COURT OF APPEALS
DECISION
DATED AND RELEASED

June 5, 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. 96-3022

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

COUNTY OF JEFFERSON,

PLAINTIFF-RESPONDENT,

v.

STEVEN P. FLEMING,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Jefferson County: WILLIAM F. HUE, Judge. *Affirmed.*

DYKMAN, P.J. This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS. Steven Fleming appeals from a judgment convicting him of operating a motor vehicle while under the influence of an intoxicant, contrary to a Jefferson County ordinance conforming with § 346.63(1)(a), STATS. Fleming asserts that the officer who arrested him lacked probable cause to do so. This is so, he reasons, because the field sobriety tests used by the officer lacked validity

and because the administration of a preliminary breath test in the absence of probable cause violated the Fourth Amendment to the United States Constitution. We conclude that even without the contested field sobriety tests and the result of the preliminary breath test, the officer had probable cause to arrest Fleming.[1] We therefore affirm.

BACKGROUND

On March 3, 1996 at about 2:45 a.m., Deputy David Drayna of the Jefferson County Sheriff's Department observed a motor vehicle enter Highway 26 in front of him and travel southbound. Highway 26 is a two-lane highway, with one lane going northbound and the other southbound. Drayna saw the vehicle travel across the center line and abruptly return to the southbound lane of the highway. The vehicle rapidly accelerated to sixty-five miles per hour and shortly made a wide turn onto old Highway 26. While doing so, the entire vehicle traveled into the opposite lane, then corrected back. After the turn, the vehicle continued straight toward a driveway, but at the last second abruptly turned to the left at a turn in the highway. Again, the vehicle was in the opposing lane, this time for about two-tenths of a mile, and then sharply jogged back into the proper lane. The officer activated his emergency lights and siren. The vehicle continued southbound, eventually turned into a private driveway and followed the driveway to its end near a trailer house. Both Drayna and operator of the vehicle got out of their cars and walked toward each other. Drayna identified Fleming from his

[1] It is not necessary under all circumstances that police officers perform field sobriety tests before probable cause to arrest for operating while under the influence of an intoxicant exists. ***State v. Wille***, 185 Wis.2d 673, 684, 518 N.W.2d 325, 329 (Ct. App. 1994).

driver's license. Drayna explained that he had stopped Fleming because he had been driving left of center.

Drayna observed that Fleming was unsteady on his feet and swayed from side to side as he walked. He also noticed an odor of intoxicants, that Fleming slurred his speech, and that his eyes were bloodshot and glassy. Drayna asked Fleming if he had been drinking, to which Fleming answered that he had been drinking earlier in the day and "had way too much." Drayna asked Fleming to perform field sobriety tests and Fleming declined, stating that Drayna should just take him to jail. Ultimately, Fleming recited the alphabet for Drayna, making it to the letter "Q" before becoming confused. At Drayna's request, Fleming attempted to perform the one-legged-stand test, but was unable to do so. Fleming then attempted the finger-to-nose test, but touched his mustache area. Drayna performed the horizontal gaze nystagmus test and then asked Fleming to perform a preliminary breath test. The test registered .30. Drayna arrested Fleming for operating a motor vehicle while under the influence of an intoxicant.

Fleming moved the trial court to suppress evidence of the field sobriety tests and the results of the preliminary breath test. The trial court denied this motion. After a trial upon stipulated facts, the trial court found Fleming guilty of operating a motor vehicle while intoxicated. Fleming appeals.

DISCUSSION

Fleming first asserts that the trial court erroneously based its probable cause finding predominately on the results of the "alphabet" test, the "finger-to-nose" test, the "one-legged-stand" test and the "horizontal gaze nystagmus" test because these tests were done improperly, were not probative of intoxication and were irrelevant. But we review a probable cause determination

de novo. ***State v. Babbitt***, 188 Wis.2d 349, 356, 525 N.W.2d 102, 104 (Ct. App. 1994). Thus, we will focus only on what we conclude are the facts from which a probable cause determination might arise. Probable cause to arrest exists where the circumstances are such that a reasonable law enforcement officer could conclude that an arrestee probably had committed an offense. *See* ***State v. Wille***, 185 Wis.2d 673, 682, 518 N.W.2d 325, 329 (Ct. App. 1994). This is a common sense test. It is based on probabilities. The facts need only be sufficient to lead a reasonable officer to believe that guilt is more than a possibility. ***County of Dane v. Sharpee***, 154 Wis.2d 515, 518, 453 N.W.2d 508, 510 (Ct. App. 1990).

We need not consider Fleming's assertions that the tests we have listed were probative of nothing. We will review for probable cause without considering the test results. Likewise, we will not consider Fleming's asserted .30 blood alcohol test. We conclude that without this evidence, there was sufficient evidence for a reasonable police officer to conclude that Fleming had been driving while under the influence of an intoxicant.

We find ***Wille*** instructive. There, an officer smelled an odor of intoxicants about Wille at a hospital. He knew that a firefighter and another officer had smelled intoxicants on and near Wille. The officer knew that Wille had rear-ended another automobile and heard Wille say that he had "to quit doing this." This information was sufficient to provide probable cause to arrest Wille. *See* ***Wille***, 185 Wis.2d at 683-85, 518 N.W.2d at 329. The factors that produced probable cause were therefore an odor of intoxicants, erratic driving and a confession. What factors or indicia of intoxication were present for Deputy Drayna?

Fleming was arrested slightly after bar time in Wisconsin. *See* ***State v. Swanson***, 164 Wis.2d 437, 453 n.6, 475 N.W.2d 148, 155 (1991). He failed to stop even after Drayna activated his lights and siren. He was driving erratically, having completely crossed the center line of the highway several times. He was unsteady on his feet and swayed from side to side. He had an odor of intoxicants about him. His eyes were bloodshot and glassy. His speech was slurred. He admitted that he had been drinking earlier in the day and confessed that he "had way too much." He originally declined to take field sobriety tests, suggesting to Drayna that he just be taken to jail.

We conclude that this information was sufficient to permit a reasonable officer to conclude that Fleming had committed the offense of operating a motor vehicle while under the influence of an intoxicant. Deputy Drayna therefore had probable cause to arrest Fleming.

Fleming argues that the indicia of intoxication Drayna observed were similar to the indicia of intoxication discussed in ***State v. Seibel***, 163 Wis.2d 164, 471 N.W.2d 226 (1991), ***State v. Swanson***, 164 Wis.2d 437, 475 N.W.2d 148 (1991), and ***State v. Krause***, 168 Wis.2d 578, 484 N.W.2d 347 (Ct. App. 1992). He asserts that in each of these cases, the court found the indicia of intoxication sufficient to support a reasonable suspicion determination, but not one of probable cause. As to ***Krause***, this assertion is untrue. There, we concluded only that a variety of factors were sufficient to establish a reasonable suspicion that Krause was operating a motor vehicle while under the influence of an intoxicant. We did not decide whether that evidence would also support a probable cause determination.

In ***Seibel***, the court noted four indicia of drinking: (1) unexplained erratic driving; (2) a strong odor of intoxicants emanating from Seibel's traveling companion; (3) a police chief's belief that he smelled an intoxicant on Seibel's breath; and (4) Seibel's belligerence and lack of contact with reality at a hospital. ***Seibel***, 163 Wis.2d at 181-83, 471 N.W.2d at 234. In ***Swanson***, the court held that these indicia were sufficient to support reasonable suspicion, but not probable cause. ***Swanson***, 164 Wis.2d at 453 n.6, 475 N.W.2d at 155. The ***Swanson*** court noted that the following factors or indicia of intoxication were sufficient to provide reasonable suspicion, but were arguably insufficient to show probable cause: (1) unexplained erratic driving; (2) an odor of intoxicants about Swanson; and (3) an incident at about bar time. ***Id.***

Fleming's indicia of intoxication includes unexplained erratic driving, an odor of intoxicants and an incident at about bar time, the indicia in ***Swanson***. Fleming had no traveling companion, was not belligerent, and was reasonably in touch with reality. But Fleming's indicia of intoxication continue: Fleming was unsteady on his feet and swayed from side to side, his eyes were bloodshot and glassy, and his speech was slurred. He admitted to drinking earlier in the day and confessed that he "had way too much." He initially declined to take field sobriety tests and instead asked to be taken to jail. When these indicia of intoxication are added to the indicia found in ***Seibel*** and ***Swanson***, there is no question the scales tip the other way. With these additional indicia of intoxication, the supreme court would have decided that probable cause existed to arrest both Seibel and Swanson. Accordingly, we conclude that those two cases are inapplicable to our decision.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports. *See* RULE 809.23(1)(b)4, STATS.