

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

April 8, 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. 96-3101

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

COUNTY OF LANGLADE,

PLAINTIFF-RESPONDENT,

v.

STANLEY S. DRABEK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Langlade County:
JAMES P. JANSEN, Judge. *Affirmed.*

MYSE, J. Stanley S. Drabek appeals a conviction for operating a motor vehicle while intoxicated. Drabek contends that the initial stop was without legal justification and that his subsequent arrest was without probable cause. Because this court the officers had a reasonable suspicion Drabek was operating his vehicle unlawfully at the time of the initial stop and had probable cause to believe he was operating a motor vehicle while intoxicated at the time of his arrest, the judgment of conviction is affirmed.

Drabek was operating his motor vehicle in an east bound lane of Forest Road, Langlade County, Wisconsin, when he was observed by two Langlade County deputies who were traveling westward. Drabek's vehicle crossed the centerline of the road forcing the driver of the police vehicle to swerve his vehicle to the shoulder of the roadway in order to avoid being struck. The officers turned and followed Drabek's vehicle, observing that it was then traveling quite slowly and that it crossed the centerline several additional times within the next one-half to three-quarter miles. The officers stopped the vehicle and when they approached they noticed a strong odor of intoxicants inside the vehicle. The officers noted that Drabek's eyes were glassy, he had difficulty removing his driver's license from his wallet, his speech was slurred and he had difficulty maintaining his balance while walking.

Although Drabek frames the issues differently, it appears that each of his contentions is a challenge to the legality of the initial stop and the subsequent arrest. Drabek states these issues as follows:

- I. Did the State fail to establish that the field sobriety tests were relevant to determining whether defendant-appellant was impaired?
- II. Can probable cause be based on tests which are not shown to be probative?

The issues as framed advance the argument that the field sobriety tests were so subjective as to have no probative value. Such an argument assumes that in the absence of the field sobriety tests there exists no basis for Drabek's arrest. This court does not agree. Properly stated, Drabek is challenging the sufficiency of the evidence upon which the officer found probable cause to arrest Drabek for operating a motor vehicle while under the influence. By implication Drabek also argues that there was an insufficient basis to justify the officers' initial stop.

Drabek's contentions raise mixed issues of law and fact. We accept the trial court's factual findings unless they are clearly erroneous. Section 805.17(2), STATS. Whether those facts fulfill the proper legal standard is a question of law. *State v. Babbitt*, 188 Wis.2d 349, 356, 525 N.W.2d 102, 104 (Ct. App. 1994).

Turning to Drabek's contention that the initial stop was unwarranted, police officers may stop an automobile if they have a "reason to believe an individual may be involved in the commission of a crime" *State v. Washington*, 120 Wis.2d 654, 660, 358 N.W.2d 304, 307 (Ct. App. 1984). The officers need "'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant'" the investigatory stop. *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968)). The evidence discloses that the initial stop was executed after Drabek's automobile crossed over the centerline forcing the officers to swerve their vehicle to the shoulder of the road to avoid a collision. In pursuit, they noted Drabek's vehicle crossing the centerline on several more occasions in a relatively short distance traveled. These observations of impaired driving are sufficient to justify the officers' stopping the vehicle to investigate the reasons for the observed erratic driving. The implication that the officer was without a sufficient basis to initially detain Drabek is without merit.

Drabek contends that after he was stopped, he was arrested without probable cause. This court disagrees. "Probable cause to arrest exists where the officer, at the time of the arrest, has knowledge of facts and circumstances sufficient to warrant a person of reasonable prudence to believe that the arrestee is committing, or has committed, an offense." *County of Dane v. Sharpee*, 154 Wis.2d 515, 518, 453 N.W.2d 508, 510 (Ct. App. 1990). The evidence need not show guilt beyond a reasonable doubt, nor even prove guilt is more probable than not. *State v. Truax*, 151 Wis.2d 354, 360, 444 N.W.2d 432, 435 (Ct. App. 1989). The information need only show that guilt was more

than a mere possibility. *Id.* Field sobriety tests are only a factor in considering the totality of the circumstances surrounding the arrest, as an officer is not required to perform such tests before making an arrest. *State v. Wille*, 185 Wis.2d 673, 684, 518 N.W.2d 325, 329 (Ct. App. 1994).

After stopping Drabek's vehicle the officer detected the odor of intoxicants, observed Drabek's eyes to be glassy and he appeared to be impaired in presenting his driving license to the officer. Based on these observations, the officer requested Drabek to perform several field sobriety tests. The bulk, but not all, of Drabek's arguments are addressed to the officer's qualifications to conduct a field sobriety examination and the lack of specificity of standards with which the officer measured Drabek's performance. While these arguments may affect the weight to be attached to the officer's testimony, it is not sufficient to affect the admissibility of the evidence nor preclude the fact finder from considering such evidence in making a determination whether probable cause existed for Drabek's arrest.

Drabek's performance was described by the officer, including the fact that Drabek was unable to walk heel-to-toe, recite the alphabet in correct order beyond the letter G and satisfactorily maintain his balance while performing the finger-to-nose test. Drabek's performance on these tests, coupled with the erratic driving the officer observed, the smell of intoxicants and Drabek's apparent impairment, constituted a sufficient basis for the officer to request a preliminary breath test. When that breath test indicated a blood alcohol level of .15%, the officer placed Drabek under arrest for operating a motor vehicle under the influence of an intoxicant. Under these facts, probable cause existed to suspect that Drabek was impaired while driving.

By the Court.—Judgment affirmed.

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

