

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

January 30, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 96-2131-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

DANIEL B. KNUTSON,

Defendant-Respondent.

APPEAL from judgment of the circuit court for Grant County:
JOHN R. WAGNER, Judge. *Affirmed.*

VERGERONT, J.¹ The State of Wisconsin appeals the trial court's decision granting Daniel Knutson's motion to suppress the results of a blood test on the ground that it was incident to an unlawful arrest because there was no probable cause to arrest Knutson for driving while under the influence of an intoxicant. We conclude that the State did not establish that there was probable cause to arrest Knutson and therefore affirm.

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

The pertinent evidence in this case is undisputed. The evidence presented to the trial court consisted of the reports of Robert Bloyer and Troy Hunzeker, both deputy sheriffs of the Grant County Sheriff's Department. These reports present the following facts. Bloyer was dispatched to a traffic accident on County Trunk Highway F in Stitzer, Wisconsin. Fire department personnel were already at the scene of the accident. A damaged jeep vehicle was sitting in a driveway just off the highway. There were two injured persons, one sitting along the highway shoulder and the other laying in the ditch line. Bloyer first talked to the person on the shoulder, who identified himself as Bob Fuchs and said the vehicle was his. When asked what happened, Fuchs looked at Bloyer and said he was not driving; he then stated they were coming from Fennimore, got here, and he did not know how it happened. Bloyer concluded that Fuchs was intoxicated because his eyes were red and glassy, there was a strong odor of intoxicants from Fuchs' breath, and Fuchs was constantly trying to move or get up even though he was complaining that his leg was sore.

Bloyer then went over to the person lying down, later identified as Knutson. Bloyer noticed a strong odor of intoxicants as he approached Knutson. A woman was with Knutson, holding his head and talking to him, but it did not look as though he was responding. She told Bloyer that she was ahead of the jeep and remembers seeing only a cloud of dust as the jeep went off the road; she could not tell who was driving. Knutson had a severe head wound and his eyes were closed. There were several people around Knutson so Bloyer did not try to talk to him.

According to Bloyer's report, he called Hunzeker by radio and asked him to meet the ambulance at Lancaster Hospital for the purpose of drawing blood incident to an arrest for the charge of causing injury by intoxicated use of a motor vehicle. According to Hunzeker's report, Bloyer asked him to go to the hospital and gain information related to two males who were being transported by rescue squad and their involvement in the accident. When Hunzeker arrived at the hospital, he talked to Knutson, who was conscious. Hunzeker asked Knutson who was driving. Knutson said, "Who the hell are you?" Hunzeker explained who he was and that he was there to assist in the accident investigation. Hunzeker smelled a strong odor of intoxicants on Knutson's breath. Hunzeker asked again who was driving and Knutson stated, "I wasn't." Hunzeker asked who was and Knutson responded "Joe [Fuchs' middle name]. I wasn't driving."

Hunzeker then went to talk to Fuchs, identified himself and asked who was driving. Fuchs said Knutson was driving. Hunzeker smelled intoxicants on Fuchs' breath. Hunzeker told Fuchs that Knutson had said he (Fuchs) was driving. Fuchs replied that he was not taking the rap on this one. Hunzeker advised Fuchs that he was under arrest for causing injury by intoxicated use of a motor vehicle. Fuchs stated he understood why he was being arrested but he was not the driver. Hunzeker then went back to Knutson and told him that Fuchs had said that he (Knutson) was driving. Knutson said he was not the driver. Hunzeker informed Knutson that he was under arrest for causing injury by intoxicated use of a motor vehicle. Blood was drawn from each individual and the tests results showed that Knutson had a blood alcohol content of .280 percent and Fuchs had a blood alcohol concentration of .255 percent.²

Knutson was charged with operating a motor vehicle while intoxicated, second offense, in violation of §§ 346.63(1)(a) and 346.65(2)(b), STATS.; operating a motor vehicle with a prohibited blood alcohol concentration, second offense, in violation of §§ 346.63(1)(b) and 346.65(2)(b); and operating after revocation, third offense, in violation of § 343.44(1) and (2)(c)1, STATS. Knutson moved to suppress the blood test results, arguing that there was no probable cause to conclude that Knutson, rather than Fuchs, was driving the vehicle. The trial court granted the motion, concluding that probable cause under these circumstances required that there be a way of "distinguishing one from the other [Fuchs and Knutson]."

On appeal, the State argues that Fuchs' statement that Knutson was driving provides probable cause to believe the Knutson was driving. The State acknowledges that the same argument can be made with respect to Fuchs-that Knutson's statement that Fuchs' was driving provides probable cause to arrest Fuchs. The State contends that under these circumstances, "common sense and public policy" support arresting both. According to the State, the officers should not be encouraged to arrest neither and they should not be encouraged to arrest one of the two, because if it is the wrong one, the "culprit goes free" without the blood alcohol test results. Knutson responds that because Fuchs was also a suspect, Fuchs' statement identifying Knutson was unreliable

² We do not summarize other events occurring after the arrest, as those are not relevant to the determination of probable cause.

and therefore insufficient to establish probable cause that Knutson was driving.³ Although we conclude the trial court properly granted Knutson's motion, we do not adopt Knutson's analysis.

The taking of a blood sample is a search and seizure within the meaning of the Fourth Amendment of the United States Constitution. *State v. Bentley*, 92 Wis.2d 860, 863-64, 286 N.W.2d 153, 155 (Ct. App. 1979). Such a search may be conducted incident to a lawful arrest, provided certain other conditions are met. *State v. Bohling*, 173 Wis.2d 529, 537, 494 N.W.2d 399, 401, *cert. denied*, 510 U.S. 836 (1993). Whether, based on undisputed facts there is probable cause to arrest Knutson presents a question of law, which we review de novo. See *State v. Riddle*, 192 Wis.2d 470, 475, 531 N.W.2d 408, 410 (Ct. App. 1995).

Probable cause exists where the totality of circumstances within the arresting officer's knowledge at the time of the arrest would lead a reasonable officer to believe that the defendant probably committed a crime. *Id.* at 476, 531 N.W.2d at 410. While the circumstances within the arresting officer's knowledge need not be sufficient to make the defendant's guilt more probable than not, the defendant's guilt must be more than a mere possibility. *Id.* Probable cause is neither a technical nor a legislative concept; rather it is a "flexible, common sense measure of the plausibility of particular conclusions about human behavior." *State v. Petrone*, 161 Wis.2d 530, 547-48, 468 N.W.2d 676, 682, *cert. denied*, 502 U.S. 925 (1991).

We agree with the State that Fuchs' statement identifying Knutson as the driver was not insufficient to constitute probable cause simply because Fuchs was also a suspect. However we do not agree with the State that the proper analysis limits consideration to Fuchs' statement that Knutson was driving. At the time Hunzeker arrested Knutson, the totality of the circumstances within Hunzeker's knowledge included more than Fuchs' statement: they also included the facts that Knutson had told Hunzeker that

³ Knutson does not contend that there was no probable cause to believe that he was intoxicated. Therefore we focus only on whether there was probable cause to believe that he was driving.

Fuchs was driving and that, after confronting Fuchs with Knutson's statement and hearing Fuchs' denial that he was driving, Hunzeker arrested Fuchs.⁴

The State does not contend that any information within Hunzeker's knowledge indicated that Knutson rather than Fuchs was driving. The State's argument is that Hunzeker did not have information sufficient to lead him to form a reasonable belief as to which one was driving, but that this was not necessary in order to have probable cause to arrest Knutson. The State points out that probable cause requires simply that it be more than a "mere possibility" that Knutson was driving. Again, the State is not taking all the circumstances within Hunzeker's knowledge into account. It is more than a mere possibility that either Knutson or Fuchs was driving--in fact, it is a certainty based on this record that one or the other was driving--but it is impossible that both were driving.⁵

We agree with the trial court that probable cause in this case means that Hunzeker must have a reasonable basis for believing that probably Knutson rather than Fuchs was driving. The State does not point to any evidence that would show such a basis. Since neither Bloyer nor Hunzeker testified, the only record is their reports. We have examined these carefully and conclude they do not contain evidence that Hunzeker had information that formed a reasonable basis for believing that probably Knutson rather than Fuchs was driving.

The State points out that *Bohling* holds that the dissipation of alcohol from a person's blood stream constitutes a sufficient exigency to justify a

⁴ Although any information that Bloyer gave Hunzeker in the phone call could also be considered as circumstances within Hunzeker's knowledge, see *State v. Mabra*, 61 Wis.2d 613, 625, 213 N.W.2d 545, 551 (1974), the reports do not indicate that Bloyer told Hunzeker that Fuchs owned the vehicle or provided Hunzeker with any other information that Hunzeker might have relied on in making either arrest.

⁵ The trial court properly noted that the analysis in this case is different from a case in which "cocaine [is] sitting on the night table between two beds [with a person in each bed]." In that case, depending on all the circumstances, there might be probable cause to believe that both persons possessed the cocaine. For the same reason, analogies to cases in which there are a number of persons in a vehicle containing a controlled substance are not sufficiently close to the facts of this case to be helpful.

warrantless blood draw under certain circumstances. *Bohling*, 173 Wis.2d at 547, 494 N.W.2d 399 at 406. We agree that a warrant was not needed in order to draw Knutson's blood. However, probable cause to arrest was necessary. Neither *Bohling* nor any other authority cited by the State suggests that the standard for probable cause is affected by the need to draw a blood sample before alcohol in the bloodstream dissipates.

We agree with the State that driving while intoxicated is a serious offense. However, we do not agree with the State that our result encourages officers in a situation such as this to either let both persons go or make a choice between the two that could be erroneous. There are a number of pieces of information that might provide a reasonable basis to believe that one person rather than the other was probably driving in a case such as this. These include the demeanor of each person when being interviewed, the location of each person at the scene of the accident in relation to the vehicle, ownership of the vehicle, and the nature and locations of the injuries of each person in relation to the damage to the vehicle. Further inquiry of each person or of others might provide additional information. Of course, even with this information, it is conceivable that an officer could arrest one of the two and later discover evidence that the other was driving. But we may not modify the requirements of the Fourth Amendment to guarantee that such a result never occurs.

By the Court.—Judgment affirmed.

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