COURT OF APPEALS
DECISION
DATED AND RELEASED

January 21, 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

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-2233-CR

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

State of Wisconsin,

Plaintiff-Respondent,

v.

Paul W. Schnelz,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed*.

WEDEMEYER, P.J.[1] Paul W. Schnelz appeals from a judgment entered after he pled guilty to one count of possession of a controlled substance (cocaine), contrary to §§ 161.16(2)(b)(1) and 161.41(3m), STATS. He claims the trial court erred in denying his motion to suppress because no probable cause existed to arrest him. Because probable cause existed sufficient to arrest Schnelz for operating a vehicle while under the influence of an intoxicant, the trial court

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

did not err in denying Schnelz's motion to suppress. Therefore, this court affirms.

I. BACKGROUND

On March 8, 1996, at 4:04 a.m., City of Milwaukee Police Officer Timothy Elwing was patrolling the area of 3000 West Lincoln Avenue. He observed a vehicle parked in front of a closed tavern. The car's engine was running, but the headlights were off. Elwing could see an individual inside the car, who began making furtive movements once he noticed the police car. The individual was Schnelz.

Elwing went over to the vehicle and motioned for Schnelz to roll down the window. At this point, Elwing smelled a moderate odor of alcohol on Schnelz's breath, noticed that his eyes were bloodshot and that his speech was slurred. Elwing said that Schnelz appeared very nervous and was unable to comply with Elwing's command to keep his hands visible. Schnelz told the officer that he had just come from a gay bar. Elwing asked Schnelz to step out of the car, at which time Schnelz almost fell over. Elwing observed an open can of beer in the vehicle.

At this point, Elwing arrested Schnelz for operating a vehicle while under the influence of an intoxicant. He performed a custodial search and discovered the controlled substance which formed the basis for the charge in this case. Schnelz filed a motion to suppress the evidence, arguing that absent the administration of a field sobriety test, the officer did not have probable cause to arrest. The trial court denied the motion. Schnelz entered a guilty plea. Judgment was entered. Schnelz now appeals.

II. DISCUSSION

The issue in this case is whether Elwing had probable cause to arrest Schnelz. The facts are not in dispute. Accordingly, whether or not probable cause existed to support Schnelz's warrantless arrest is a question of law that this court reviews *de novo*. *See* ***State v. Drogsvold***, 104 Wis.2d 247, 256-

57, 383 N.W.2d 243, 247-48 (Ct. App. 1981). Upon reviewing the record in the instant case, this court concludes that probable cause existed and, therefore, the arrest was legal and the evidence discovered incident to the arrest should not be suppressed.

Probable cause requires that the police officer have facts and circumstances within his or her knowledge sufficient to warrant a reasonable person to conclude that the defendant has committed, or is in the process of committing, an offense. The information available to the officer must lead a reasonable police officer to believe that "guilt is more than a possibility." Probable cause includes the "totality of the circumstances" within the officer's knowledge at the time, though the "'evidence need not reach the level of proof beyond a reasonable doubt or even [show] that guilt is more likely than not.'" (Citations omitted.) ***State v. Richardson***, 156 Wis.2d 128, 148, 456 N.W.2d 830, 838 (1990).

The facts present here provided Elwing with probable cause to believe that Schnelz had committed the offense of operating a vehicle while under the influence of an intoxicant. Schnelz admitted that he had just been at a bar, Elwing smelled intoxicants on his breath, Schnelz's speech was slurred, his eyes were bloodshot, he had difficulty with motor coordination and with understanding orders, and there was an open intoxicant in Schnelz's car. These factors together, even absent a field sobriety test, provided Elwing with probable cause to arrest Schnelz. *See* ***State v. Wille***, 185 Wis.2d 673, 684, 518 N.W.2d 325, 329 (Ct. App. 1994) (field sobriety test not always required in order to find probable cause).

Schnelz relies on dicta in ***State v. Swanson***, 164 Wis.2d 437, 475 N.W.2d 148 (1991) to support his argument that absent a field sobriety test, an officer does not have probable cause to make the arrest. Although this court acknowledges that ***Swanson*** does contain certain language that seems to support Schnelz's argument, this language has been qualified by ***Wille***. Whether probable cause exists is assessed on a case-by-case basis. ***Id.*** Sometimes a field sobriety test is required to establish probable cause and sometimes it is not. ***Id.*** This court concludes that all of the facts present in the instant case were sufficient to establish probable cause without requiring field sobriety tests. Therefore, the trial court did not err in denying Schnelz's motion to suppress.

By the Court.—Judgment affirmed.

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