COURT OF APPEALS
DECISION
DATED AND RELEASED

April 3, 1997

NOTICE

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.

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

No. 96-2786-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

TRACY D. REYNOLDS,

DEFENDANT-APPELLANT.

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

ROGGENSACK, J. Tracy D. Reynolds appeals from a judgment convicting her of operating a motor vehicle while under the influence of intoxicants (OMVWI), contrary to § 346.63(1)(a), STATS. Reynolds claims that the results of the field sobriety test given at the police station should have been suppressed because taking her to the police station was an arrest without probable cause. We agree with Reynolds that taking her to the police station was an arrest.

However, because we conclude that Reynolds' arrest was based on probable cause, we affirm.[1]

BACKGROUND

At 10:30 p.m. on the evening of December 20, 1995, Officer Jerry Linder heard Reynolds' vehicle squeal its tires as it made a right hand turn onto the left side of a two-way street, and saw it travel for about a block on the wrong side of the street before returning to the correct side. Linder stopped Reynolds, and noticed the odor of intoxicants as she rolled down her window. Reynolds admitted she had been drinking, and her speech was slow and slurred. Linder asked Reynolds to come back to his squad car. He noticed she had trouble maintaining her balance. When Linder asked Reynolds to take a preliminary breath test (PBT) she began to cry and asked to be taken home.

At that point, Linder decided to take Reynolds to the police station to conduct field sobriety tests. He testified that his decision was based on the icy, dark conditions, which he believed might unfairly affect the testing. Linder administered the sobriety tests in a police station hallway, and issued an OMVWI citation after Reynolds failed the heel-to-toe test. Linder then gave Reynolds the statutory warnings required under the Informed Consent Law, and asked her to submit to chemical testing. She consented, and an intoxilyzer test showed she had an alcohol concentration of 15 grams per 210 liters of breath. Linder then issued a citation for driving with a prohibited alcohol concentration. Based upon these

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

citations, Reynolds was charged in a criminal complaint with violations of § 346.63(1)(a) and (b), STATS., as second offenses.[2]

Reynolds challenged the admission of the field sobriety and intoxilyzer test results on the ground that she had been arrested without probable cause prior to their administration. The trial court denied the motion to suppress, holding that Linder had probable cause to arrest Reynolds at the scene of the stop. Reynolds was convicted of OMVWI, after she pleaded no contest. We agree with the trial court's conclusion; and therefore, we affirm.

DISCUSSION

Standard of Review.

When a suppression motion is reviewed, the trial court's findings of fact will be sustained unless they are clearly erroneous. ***State v. Roberts***, 196 Wis.2d 445, 452, 538 N.W.2d 825, 828 (Ct. App. 1995). However, we will independently determine whether the established facts show when a person was under arrest, as a question of law. ***State v. Swanson***, 164 Wis.2d 437, 445, 475 N.W.2d 148, 152 (1991). Likewise, whether undisputed facts constitute probable cause is a question of law which we review without deference to the trial court. ***State v. Babbitt***, 188 Wis.2d 349, 356, 525 N.W.2d 102, 104 (Ct. App. 1994).

Moment of Arrest.

An arrest occurs when "a reasonable person in the defendant's position would have considered himself or herself to be 'in custody', given the

[2] Reynolds had a previous OMVWI conviction on August 26, 1991.

degree of restraint under the circumstances." ***Swanson***, 164 Wis.2d at 446-47, 475 N.W.2d at 152. This is an objective test, focusing on what the officer's actions and words would reasonably have communicated to the defendant, rather than the subjective belief of either the officer or the defendant. ***Id***.

The State argues that an officer who has reasonable suspicion that a person has been driving while under the influence is entitled to have the suspect perform tests which would either confirm or dispel the officer's suspicions. We agree. *See* ***Terry v. Ohio***, 392 U.S. 1 (1968). However, the police may not "seek to verify their suspicions by means that approach the conditions of arrest." ***Florida v. Royer***, 460 U.S. 491, 499 (1983). While a suspect may be detained short of arrest during an investigatory traffic stop, such a stop differs from an arrest by its brevity, and its public nature. ***Berkemer v. McCarty***, 468 U.S. 420, 438 (1984). Moreover, Wisconsin requires that investigative questioning "be conducted in the vicinity where the person was stopped." Section 968.24, STATS. While the State makes an interesting argument that the totality of the circumstances used to judge the reasonableness of removing a suspected drunk driver from the scene should take into account winter weather conditions, it cites no Wisconsin authority for the proposition that *a police station hallway* may be considered "in the vicinity" of the street where the driver was detained.[3]

Reynolds was transported, in the back seat of a squad car, from a public street to the police station. She asked to be allowed to go home but her

[3] The State does cite a treatise for the proposition that field sobriety tests may be performed at police stations in some states, but its persuasive effect is limited by Wisconsin's more specific statute. The State also suggests that the officer was in a no-win situation because the defendant would have been able to challenge the validity of the sobriety tests had they been performed on an icy road. However, we address only the facts of the case as it occurred.

request was refused. We conclude that a reasonable person in her position would have considered herself to be in police custody. Therefore, Reynolds was under arrest for Fourth Amendment purposes at the time the field sobriety tests were performed.

Probable Cause to Arrest.

Every warrantless arrest must be supported by probable cause. ***Molina v. State,*** 53 Wis.2d 662, 670, 193 N.W.2d 874, 877 (1972); *see also* U.S. CONST. amend. IV, WIS. CONST. art. I, § 11, *and* § 968.07(1)(d), STATS. A police officer has probable cause to arrest when the totality of the circumstances within that officer's knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant probably committed a crime. ***State v. Koch***, 175 Wis.2d 684, 701, 499 N.W.2d 152, 161 (1993). This is a practical test, based on "considerations of everyday life on which reasonable and prudent men, not legal technicians, act." ***State v. Drogsvold***, 104 Wis.2d 247, 254, 311 N.W.2d 243, 247 (Ct. App. 1981) (citation omitted). The objective facts before the police officer need only lead to the conclusion that guilt is more than a possibility. ***State v. Richardson***, 156 Wis.2d 128, 148, 456 N.W.2d 830, 838 (1990).

Reynolds cites ***State v. Swanson*** to support her position that Linder lacked probable cause to arrest her for OMVWI without the results of the field sobriety tests. A footnote in ***Swanson*** commented:

> Unexplained erratic driving, the odor of alcohol, and the coincidental time of the incident [with bar closing] 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 437, 453-54 n.6, 475 N.W.2d 148, 155 n.6 (1991). However, the ***Swanson*** footnote has not been interpreted to require a field sobriety test before arrest in all cases. *See, e.g.,* ***State v. Wille***, 185 Wis.2d 673, 518 N.W.2d 325 (Ct. App. 1994) (holding that an officer had probable cause to arrest a suspect who had hit the rear end of a car parked along the highway, smelled of intoxicants, and stated in his hospital room that he had "to quit doing this") *and* ***State v. Babbitt***, 188 Wis.2d at 357-58, 525 N.W.2d at 104-05 (holding that an officer had probable cause when a suspect drove erratically, smelled of intoxicants, walked slowly and deliberately and was uncooperative). Thus, field sobriety tests are but part of the totality of circumstances to be taken into account by the arresting officer.

The arresting officer in this case had significantly greater evidence supportive of intoxication than did the officer in ***Swanson***, because the defendant in that case demonstrated “no difficulty standing and did not have slurred or impaired speech.” ***Swanson***, at 442, 475 N.W.2d at 150. Reynolds was observed driving on the wrong side of the street; she smelled of intoxicants and admitted she had been drinking; she had difficulty keeping her balance when walking to the squad car; and she became very upset when asked to take a PBT. These facts would lead a reasonable police officer to conclude that there was more than a possibility that Reynolds had been driving while under the influence. Linder had probable cause to arrest Reynolds at the scene.

CONCLUSION

We conclude that Reynolds was placed under arrest at the scene of the traffic stop before the sobriety tests were performed; however, her arrest was supported by probable cause to believe that she had been operating a motor vehicle while under the influence of intoxicants. Her motion to suppress was properly denied and the judgment of conviction is affirmed.

By the court.—Judgment affirmed.

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