COURT OF APPEALS
DECISION
DATED AND RELEASED

April 23, 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. 96-2831

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

CITY OF SHEBOYGAN,

PLAINTIFF-RESPONDENT,

v.

MICHAEL J. GROHSKOPF,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sheboygan County: GARY LANGHOFF, Judge. *Affirmed.*

NETTESHEIM, J. Michael J. Grohskopf appeals from a forfeiture judgment of conviction for operating a motor vehicle with a prohibited blood alcohol concentration (BAC) in violation of § 346.63(1)(b), STATS. On appeal, Grohskopf argues that the trial court should have suppressed the evidence garnered after his arrest because the arresting officer did not have probable cause to ask Grohskopf to submit to a preliminary breath screening test (PBT). The trial court held that a lower level of probable cause than that required for arrest is

contemplated by the PBT statute, § 343.303, STATS. Although we disagree with the trial court's interpretation of the statute, we nonetheless affirm because probable cause existed to support Grohskopf's arrest prior to the PBT request. We therefore affirm the judgment.

BACKGROUND

The facts in this case are not in dispute. On August 6, 1995, Grohskopf came to the City of Sheboygan Police Department in order to pick up his friend who had been arrested earlier that same day for operating a motor vehicle while intoxicated. Upon arriving at the police department, Grohskopf spoke with Officer David Anderson who noticed that Grohskopf had bloodshot eyes, slurred speech and an odor of intoxicants on his breath. Grohskopf admitted to Anderson that he had been drinking earlier that day at Brat Days and the Cascade Picnic and that he had driven his vehicle to the police department to pick up his friend.

Anderson then requested Grohskopf to submit to a preliminary breath test. Grohskopf agreed and the test produced a test result of 0.19%. Anderson then arrested Grohskopf and administered field sobriety tests and an intoxilyzer test. Based on this evidence, the City charged Grohskopf with both OWI and operating with a prohibited BAC.

Grohskopf pled not guilty to both charges and brought a motion to suppress the evidence garnered against him. The parties then stipulated to the facts and the City further agreed to dismiss the OWI charge and proceed only on the BAC charge.

The trial court held that probable cause to arrest was not the standard of probable cause required for a PBT. Instead, the court ruled that the officer need

only have a reasonable basis to believe that guilt is more than a possibility. No reported case has answered whether this lower level of probable cause is contemplated by § 343.303, STATS., but we readily acknowledge that certain unpublished decisions of the court of appeals support the trial court's interpretation.[1] We, however, respectfully disagree with the trial court and these unpublished cases.

Instead, we conclude that the statute means what it says: i.e., that probable cause must support a PBT request. We so hold for a variety of reasons. First, and most importantly, we conclude that the statute is clear and unambiguous.

Second, later in the very same sentence of the same statute, the legislature chose to expressly recite a lower level of suspicion as to drivers who are driving or operating a commercial motor vehicle.[2] It follows that if the legislature had intended a different level of probable cause or suspicion as to a noncommercial operator, it would have used similar language. *See* ***Obstetrical & Gynecological Assocs. v. Landig***, 129 Wis.2d 362, 368, 384 N.W.2d 719, 722 (Ct. App. 1986). In fact, this very approach was suggested in language originally proposed in this legislation. This language would have permitted an officer to request a PBT if the officer had "reasonable suspicion."[3] However, this proposed

[1] *See, e.g.*, ***State v. Wollin*****,** No. 90-0079, unpublished slip op. (Wis. Ct. App. Oct. 4, 1990)**,** and ***County of Sheboygan v. Schweigl***, No. 93-0559, unpublished slip op. (Wis. Ct. App. June 30, 1993).

[2] This portion of § 343.303, STATS., states, "[O]r if the officer detects any presence of alcohol … on a person driving or operating or on duty time with respect to a commercial motor vehicle or has reason to believe that the person is violating or has violated s. 346.63(7) … the officer … may request the person to provide a sample of his or her breath for a [PBT] ….

[3] While we may not look to legislative history to establish that a statute clear on its face is ambiguous, we may look to such history to bolster our conclusion that the statute is indeed unambiguous. ***Novak v. Madison Motel Assocs.***, 188 Wis.2d 407, 416, 525 N.W.2d 123, 126 (Ct. App. 1994).

language was not adopted. Instead, the legislature opted for the "probable cause" language recited in the present statute.

Third, the test which the trial court employed (guilt is more than a possibility) is simply an alternative way of stating the conventional test for probable cause to arrest. *See* ***County of Dane v. Sharpee***, 154 Wis.2d 515, 518, 453 N.W.2d 508, 510 (Ct. App. 1990).

We also note that an officer's determination that grounds for an arrest exist *does not mandate that the officer must arrest the suspect.* We suspect that the courts which have ruled otherwise on this issue have overlooked this subtle distinction. Those courts seem to believe that a PBT request necessarily means that probable cause to arrest does not exist. Thus, those courts have concluded that a lower standard of probable cause must necessarily apply. But our experience teaches that in most cases in which PBT tests are requested, the officer already has facts showing probable cause to arrest, *but the arrest has not yet been formally made.* In that situation, if the PBT test result is over the legal limit, that added information becomes but one more fact in support of probable cause. Alternatively, in a close case, if the test result is under the legal limit, the officer may choose not to arrest. The important point is that the PBT is not determinative of probable cause. *See* ***id***. at 519, 453 N.W.2d at 510.

However, our disagreement with the trial court's holding on this point is of no consequence in this case since we conclude that Anderson had probable cause to arrest Grohskopf prior to the PBT request. OWI consists of two elements: (1) that the defendant operate a motor vehicle; and (2) that the defendant be under the influence of an intoxicant. *See* WIS J I—CRIMINAL 2668. This second element requires that the defendant's ability to operate a vehicle be

impaired because of the consumption of an alcoholic beverage, but it does not require that the impaired ability be demonstrated by any particular acts of unsafe driving. *See* ***id***.

With these elements in mind, we conclude that Anderson had probable cause to believe that Grohskopf had operated a motor vehicle while intoxicated when he requested the PBT test. Grohskopf arrived at the police department exhibiting classic symptoms of intoxication. He also admitted that he had driven to the department and he admitted that he had been drinking at two different festivals during the day. Probable cause is a test based on probabilities; it need only lead a reasonable officer to believe that guilt is more than a possibility; it is also a commonsense test. *See* ***Sharpee,*** 154 Wis.2d at 519, 453 N.W.2d at 510. This test was satisfied in this case.

Grohskopf relies on ***State v. Seibel***, 163 Wis.2d 164, 471 N.W.2d 226 (1990), and ***State v. Swanson***, 164 Wis.2d 437, 475 N.W.2d 148 (1991). We disagree that either case governs this case. ***Seibel*** was a search incident to arrest case. *See* ***Seibel,*** 163 Wis.2d at 166, 471 N.W.2d at 227. The issue was the standard for allowing the police to withdraw blood from the suspect after he had been arrested. *See* ***id.*** The supreme court held that "reasonable suspicion" was the standard, *see* ***id***. at 179, 471 N.W.2d at 233, and then examined whether the facts of the case satisfied that standard, *see* ***id***. at 180-83, 471 N.W.2d at 233-35. Likewise, in ***Swanson***, the issue was whether the defendant was in custody for purposes of a search under the Fourth Amendment. *See* ***Swanson,*** 164 Wis.2d at 441, 475 N.W.2d at 150. We see no controlling correlation between the level of probable cause or reasonable suspicion in those search settings and the question of probable cause to arrest Grohskopf in this case.

Grohskopf also points to the ***Swanson*** court's footnote statement which we recite in the accompanying footnote.[4] We do not dispute that this language facially supports Grohskopf's argument in this case. However, ***Swanson*** has been limited in its application. In ***State v. Wille***, 185 Wis.2d 673, 684, 518 N.W.2d 325, 329 (Ct. App. 1994), the court stated, "The ***Swanson*** footnote does not mean that under all circumstances the officer must first perform a field sobriety test, before deciding whether to arrest for operating a motor vehicle while under the influence of an intoxicant."

CONCLUSION

We conclude that Anderson had probable cause to arrest Grohskopf prior to requesting the PBT test. Since the arrest was valid, the trial court properly denied Grohskopf's motion to suppress the evidence garnered subsequent to the arrest.

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[4] The supreme court said:

> 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.

State v. Swanson, 164 Wis.2d 437, 454 n.6, 475 N.W.2d 148, 155 (1991).

The ***Swanson*** court also said that the various indicia of intoxication recited in ***Seibel*** added up to reasonable suspicion but not probable cause. That, however, is not a correct recapturing of ***Seibel***. What the ***Seibel*** court said was, "While none of these indicia alone would give rise to a reasonable suspicion that the defendant's driving was impaired by alcohol, taken together they gave the police reason to suspect that the defendant's driving was impaired by alcohol." ***State v. Seibel,*** 163 Wis.2d 164, 183, 471 N.W.2d 226, 235 (1990). The ***Seibel*** court did not say how those collective indicia measured up against a probable cause standard.

By the Court.—Judgment affirmed.

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