State of Wisconsin: Circuit Court: Waukesha County:

State of Wisconsin,

Plaintiff,

v. Case No. 2008CF001397

Michael Murray,

Defendant.

Defendant's Motion to Suppress Results of Blood Test

Please take notice that on the 8th day of May, 2009, at 2:00 p.m.., or as soon thereafter as counsel may be heard, the above-named defendant will appear before that branch of the Waukesha County Circuit Court presided over by the Honorable Linda Van De Water, and will then and there move the court to suppress the results of the analysis of the defendant's , blood.

As grounds, the undersigned shows to the court as follows:

1. The police lacked a warrant to draw Murray's blood; and,

2. The police were not permitted, under the Implied Consent Law, to draw Murray's blood because there was no probable cause to believe that Murray had violated Sec. 346.63(1)(a), Stats., (operating under the influence of alcohol); and,

3. There was no reasonable suspicion to believe that an involuntary draw of Murray's blood would yield evidence of a crime. Murray was under arrest for disorderly conduct (urinating in public). Thus, the warrantless draw of Murray's blood was unreasonable under the Fourth Amendment.

Wherefore, the defendant hereby requests that the court enter an order suppressing the results of the blood test.

This motion is further based upon the attached Memorandum of Law.

Dated at Milwaukee, Wisconsin, this _____ day of _____, 2009:

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Memorandum in Support of Defendant's Motion to Suppress Results of Blood Test

Factual Background

Amy LeFeber was driving in heavy traffic when she noticed a vehicle immediately behind her that had two young men in it. Both men were dressed similarly. Not much later, LeFeber noticed that the passenger in the vehicle behind her had slumped forward like he were ill or extremely intoxicated. According to LeFeber, the other young man- the driver- appeared to be attempting to help the passenger. Moments later, the vehicle bumped LeFeber's vehicle from behind. It was a very minor collision; nonetheless, LeFeber, motioned for the other vehicle to pull into the parking lot of a nearby business. LeFeber did so but the other car did not. LeFeber was able to write down the plate number of the other vehicle, though.

LeFeber called the police and Waukesha Police officer David Platta met her in the parking lot. Platta interviewed LeFeber, and took information from her including a description of the car, the occupants of the car, and the plate number. This information was relayed to the police department. Moments later Platta learned that the other vehicle was registered to Michael Murray.

Later, police received a separate call that a bar-tender had custody of a man who, the barkeep claimed, had been urinating outside of his tavern. Officer David Daily,

a separate officer from the one who investigated the car accident with LeFeber, responded to that call and, when he got there, he found Michael Murray being held in a head-lock by the irate barkeep. Murray was turned over to Daily. According to the officer, Murray seemed very intoxicated. Murray was arrested for disorderly conduct based upon the bartender's claim that Murray had been urinating in public.

Murray was taken to the police station and placed in a cell. A short time later, Daily heard a radio dispatch that Platta was looking for a driver who had been involved in a hit-and-run incident (the incident involving LeFeber). Daily asked, via radio, to whom the suspect vehicle was registered and Platta informed Daily that it was registered to Michael Murray. Daily then told Platta where Murray's vehicle was parked.[1]

After receiving that information, Daily removed Murray from his cell and took him to Waukesha Memorial Hospital for a legal blood draw. At the hospital Daily issued Murray a citation for operating under the influence of alcohol and then demanded that Murray submit to a blood draw. Murray complied.

The following day, LeFeber was shown a photo array containing a photograph of Murray and she was unable to identify the driver of the car that had bumped her.

Argument

I. At the time the blood was drawn the police lacked probable cause to arrest Murray for a violation of Sec. 346.63(1)(a), Stats. and, therefore, the blood draw was not legal under the Implied Consent Law.

A. The implied consent law

Wisconsin's Implied Consent Law provides that any person who operates a motor vehicle on the public roadway impliedly consents to a test of his blood for the presence of alcohol. However, implied consent arises *only* where the person is under arrest for a violation of Sec. 346.63(1)(a), Stats. (operating under the influence of alcohol). Thus, if Murray was properly under arrest for operating under the influence of

1 Platta then went to Murray's vehicle and found the other young man, Ryan Harman, asleep in the passenger seat. Platta was eventually able to wake up Harman, who was extremely intoxicated. Platta asked him who was driving the car and Harman said that his friend "Mike" was driving. The police reports are unclear as to whether this information was ever conveyed to Officer Daily. It seems unlikely, though, because Daily does not mention it in his report.

alcohol at the time his blood was drawn, then his motion to suppress must be denied. On the other hand, if Murray was merely under arrest for some non-drunk-driving offense, then the Implied Consent Law is of no help to the State.

Sec. 343.305(2), Stats., provides:

> (2) **Implied consent.** Any person who is on duty time with respect to a commercial motor vehicle or drives or operates a motor vehicle upon the public highways of this state, or in those areas enumerated in s. 346.61, is deemed to have given consent to one or more tests of his or her breath, blood or urine, for the purpose of determining the presence or quantity in his or her blood or breath, of alcohol,

Additionally, 343.305(3)(a), Stats., provides:

> (a) Upon arrest of a person for violation of s. 346.63 (1), (2m) or (5) or a local ordinance in conformity therewith, or for a violation of s. 346.63 (2) or (6) or 940.25, or s. 940.09 where the offense involved the use of a vehicle, or upon arrest subsequent to a refusal under par. (ar), a law enforcement officer may request the person to provide one or more samples of his or her breath, blood or urine for the purpose specified under sub. (2).

The key question, then, is whether there was probable cause to arrest Murray for operating under the influence at the time the blood was drawn.

B. Probable cause to arrest for operating under the influence of alcohol

In, *State v. Babbitt*, 188 Wis. 2d 349, 356, 525 N.W.2d 102, 104 (Ct. App. 1994) the Court of Appeals explained that, in determining whether probable cause exists, the court must examine the totality of the circumstances facing the arresting officer at the time. The question is whether a reasonable officer, under the same circumstances, would believe that the defendant committed a crime or violated a traffic statute. *See id*. The circumstances do not have to demonstrate proof beyond a reasonable doubt or that guilt is more likely than not, but merely that a reasonable officer would conclude that the defendant probably operated a motor vehicle while under the influence of an intoxicant. *See id*. at 357, 525 N.W.2d at 104.

Facts constituting probable cause not all be within the personal knowledge of the arresting officer. *See State v. Mabra*, 61 Wis. 2d 613, 625, 213 N.W.2d 545 (1974). An officer "may rely on all the collective information in the police department" as long as "there is police-channel communication to the arresting officer" and the officer acts in good faith. *Id*. The Wisconsin Supreme Court reiterated this principal in *Mabra,* where an officer arrested the occupants of a vehicle because police dispatch stated the vehicle was involved in a crime. *Id*. at 617. The facts known to the police department were sufficient to establish probable cause for an arrest. *Id*. at 626. Because the "police force is considered as a unit," the facts constituting probable cause were imputed to the arresting officer acting in concert with the department. *Id*. at 625.

If the police department does not communicate the police data to the arresting officer, though, the collective-knowledge theory cannot apply. *State v. Friday*, 140 Wis. 2d 701, 713-14, 412 N.W.2d 540 (Ct. App. 1987), rev'd on other grounds, 147 Wis. 2d 359, 434 N.W.2d 85 (1989).

C. Even under "collective knowledge" the police lacked probable cause to believe that Murray operated his motor vehicle while under the influence of alcohol.

Firstly, it must be pointed out that LeFeber did not, and could not, identify Murray as the driver of the vehicle that had bumped her. Thus, LeFeber could not have given Officer Platta a description sufficient enough to permit Platta, or Daily, to identify Murray as the driver.

Secondly, the statement of Ryan Harman is hardly sufficient to establish probable cause to believe that Michael *Murray* was the driver of the car. Harman was extremely intoxicated and had been asleep. This, alone, makes his statement unreliable. But even if the statement is found to be reliable, it does not establish that Michael Murray is the "Mike" who Harman claimed was driving the car. Michael is a very common name. It does not follow that simply because the car was registered to Michael Murray, and that Michael Murray was found, nearby, being held in a head-lock by a bartender, that Murray is the "Mike" to whom Harman referred. Harman certainly

could have been brought to the police station to view Murray to determine whether this was the "Mike" to whom he referred. Or, even easier, the officer could have asked Harman what "Mike's" last name was.

For these reasons, there is no probable cause to believe that Michael Murray drove an automobile on a public roadway while under the influence of alcohol. As such, Murray was not properly under arrest for a violation of Sec. 346.63(1)(a), Stats., and the Implied Consent Law does not apply.

II. There was no reasonable suspicion that Murray's blood contained evidence of a crime.

The Implied Consent Law is not the only means by which blood may be drawn, though. In, *State v. Seibel*, 163 Wis. 2d 164, 471 N.W.2d 226 (1991) the Wisconsin Supreme Court held that blood may be drawn incident to a non-OWI arrest if the police reasonably suspect that the defendant's blood contains evidence of a crime. *Seibel,* 163 Wis. 2d at 166.

Here, though, Murray was under arrest for disorderly conduct. Thus, the level of alcohol in Murray's blood is not evidence of that crime. Probable cause was lacking to arrest Murray for OWI because there was no evidence that he was the driver of the car in question. Thus, the amount of alcohol in Murray's blood could not be evidence that Murray committed any alcohol-related traffic offense. Likewise, there was no evidence that Murray handled any firearm or engaged in any other conduct that is prohibited while intoxicated.

Thus, the draw of Murray's blood was unreasonable under the Fourth Amendment.

Conclusion

For these reasons it is respectfully requested that the court issue an order

suppressing the results of the blood test.

Dated at Milwaukee, Wisconsin, this _____ day of _____, 2009:

Law Offices of Jeffrey W. Jensen
Attorneys for the Defendant

By:_____
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