff to have an odor of intoxicants on his breath and red, watery eyes. Metzen had information from Jordan that the accident took place in a distress lane off the roadway and, in his opinion, he believed Pfaff was unable to safely control his vehicle. After making these findings, Judge Kieffer stated, "[T]he Court looks at the totality of all these circumstances, and the Court believes that based upon these particular circumstances, that there did exist probable cause to believe that Mr. Pfaff was under the influence." *Id.* at ¶ 20.

In *State v. Kasian*, 207 Wis. 2d 611, 622, 558 N.W.2d 687 (Ct. App. 1996)

the Court of Appeals upheld the trial court's ruling that there was probable cause to arrest the defendant for OWI. In doing so, the Court stated:

In this case, the arresting officer came upon the scene of a one-vehicle accident. The officer observed a damaged van next to a telephone pole. The engine of the van was running and smoking. An injured man, whom the officer recognized as Kasian, was lying next to the van. The officer observed a strong odor of intoxicants about Kasian. Later, at the hospital, the officer observed that Kasian's speech was slurred. We hold that this evidence constituted probable cause to believe that Kasian had operated the vehicle while intoxicated. *Id.*

In *State v. Dunn*, 158 Wis. 2d 138, 142, 462 N.W.2d 538 (Ct. App. 1990), an officer pulled into the Eau Claire County municipal shops at 2:10 a.m. to get gas. She observed another vehicle pull into the lot and stop some twenty-five or thirty feet away. *Id.* The officer observed the vehicle door open and saw the "subject inside of it stick his head out the door either to spit something out or to look under the door". *Id.* The officer noted the engine had been turned off. *Id.* The officer filled her gas tank and then approached the vehicle where she observed Dunn slumped over in the seat, "almost laying on the seat." *Id.* at 142-43. When she made contact with Dunn, the officer detected a "very strong odor of intoxicants ... very, very powerful."

Id. at 144. The officer also observed vomit on the ground and on the car door and noted Dunn's speech was "somewhat slurred". *Id.* Dunn refused to exit the vehicle several times, using expletives, and the officer called for backup, which arrived and made an arrest for OWI and resisting an officer. *Id.*

The Court of Appeals held that there was probable cause to arrest the defendant for OWI stating:

Following the *Terry*-type inquiry, and after observing Dunn's slurred response to her inquiry, his irrational denial of the odor of intoxicants and his profane and prolonged refusal to cooperate, and taking into account all of the surrounding circumstances, Dahlke had the evidentiary probable cause to justify the formal arrest. *Id.* at 146.

C. Mr. Schindler Was Not under Arrest for Operating While Intoxicated Until after He Refused to perform the Standard Field Sobriety tests.

Unfortunately for the State, the record does not establish when exactly Deputy Eisenberg knew about Mr. Schindler's prior OWI convictions. The record does contain information, however, regarding when Deputy Eisenberg officially arrested Mr. Schindler for Operating While Intoxicated. The record shows that Mr. Schindler was placed in handcuffs due to his resistive behavior, not because he was under arrest for Operating While Intoxicated. The record further shows that his arrest for Operating While Intoxicated did not occur until much later after he had refused to perform Standard Field Sobriety tests.

At the refusal hearing, Deputy Eisenberg testified that she had to ask multiple times for Mr. Schindler to turn off the vehicle. (R. 30:7) Deputy Eisenberg had to

ask multiple times for Mr. Schindler to step out of the vehicle. (R. 30:7) Mr. Schindler's response to Deputy Eisenberg's order to step out of the vehicle was that he was a nationalist and did not answer questions. (R. 30:8) When officers opened the vehicle door, they asked him to step out again, and he grabbed for a pen. (R. 30:8) At that point, Deputy Eisenberg grabbed Mr. Schindler's right hand and pulled him from the vehicle. (R. 30:8) Mr. Schindler was told to put his hands behind his back and he refused. (R. 30:8) Deputy Eisenberg was able to get one hand in handcuffs, but Mr. Schindler would not allow Deputy Eisenberg to place the other hand behind his back. (R. 30:9)

Counsel for Mr. Schindler asked Deputy Eisenberg if she typically administers Standard Field Sobriety tests before making an arrest for OWI, and she answered yes. (R. 30:20) Deputy Eisenberg testified that had Mr. Schindler agreed to perform the Field Sobriety tests, she would have taken the handcuffs off, and that Mr. Schindler was in handcuffs because he had been uncooperative. (R. 30:28) Deputy Eisenberg testified that she told Mr. Schindler he was under arrest after he refused to do the Standard Field Sobriety tests. (R. 30:24) Deputy Eisenberg testified that Mr. Schindler was not under arrest at the time they pulled him out of his vehicle, handcuffed him and placed him in the squad. (R. 30:25) Rather, they were trying to do an investigation. (R. 30:25)

D. Deputy Eisenberg Had Probable Cause to Arrest Mr. Schindler for Operating While Intoxicated.

When Deputy Eisenberg arrived on scene, she already knew that the defendant has lost control of his vehicle considering it was located 50-70 feet down a steep ravine. (R. 30:4-5, 18) While she did not observe Mr. Schindler driving, Deputy Eisenberg did hear the vehicle engine revving, saw the tires spinning in the mud and observed that Mr. Schinder was the only person in the vehicle. (R. 30:5, 7) Section 346.63(3)(b), Wis. Stats. defines operate as “the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.”

Deputy Eisenberg testified that after Mr. Schindler was asked to step out of the vehicle, she could smell the odor of intoxicants coming from the vehicle and observed that Mr. Schinder had bloodshot and glassy eyes, and that his speech was slurred. (R. 30:7) No alcohol was found in the vehicle, (R. 30:8), so Mr. Schindler could not have become intoxicated after his vehicle ran off the road. He was resistive to the point that he had to be handcuffed and refused to perform any of the Standard Field Sobriety tests. (R. 30:7-9, 11)

CONCLUSION

Prior case law on the matter that establishes that law enforcement need not observe impaired driving or conduct field sobriety tests to arrest a defendant for Operating While Intoxicated. Further, the case law establishes that inability to

control a vehicle, resistive behavior as well as the refusal to perform Standard Field Sobriety tests can be considered in the probable cause analysis. Because of the observations of Deputy Eisenberg, Mr. Schindler's behavior as well as the lower burden of proof at a Refusal hearing, the Circuit Court did not err in finding there was probable cause to support the OWI arrest. Deputy Eisenberg knew Mr. Schindler had lost control of his vehicle and smelled the odor of alcohol on his person. She observed he had bloodshot and glassy eyes and slurred speech. Mr. Schindler was resistive to the point that he had to be actively restrained and refused to perform Standard Field Sobriety tests. Considering all these factors, this Court should deny Mr. Schindler's request to reverse the Judgment of Conviction and vacate the Refusal.

Dated this 22nd day of September, 2023 at Jefferson, Wisconsin.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §(Rule) 809.19(8)(b), (bm), and (c) for a brief. The length of the brief is 13 pages with 1,993 words.

Electronically Signed By:

Theresa A. Beck

Assistant District Attorney

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. §801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Supreme Court and Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 22nd day of September, 2023 at Jefferson, Wisconsin

Electronically Signed By:

Theresa A. Beck

Assistant District Attorney