COURT OF APPEALS
DECISION
DATED AND FILED

July 15, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

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.

No. 99-0238

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

CITY OF WAUTOMA,

PLAINTIFF-RESPONDENT,

V.

RICHARD A. WEHE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waushara County: LEWIS MURACH, Judge. *Affirmed.*

DYKMAN, P.J.[1] Richard A. Wehe appeals from a judgment convicting him of operating a motor vehicle while intoxicated (OMVWI). Wehe contends that his arrest was not based on probable cause and that the sobriety tests

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

he performed are not probative of intoxicated behavior. We disagree and conclude that the officer's observations gave him probable cause to arrest Wehe.

At Wehe's suppression hearing, City of Wautoma Police Sergeant Paul Weiss testified that he observed a maroon van weaving back and forth from the center line to the fog line in front of him. Sometimes the vehicle would cross the centerline approximately six to eight inches before swerving back toward the fog line. This occurred approximately three or four times for about a mile to a mile and a half.

Sgt. Weiss activated his red and blue lights and stopped the van. The driver identified himself as Richard Wehe. Sgt. Weiss observed Wehe's bloodshot eyes and slurred speech, and detected a strong odor of intoxicants coming from his vehicle. Wehe denied he had been drinking. Sgt. Weiss asked Wehe to perform a series of physical tests, and Wehe exited his vehicle, stumbling in the process.

Sgt. Weiss again asked whether Wehe had been drinking and Wehe admitted that he had. Sgt. Weiss had Wehe attempt a series of physical tests. Wehe recited the alphabet correctly, but continued to slur his speech. Sgt. Weiss noted that Wehe reeked of alcohol. Wehe unsuccessfully attempted to stand on one leg, but he informed Sgt. Weiss that he had one leg that was shorter than the other, a bad right knee, a broken back, a missing right finger, a gunshot wound, torn ligaments in his left knee, and a right knee that was out. Wehe also tried to walk heel to toe in a straight line, but was unable to maintain his balance.

Based upon his observations of Wehe, Wehe's performance in the physical tests, and Wehe's driving, Sgt. Weiss formed the belief that Wehe was under the influence of alcohol and placed him under arrest. A subsequent blood

test revealed Wehe had a .174 blood alcohol concentration. The trial court denied Wehe's motion to suppress, finding that Sgt. Weiss had probable cause to place Wehe under arrest for OMVWI. At a stipulated trial, the trial court found Wehe guilty of OMVWI.

Wehe argues on appeal that Sgt. Weiss did not have probable cause to arrest him for OMVWI. Whether a set of facts constitutes probable cause is a question of law that we review de novo. *See* ***State v. Babbitt*****,** 188 Wis.2d 349, 356, 525 N.W.2d 102, 104 (Ct. App. 1994). In deciding whether probable cause for an arrest exists, we look at whether "the totality of the circumstances within the arresting officer's knowledge at the time of the arrest would lead a reasonable police officer to believe … that the defendant was operating a motor vehicle while under the influence of an intoxicant." ***State v. Nordness***, 128 Wis.2d 15, 35, 381 N.W.2d 300, 308 (1986). That a reasonable officer could conclude, based on the information known to the arresting officer, that the "defendant probably committed" the offense is sufficient to establish probable cause. ***State v. Koch***, 175 Wis.2d 684, 701, 499 N.W.2d 152, 161 (1993). We may also consider the conclusions that officers draw based on their investigative experience. *See* ***State v. Wille***, 185 Wis.2d 673, 683, 518 N.W.2d 325, 329 (Ct. App. 1994).

The facts relevant to a determination of whether Weiss had probable cause to arrest Wehe are as follows: Weiss observed Wehe's vehicle weaving back and forth in its own lane and crossing the centerline about three to four times in a mile to a mile and a half. Wehe admitted he had been drinking and Weiss observed Wehe's bloodshot eyes, slurred speech, and noticed a strong odor of alcohol. Wehe stumbled when he tried to exit the vehicle and, when he tried to walk heel to toe in a straight line, he lost his balance and sidestepped on several occasions.

Using the ***Nordness*** standard, we conclude that the totality of these facts would lead a reasonable police officer to believe that Wehe was operating a motor vehicle while under the influence of an intoxicant. The facts, taken as a whole, are sufficient to establish probable cause to arrest for OMVWI.

Wehe argues that his multiple physical disabilities negate the indications of intoxication. Wehe, however, fails to identify how his physical impairments produced bloodshot eyes, slurred speech, and a strong odor of intoxicants upon his breath. We see no logical correlation between Wehe's physical impairments and these facts.

Furthermore, probable cause is an objective test. The relevant inquiry is whether the facts would lead a reasonable police officer to believe that a violation had occurred or was occurring. *See* ***Johnson v. State***, 75 Wis.2d 344, 348-49, 249 N.W.2d 593, 595-96 (1977). Sgt. Weiss, or any other reasonable police officer, could have disbelieved Wehe regarding the significance of his physical conditions.

The Wisconsin Supreme Court established a minimum for probable cause in an OMVWI case in ***State v. Swanson***, 164 Wis.2d 437, 475 N.W.2d 148 (1991). In ***Swanson***, the court determined that the following indicators did not constitute probable cause: (1) the defendant's erratic driving, (2) the odor of intoxicants emanating from the defendant as he spoke, and (3) the incident occurred approximately at the time when bars close in Wisconsin. *See* ***id.*** 164 Wis. 2d at 453 n.6, 475 N.W.2d at 155 n.6. The ***Swanson*** court determined these three indicia formed a basis for a reasonable suspicion, but were not enough for probable cause.

The facts before us differ markedly from the facts in ***Swanson***. There might be a possible, non-alcohol-related explanation for Wehe's bloodshot eyes, or his slurred speech, or the odor of alcohol about him, or his erratic driving, or his stumbling, or his performance on the field sobriety tests, but it is probable that Wehe was operating a motor vehicle while intoxicated. Probable cause is a test with a very low threshold. The evidence need not even reach the level that guilt is more likely than not. *See* ***State v. Mitchell***, 167 Wis.2d 672, 681-82, 482 N.W.2d 364, 367-68 (1992). We are not persuaded that Wehe's assertion of physical impairments prevents his arrest for OMVWI.

Wehe also argues that the City of Wautoma should not be allowed to use field sobriety tests to determine probable cause because the city failed to show how sobriety tests are probative of intoxication. Wehe claims the city must prove that sobriety tests are reliable indicators of intoxication before they can be used to determine intoxication.

Since Wisconsin's appellate courts have not directly addressed this issue, we examine authority from other states. In ***Illinois v. Sides***, 556 N.E.2d 778, 778 (Ill. App. Ct. 1990), the Illinois Court of Appeals considered whether scientific evidence must be submitted to determine the validity of field sobriety tests. The Illinois court stated that intoxication can be understood by lay persons, and therefore expert testimony is not needed. The court said:

> [I]t is entirely appropriate for the jury to consider the defendant's ability to perform the simple physical tasks which comprise the field-sobriety tests. The jury's inference that a defendant who had difficulty performing some of these tasks may have been similarly impaired in his ability to think and act with ordinary care when in operation of an automobile is entirely justified and one which the law permits the jury to draw.

> Certainly in our modern society, a juror's common observations and experiences in life would include not only the driving of an automobile, but a familiarity with the degree of physical and mental acuity required to do so. No expert testimony is needed nor is a showing of scientific principles required before a jury can be permitted to conclude that a person who performs badly on the field-sobriety tests may have his mental or physical faculties "so impaired as to reduce his ability to think and act with ordinary care."

Id. at 779-80 (quoting Illinois Pattern Jury Instruction, Criminal, No. 23.05 (2d ed. Supp. 1989)). The Illinois court decided that the effects of intoxication are so well known to lay persons that evidence does not need to be submitted to determine the reliability or validity of field sobriety tests.

The state of Florida also addressed this issue in ***Florida v. Meador***, 674 So. 2d 826 (Fla. Dist. Ct. App. 1996). In ***Meador***, the defendants sought to exclude evidence of the field sobriety tests on the grounds that the "testing lacked both scientific reliability and probative value, and was otherwise highly prejudicial." ***Id.*** at 828. The Florida court determined that the effects of intoxication were so commonly understood that expert testimony as to the validity of sobriety tests would be superfluous. The court noted:

> There are objective components of the field sobriety exercises, which are commonly understood and easily determined, such as whether a foot is on a line or not. Jurors do not require any special expertise to interpret performance of these tasks. Thus, evidence of the police officer's observations of the results of defendant's performing the walk-and-turn test, … should be treated no differently than testimony of lay witnesses … concerning their observations about the driver's conduct and appearance.

Id. at 831. The Florida court determined that since lay persons are allowed to testify as to their own perception of someone's intoxication, a police officer, who

suspects that a person has been operating a motor vehicle while intoxicated, should likewise be able to testify as to their own perception of the defendant's intoxication.

We agree with the reasoning of both the Illinois and Florida courts. Wisconsin has long held that a lay witness, who has had the opportunity to observe the facts upon which he or she bases his or her opinion, may give an opinion as to whether a person at a particular time was intoxicated. *See* ***State v. Burkman***, 96 Wis.2d 630, 645, 292 N.W.2d 641, 648 (1980). *See also* ***Kuroske v. Aetna Life Ins. Co.***, 234 Wis. 394, 404, 291 N.W. 384, 388 (1940). Expert testimony will not help in determining the validity and reliability of field sobriety tests, and is therefore unnecessary. The trial court did not err by concluding that Sgt. Weiss's observations gave him probable cause to arrest Wehe for OMVWI.

By the Court.—Judgment affirmed.

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