FILED
FEB 2 3 1989
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

250

RICKY EDWARD KAMP,)

Plaintiff-Appellee,)

vs.)

M.J. FETTKETHER and BUCHANAN COUNTY, IOWA,) 8-506 / 88-189

Defendants-Appellants.)

Appeal from the Iowa District Court for Delaware County (No. CL-2138), William G. Klotzbach, Judge.

Defendant-appellant M.J. Fettkether appeals a jury verdict awarding plaintiff-appellee Ricky Edward Kamp damages on his claims of false arrest and imprisonment, malicious prosecution and a deprivation of civil rights. **REVERSED.**

Raymond R. Stefani, of Gray, Stefani & Mitvalsky, Cedar Rapids, and Allan W. Vander Hart, Buchanan County Attorney, for the defendants-appellants.

James Burns, of Miller, Pearson, Gloe, Burns, Beatty & Cowie, P.C., Decorah, for the plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson and Schlegel, JJ.

OXBERGER, C.J.

Defendant-appellant M.J. Fettkether appeals a jury verdict awarding plaintiff-appellee Ricky Edward Kamp damages on his claims of false arrest and imprisonment, malicious prosecution and a deprivation of civil rights under 42 U.S.C. section 1983.

M.J. Fettkether, a Buchanan deputy county sheriff, stopped Ricky Kamp for speeding. While talking with Kamp, Deputy Fettkether noticed an odor of alcohol on his breath. Kamp admitted he had been drinking. Kamp was asked to perform field sobriety tests. Based on Kamp's performance of these tests, and other signs of alcohol consumption, Deputy Fettkether arrested Kamp for operating a motor vehicle while intoxicated (OWI). Kamp's intoxilyzer breath test result of .087 was below the then .13 statutory level allowing a presumption of intoxication. See Iowa Code § 321.281(1)(a) (1985). The OWI charge was subsequently dismissed.

Kamp later filed the above-listed claims against Deputy Fettkether and Buchanan County. Following a trial the jury awarded Kamp over $13,000 against Deputy Fettkether alone. The special verdict form showed the jury found Fettkether had not been acting within the scope of his employment for Buchanan County. Fettkether has appealed the verdict and the trial court's entry of judgment on the verdict, including an award of $2,704 on Kamp's posttrial motion for

attorney fees. Fettkether contends the trial court erred when it (1) denied his motions for directed verdict, judgment notwithstanding the verdict (judgment n.o.v.) and new trial on all of Kamp's claims, (2) refused to allow him to testify regarding his past experience with arrests for drunk driving where an individual has lost his/her stomach contents before taking an intoxilyzer test, and (3) submitted an instruction on the element of malice which misstated the applicable law.

The elements of malicious prosecution are (1) a previous prosecution, (2) an instigation or procurement thereof by defendant, (3) termination of the prosecution by an acquittal or discharge of plaintiff, (4) want of probable cause, (5) malice in bringing the prosecution on the part of the defendant, and (6) damages to the plaintiff. Yoch v. City of Cedar Rapids, 353 N.W.2d 95, 100-01 (Iowa App. 1984) (citing Sarvold v. Dodson, 237 N.W.2d 447, 448 (Iowa 1976)). The elements of false arrest and imprisonment are (1) detention or restraint against one's will, and (2) unlawfulness of the detention or restraint. Kraft v. City of Bettendorf, 359 N.W.2d 466, 469 (Iowa 1984); Children v. Burton, 331 N.W.2d 673, 678-79 (Iowa), cert. denied, 464 U.S. 848, 104 S.Ct. 155, 78 L.Ed.2d 143 (1983).

To support his civil rights claim Kamp had to prove (1) Fettkether deprived him of a right secured by the

constitution and laws of the United States and (2) that Fettkether acted under color of state law. Christenson v. Ramacker, 366 N.W.2d 905, 907 (Iowa 1985).

In his directed verdict, judgment n.o.v. and new trial motions Fettkether argued insufficient evidence existed to prove (1) want of probable cause and the malice elements as to the malicious prosecution claim, (2) the element of unlawful detention as to the false imprisonment claim, and (3) element of unlawful deprivation of a constitutional right regarding the civil rights claim due to the fact the deputy had acted with probable cause to arrest Kamp on an OWI charge.

For purposes of reviewing the denial of Fettkether's motions, we view the evidence in the light most favorable to the nonmoving party. Children, 331 N.W.2d at 681.

The determination as to whether or not probable cause exists must be determined on the particular facts of each case; if pertinent facts relating to the existence of probable cause are in dispute the existence of probable cause is a jury question. Kraft, 359 N.W.2d at 470. The trial court's denial of Fettkether's motions for directed verdict, judgment n.o.v., a new trial would be properly denied if the evidence presented during the trial created such a dispute. Children, 331 N.W.2d at 681.

We have reviewed Fettkether's motions and the evidence relevant to the probable cause issue. The evidence at

trial does not create a sufficient dispute regarding the existence of probable cause at the time of Kamp's arrest to allow submission of the issue to the jury. The deputy testified Kamp failed sobriety tests, admitted to drinking, slurred his words, had an odor of alcohol about him, had empty beer cans in the car, difficulty walking and had been speeding. The only evidence at trial which could be construed as contradicting the deputy's observations is vague at best. Kamp himself testified to having at least eight beers before driving that night. Although Kamp testified he thought his performance on the sobriety tests was all right, his testimony is replete with answers indicating he was not certain or could not remember the tests and what was required. Kamp's companion in the car, William Kohlmeyer, also testified they had both been drinking and he did not feel capable of driving the car after Kamp was arrested. Kohlmeyer testified he did not see Kamp performing the tests. Such evidence does not rise to a level upon which reasonable minds could differ on the issue of probable cause to arrest.

The trial court, in its ruling on Fettkether's motion for new trial, found as a matter of law that Deputy Fettkether had probable cause to arrest Kamp on an OWI charge due to the subjective tests and observations made at the scene. We agree with the trial court's finding on this issue. See Westendorf v. Iowa Dep't of Transp., 400 N.W.2d

553, 555 (Iowa 1987). However, we disagree with the trial court that the existence of probable cause had to continue or was a question for the jury to decide once Kamp's intoxilyzer results were found to be below the statutory level. Having lawfully arrested Kamp the deputy had a right to process the arrest. Children, 331 N.W.2d at 682. While the code may provide an officer with discretion whether or not to arrest someone, Mr. Kamp had already been arrested before he took the intoxilyzer test. The law existing at the time indicated Mr. Kamp could still be charged and tried for OWI even though his test results were under the statutory limit. See Iowa Code § 321.281 (1985). We cannot say Deputy Fettkether had a legal duty to "de-arrest" Mr. Kamp or issue a summons to Mr. Kamp's sister requiring her to take Kamp home the night of his arrest. The jury verdict, and the trial court judgment entered on the verdict, and allowing Mr. Kamp's attorney fees is reversed. Having reversed on this issue, we need not address Fettkether's other claims. Kamp's cross-appeal for additional attorney fees is denied.

REVERSED.