COURT OF APPEALS
DECISION
DATED AND RELEASED

September 12, 1996

NOTICE

No. 96-1177

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

COUNTY OF DANE,

Plaintiff-Respondent,

v.

STEVEN SPRING,

Defendant-Appellant.

APPEAL from an order of the circuit court for Dane County: MICHAEL N. NOWAKOWSKI, Judge. *Affirmed*.

DEININGER, J.[1] Steven Spring appeals from an order convicting him of operating a motor vehicle while intoxicated, contrary to § 346.63(1)(a), STATS. The sole issue is whether probable cause existed for Spring's arrest where the arresting officer did not perform any field sobriety tests. Because we conclude that probable cause existed, we affirm the order.

[1] This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

BACKGROUND

The relevant facts are not disputed. Officer Paul Miller of the Dane County Sheriff's Department was dispatched to a motorcycle accident site at approximately 2:00 a.m. on July 31, 1995. When he arrived at the accident site, he saw a motorcycle laying in the middle of the road and two men, one standing and another laying on the pavement near the motorcycle. Miller spoke to both men and the man on the ground, Spring, told him that he had injured his shoulder. Miller saw no other apparent injuries on Spring. Apparently, Spring, who was operating the motorcycle, crossed the centerline of the highway and went off the left side of the road, traveled parallel to the road for approximately twenty-five feet and, while attempting to get back on the road, hit the pavement and overturned his motorcycle.

Miller noticed "the odor of intoxicants" on Spring's breath and observed that Spring had "very bloodshot eyes" and his "speech was real[ly] slurred terrible," to the point of being "hard to understand." Spring was unable to stand and "appeared very intoxicated." Spring had difficulty answering Miller's questions, and named two different towns and a tavern in a third town as the place from which he had been driving prior to the accident. After Miller had been with Spring for approximately 30-45 minutes, an ambulance came for Spring and Miller informed him that he was under arrest. Miller had not asked Spring to perform any field sobriety tests.

A blood sample taken from Spring at the hospital indicated a blood alcohol level of .23%, over twice the legal limit. Spring was charged with operating a motor vehicle while under the influence of intoxicants and operating a motor vehicle while having a prohibited blood alcohol content, contrary to § 346.63(1)(a) and (b), STATS. The parties agreed to a stipulated trial, and, after reviewing the stipulated materials, the trial court found Spring guilty of the operating while intoxicated charge and dismissed the operating with a prohibited alcohol content charge. Spring reserved his right to appeal the legality of his arrest.

ANALYSIS

Whether undisputed facts show probable cause to arrest is a question of law which we review de novo, owing no deference to the trial court's analysis. ***State v. Babbitt***, 188 Wis.2d 349, 356, 525 N.W.2d 102, 104 (Ct. App. 1994). The State need not show evidence sufficient to prove guilt beyond a reasonable doubt, nor even to show that guilt is more probable than not. ***State v. Truax***, 151 Wis.2d 354, 360, 444 N.W.2d 432, 435 (Ct. App. 1989). Rather, we look to the totality of the circumstances, ***Babbitt***, 188 Wis.2d at 356, 525 N.W.2d at 104, to determine whether the objective facts would "lead a reasonable officer to believe that guilt is more than a possibility." ***Truax***, 151 Wis.2d at 360, 444 N.W.2d at 435.

Spring, citing ***State v. Swanson***, 164 Wis.2d 437, 475 N.W.2d 148 (1991), argues that by failing to perform field sobriety tests, Miller could not have more than a "reasonable suspicion" that Spring was operating a motor vehicle under the influence of intoxicants. He relies on the following footnote from ***Swanson***:

> [F]or [an] arrest to be lawful, probable cause for arrest must exist. Probable cause requires more than a bare suspicion. Unexplained erratic driving, the odor of alcohol, and the coincidental time of the incident form the basis for a reasonable suspicion but should not, in the absence of a field sobriety test, constitute probable cause to arrest someone for driving while under the influence of intoxicants. A field sobriety test could be as simple as a finger-to-nose or walk-a-straight-line test. Without such a test, the police officers could not evaluate whether the suspect's physical capacities were sufficiently impaired by the consumption of intoxicants to warrant an arrest.

Swanson, 164 Wis.2d at 454 n.6, 475 N.W.2d at 155 (citations omitted).

We have held that the footnote in ***Swanson*** does not require that under all circumstances an officer must first perform a field sobriety test before deciding whether to arrest an individual for operating a motor vehicle while

under the influence of intoxicants. ***State v. Wille***, 185 Wis.2d 673, 684, 518 N.W.2d 325, 329 (Ct. App. 1994).[2]

Probable cause is a determination based on the factual and practical considerations of everyday life on which reasonable and prudent persons, rather than legal technicians, act. ***Truax***, 151 Wis.2d at 360, 444 N.W.2d at 435. It is a common sense test that looks to the totality of the circumstances facing the officer at the time of the arrest to determine whether the officer could have reasonably believed that the defendant had committed, or was committing, an offense. ***County of Dane v. Sharpee***, 154 Wis.2d 515, 518, 453 N.W.2d 508, 510 (Ct. App. 1990).

With these considerations in mind, we conclude that Officer Miller had probable cause to arrest Spring for operating a vehicle while intoxicated. This is not a case, as in ***Swanson***, where the only facts known to the arresting officer were that the defendant smelled of alcohol, was driving erratically, and was involved in an accident around bar closing time. Here, in addition to the same factors noted by the court in ***Swanson***, the officer observed that Spring "appeared very intoxicated" and "was really ... confused," basing his observation on the facts that Spring had "very bloodshot eyes," slurred his words to the point of being "hard to understand" and had difficulty standing. Spring had difficulty naming the location from which he had just driven, and indicated that he had visited a tavern in one of the locations he named as a possible prior location. Miller also determined that Spring's was a single-vehicle accident occurring after he drove off the left side of the road.

The State argued at the evidentiary hearing that, given the fact that Miller, an experienced officer, spent a total of approximately 30-45 minutes with Spring before arresting him and had observed Spring exhibiting at least two of the behaviors that field sobriety tests are designed to detect, i.e., slurred speech and problems with balance, his belief that Spring had been driving while intoxicated was reasonable. We agree. We must give deference to the "reasonable inferences drawn by the police officers at the accident scene in light

[2] We do not quarrel with the trial court's observation that the ***Swanson*** footnote is dicta. The supreme court expressly declined to determine whether the facts in ***Swanson*** were sufficient for probable cause to support an arrest for operating while under the influence of intoxicants. ***State v. Swanson***, 164 Wis.2d 437, 453, 475 N.W.2d 148, 155 (1991).

of their experience." ***State v. Seibel***, 163 Wis.2d 164, 183, 471 N.W.2d 226, 235, *cert. denied*, 502 U.S. 986 (1991).

Spring also argues that his case is comparable to ***State v. Seibel***, 163 Wis.2d 164, 471 N.W.2d 226, *cert. denied*, 502 U.S. 986 (1991), where the State conceded that the facts were inadequate to support a determination of probable cause. ***Id.*** at 171, 471 N.W.2d at 229. In ***Seibel***, a motorcyclist crossed over the highway's center line and crashed into another vehicle, causing a fatal accident. The officers at the scene noticed a "very strong" odor of intoxicants from the motorcyclists with whom Seibel was traveling. At the hospital to which Seibel was taken, he "exhibited a belligerence and lack of contact with reality" and another officer smelled an intoxicant on the defendant. ***Id.*** at 182, 471 N.W.2d at 234. An officer at the hospital directed a staff person to draw Seibel's blood to test for intoxicants and Seibel was subsequently charged with negligent homicide. At issue in the case was whether the police needed probable cause or the lesser standard of reasonable suspicion to believe that Seibel's blood contained evidence of a crime in order to draw a blood sample. The supreme court held that the proper standard was reasonable suspicion, ***id.*** at 179, 471 N.W.2d at 233, and that the facts in the case constituted a reasonable suspicion sufficient to justify drawing Seibel's blood. ***Id.*** at 183, 471 N.W.2d at 235.

Spring argues that the ***Seibel*** court's discussion of reasonable suspicion, in light of the court's subsequent discussion in ***Swanson*** of facts which were insufficient for probable cause, supports his contention that Miller did not have probable cause to arrest him in absence of field sobriety tests. We disagree. The issue in ***Seibel***, as we noted above, was not whether the facts supported probable cause to arrest for drunk driving, but only "whether the standard for drawing a blood sample in a search incident to an arrest is `reasonable suspicion' or `probable cause' that the defendant's blood contains evidence of a crime." ***Id.*** at 166, 471 N.W.2d at 227. In other words, the issue in ***Seibel*** involved the legality of the search, or invasion, of Seibel's body, not whether there was probable cause to arrest him. The fact that the State in that case conceded a lack of probable cause is of no precedential value, and Spring's attempt to compare his case with ***Seibel*** fails.

We conclude, based on the totality of the circumstances, that Officer Miller had probable cause to support an arrest for operating a motor vehicle while intoxicated. Accordingly, we affirm the order.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.