

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**June 21, 2012**

Diane M. Fremgen  
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. 2011AP1523**

**STATE OF WISCONSIN**

Cir. Ct. Nos. 2008TR2826  
2009TR120

**IN COURT OF APPEALS  
DISTRICT IV**

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**MARQUETTE COUNTY,**

**PLAINTIFF-RESPONDENT,**

**V.**

**CARL G. CULVER,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Marquette County: RICHARD O. WRIGHT, Judge. *Affirmed.*

¶1 HIGGINBOTHAM, J.<sup>1</sup> Defendant Carl G. Culver appeals a judgment of conviction for operating a motor vehicle while intoxicated and operating with a prohibited alcohol concentration, first offense. He also appeals

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

an order of the circuit court denying his motion to suppress evidence obtained by the Marquette County Sheriff's Department on the grounds that the officer lacked probable cause to arrest him. We affirm.

### ***Background***

¶2 On November 30, 2011, at approximately 8:38 p.m., Marquette County Sheriff's Patrol Sergeant Jordan McCoy was dispatched to a one-vehicle slide-off accident on County Highway A near Glen Avenue. McCoy arrived at the intersection at 9:14 p.m. Unable to locate the vehicle, McCoy proceeded to an address on Glen Avenue where the driver of the car was reportedly located. Culver was at this address; it was not his residence. The home's residents let McCoy in to speak with Culver.

¶3 McCoy found Culver soaking wet and covered in a blanket. McCoy told Culver he could not find Culver's vehicle and asked Culver to come with him to locate it. McCoy "escorted" Culver to his squad car and "placed" Culver in the back. Culver was not handcuffed and McCoy did not place a hand on Culver in taking him out to the squad car or letting Culver into its back seat.

¶4 Culver told McCoy his vehicle had slid off the highway south of Glen Avenue. When McCoy was unable to locate the vehicle, he then traveled north of Glen Avenue and found Culver's vehicle upside down in a drainage ditch and filled with water where the vehicle had broken through the ice. It appeared that Culver had failed to negotiate a turn and slid off the road. At some point after locating the vehicle, McCoy became concerned that Culver may be suffering from hypothermia and called an ambulance. McCoy then noticed the smell of intoxicants on Culver's breath and asked him if he had been drinking. Although

first denying it, Culver admitted he had been drinking after McCoy told him he could smell intoxicants on Culver's breath.

¶5 Due to Culver's condition, the cold weather and snow, McCoy did not believe it was wise to have Culver, or anyone else, attempt any field sobriety tests. After the ambulance crew informed McCoy that Culver should be transported to the hospital due to potential hypothermia, McCoy administered a Preliminary Breath Test (PBT).<sup>2</sup> McCoy testified that he administered the PBT based upon the odor of intoxicants and the fact of the vehicle accident. Before allowing the ambulance crew to transport Culver to the hospital, McCoy advised him that he was under arrest for operating a motor vehicle while intoxicated (OWI).

¶6 Culver was issued a citation by Marquette County for Operating with a Prohibited Alcohol Concentration (PAC), first offense, on January 12, 2009.<sup>3</sup> Culver filed a motion to suppress, alleging that McCoy had no reasonable suspicion to support detaining Culver and no probable cause to arrest him. The motion was heard on May 6, 2009. McCoy was the only witness who testified at the hearing. When the State attempted to introduce the PBT results, Culver objected, arguing that the State had failed to establish that the device used by McCoy had been approved by the State of Wisconsin as required by statute. The court allowed McCoy to testify as to the results of the PBT, but suspended the

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<sup>2</sup> McCoy testified that the PBT registered a .084 or .082. However, as discussed later in this opinion, the circuit court refused to admit the PBT results into evidence and this ruling has not been challenged by the State.

<sup>3</sup> Culver was also served and pled not guilty to a citation for OWI, first offense, arising out of this same incident, but which was filed under a separate case number, Marquette County Case No. 2008TR2826.

admission of that testimony until the State provided the necessary documents demonstrating that the PBT device at issue had been so approved. The court gave the State ten days to produce this information, and time thereafter for the parties to argue their positions in writing. The State failed to provide documentation that the Wisconsin Department of Transportation had approved the specific PBT device for use by law enforcement officers.

¶7 In a written decision, the circuit court denied Culver's motion to suppress. The court ruled that Culver was not seized within the meaning of the Fourth Amendment when McCoy had Culver accompany him in the squad car to find Culver's vehicle. The court also determined that McCoy had probable cause to arrest Culver for OWI based on three factors: the "likely cause of the accident (missing the curve)[,] the defendant's confusion and the odor of intoxicants." In its decision, the circuit court explicitly noted that it gave "no weight to the PBT test, lacking argument from the State as to its admissibility here." The matter proceeded to trial, and Culver was convicted of OWI, first offense, and PAC, first offense. Culver appeals the denial of his motion to suppress and the judgment of conviction. Additional facts, as necessary, are set forth in the discussion section.

### *Discussion*

¶8 The sole issue in dispute is whether the circuit court properly concluded, under the totality of the circumstances, that McCoy had probable cause to arrest Culver for OWI. Whether police have probable cause for an arrest is a question of constitutional fact. *See State v. Secrist*, 224 Wis. 2d 201, 208, 589 N.W.2d 387 (1999). We review questions of constitutional fact under a two-part test: we will uphold a circuit court's findings of historical fact unless it is clearly erroneous, but we review de novo whether those facts meet constitutional

principles. *State v. McMorris*, 213 Wis. 2d 156, 165, 570 N.W.2d 384 (1997). The burden is on the State to prove that the officer had probable cause to arrest. *State v. Lange*, 2009 WI 49, ¶19, 317 Wis. 2d 383, 766 N.W.2d 551.

¶9 We assess the question of probable cause on a case-by-case basis, under a totality of the circumstances analysis. *Id.*, ¶20. This analysis includes determining “whether the arresting officer’s knowledge at the time of the arrest would lead a reasonable police officer to believe ... that the defendant was operating a motor vehicle while under the influence of an intoxicant.” *State v. Babbitt*, 188 Wis. 2d 349, 356-57, 525 N.W.2d 102 (1994) (citation omitted). “Probable cause to arrest does not require proof beyond a reasonable doubt or even that guilt is more likely than not.” *Id.* (citation omitted). “It is sufficient that a reasonable officer would conclude, based upon the information in the officer’s possession, that the defendant probably committed the offense.” *Id.* (citation and brackets omitted). “In determining whether there is probable cause, the court applies an objective standard, considering the information available to the officer and the officer’s training and experience.” *Lange*, 317 Wis. 2d 383, ¶20. Accordingly, we are “not bound by the officer’s subjective assessment or motivation.” *State v. Kasian*, 207 Wis. 2d 611, 621-22, 558 N.W.2d 687 (Ct. App. 1996).

¶10 Culver argues that the two factors McCoy testified he relied on in establishing probable cause to arrest Culver, the auto accident and the odor of intoxicants on Culver’s breath, were insufficient to establish probable cause. In Culver’s view, these factors likely support reasonable suspicion, but they certainly do not establish probable cause. Culver points out that, unlike the defendant in *Washburn County v. Smith*, 2008 WI 23, 308 Wis. 2d 65, 746 N.W.2d 243, there was no evidence of impaired driving and Culver did not admit to consuming a

substantial amount of alcohol over a long period of time. *See id.*, ¶34. Culver takes the position that it is not possible to determine solely from the odor of intoxicants when, what and how much alcohol he consumed. In addition, Culver suggests, citing *State v. Swanson*, 164 Wis. 2d 437, 453 n.6, 475 N.W.2d 148 (1991), that field sobriety tests are required to establish probable cause and that here the officer did not perform the tests. Culver also asserts that we should ignore the preliminary breathalyzer test results because the circuit court did not consider the results in determining that probable cause existed to arrest Culver for OWI.<sup>4</sup>

¶11 In response, the State points to five factors as supporting probable cause to arrest Culver: (1) McCoy detected an odor of intoxicants coming from Culver's breath; (2) an unexplained motor vehicle accident; (3) Culver initially lied about whether he had been drinking that evening, which the State asserts is evidence of Culver's consciousness of guilt; (4) Culver admitted to drinking alcohol after McCoy told Culver that he could smell alcohol on Culver's breath; and (5) Culver gave McCoy incorrect information regarding the location of his vehicle, which, according to the State, reflects that either Culver was lying when he told McCoy the vehicle was at a different location, or that Culver was confused because he had been drinking.

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<sup>4</sup> As we noted, in its decision denying Culver's motion to suppress, the court did not rely on the PBT results because the State had failed to provide appropriate documentation that the Wisconsin Department of Transportation had certified this particular PBT device for use by law enforcement to establish a preliminary reading of an individual's blood alcohol concentration. We therefore do not rely on the PBT results here in determining whether Sergeant McCoy had probable cause to arrest Culver for OWI.

¶12 In support, the State relies on two cases with factors similar to the factors present in this case in which the court of appeals concluded constituted probable cause to arrest for OWI. In *Kasian*, we concluded that three factors were sufficient to constitute probable cause to arrest Kasian: (1) a one-vehicle accident where a damaged van was found next to a telephone pole with the engine running and smoking; (2) Kasian was lying next to the van with a “strong” odor of intoxicants emanating from him; and (3) the officer observed at the hospital that Kasian’s speech was slurred. *Kasian*, 207 Wis. 2d at 622. In *State v. Wille*, four factors were cited as sufficient to establish probable cause to arrest: (1) at the hospital, the deputy sheriff smelled a strong odor of intoxicants coming from the defendant; (2) the deputy was aware that a fire fighter and another officer had smelled intoxicants around the defendant; (3) the defendant had driven his car into the rear end of another vehicle parked alongside the highway shoulder; and (4) the deputy heard the defendant say that he had “to quit doing this.” *State v. Wille*, 185 Wis. 2d 673, 683-84, 518 N.W.2d 325 (Ct. App. 1994). We concluded this statement provided evidence of the defendant’s consciousness of guilt.

¶13 We conclude, under the totality of the circumstances, that the facts known to Sergeant McCoy at the time he placed Culver under arrest, were such that a reasonable officer could conclude that Culver was operating a motor vehicle while under the influence of an intoxicant. McCoy observed an odor of intoxicants emanating from Culver’s breath. McCoy knew that Culver had failed to successfully navigate a turn, causing Culver’s vehicle to land in a nearby ditch upside down. After smelling the odor of alcohol on Culver’s breath, McCoy asked Culver whether he had been drinking that evening, to which Culver answered in the negative. After McCoy informed Culver that he could smell alcohol on Culver’s breath, Culver told McCoy that he in fact had been drinking. Culver’s

inconsistent answers are evidence of his consciousness of guilt. The record also shows that Culver was confused about where his vehicle was located, as evidenced by Culver misinforming McCoy that the vehicle landed in a ditch north of County Highway A when in fact the vehicle was found south of County Highway A.

¶14 As we indicated, Culver cites to *Swanson*, 164 Wis. 2d 437, in support of the position that an officer must first perform field sobriety tests before deciding whether there is probable cause to arrest for OWI. *Id.* at 453-54 n.6. That reading of *Swanson* was rejected in *Wille*. See *Wille*, 185 Wis. 2d at 684.

¶15 In sum, we conclude that Sergeant McCoy had probable cause to arrest McCoy and therefore the circuit court properly denied Culver's motion to suppress the evidence obtained as a result of his warrantless arrest. We therefore affirm the judgment of conviction and the court's order denying Culver's motion to suppress.

*By the Court.*—Judgment and order affirmed.

This appeal will not be published. See WIS. STAT. RULE 809.23(1)(b)4.



