

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 24, 2005

Cornelia G. Clark
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2004AP3035

Cir. Ct. Nos. 2004TR4280
2004TR4797

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

EAU CLAIRE COUNTY,

PLAINTIFF-RESPONDENT,

V.

CRAIG M. MADER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Eau Claire County: ERIC J. WAHL, Judge. *Affirmed.*

¶1 CANE, C.J.¹ Craig Mader appeals a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant (OWI). He

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

contends the officer did not have probable cause to arrest him and therefore the evidence resulting from the arrest should have been suppressed. We disagree and affirm the judgment.

BACKGROUND

¶2 On April 19, 2004, Eau Claire County deputy Travis Holbrook was dispatched to the scene of a one-car accident. Upon arrival, Holbrook observed that a vehicle had left the roadway, gone through a ditch and struck some trees. Mader approached Holbrook and identified himself as the driver. Holbrook testified that he observed that Mader's speech was slurred and that he detected an odor of intoxicants on Mader's breath and about "his person." Holbrook also stated that Mader admitted to consuming alcohol that evening. Mader told Holbrook he had been traveling westbound when his throttle stuck, causing the accident. However, based on his observations, Holbrook determined that Mader had been traveling eastbound at a high rate of speed before the accident.

¶3 Holbrook asked Mader to perform field sobriety tests. Holbrook testified that Mader was unable to complete the horizontal gaze nystagmus test because he was unable to perform it without his eyeglasses. During the walk and turn test, Mader stepped off the line and in the process failed to touch heel to toe. Otherwise, Mader performed the test correctly. During the one-legged stand test, Mader swayed when he counted twenty and put his foot down at twenty-three and twenty-six. However, he counted correctly and kept his arms at his side during the test. Based on the results of the testing, Holbrook asked Mader to perform a preliminary breath test (PBT). The result was .07%. Holbrook determined Mader was driving while under the influence of an intoxicant and arrested him.

¶4 After Mader was charged with OWI, he filed a motion to suppress evidence resulting from the arrest. He argued Holbrook did not have probable cause to arrest him. The circuit court denied the motion and Mader was ultimately found guilty of OWI.

DISCUSSION

¶5 Upon review of a motion to suppress, we will sustain the trial court's historical findings of fact unless those findings are clearly erroneous. *State v. Amos*, 220 Wis. 2d 793, 797, 584 N.W.2d 170 (Ct. App. 1998). However, whether those facts satisfy the constitutional requirement of reasonableness presents a question of law that we review de novo. *Id.* at 797-98.

¶6 Here, we address whether Holbrook had probable cause to arrest Mader. In OWI cases, probable cause will be found “where 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 ... 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 (1986). This is a commonsense test, based on probabilities. See *County of Dane v. Sharpee*, 154 Wis. 2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990). The facts need only be sufficient to lead a reasonable police officer to believe that guilt is more than a possibility. *Id.*

¶7 Mader first argues his performance on the field sobriety tests was not sufficient to give Holbrook probable cause to believe that he was operating while intoxicated. He contends the markers of intoxication Holbrook observed were minimal at best and did not amount to probable cause that he was under the influence of an intoxicant. Rather, Mader maintains they only showed a mere possibility he was impaired. However, in *State v. Kasian*, 207 Wis. 2d 611, 622,

558 N.W.2d 687 (Ct. App. 1996), we concluded that in some cases, field sobriety tests may not always be necessary to establish probable cause. In *Kasian*, the officer came upon the scene of a one-car accident. The officer observed a damaged van next to a telephone pole. The officer noted an odor of intoxicants about Kasian and that Kasian's speech was slurred. *Id.* We concluded that these factors were enough to give the officer probable cause to believe Kasian was driving while intoxicated, even though the officer did not have Kasian perform any field sobriety tests. *Id.* Here, the facts are similar. Holbrook was dispatched to the scene and found Mader's car had left the road, gone through the ditch and crashed into a tree. Holbrook noted an odor of intoxicants about Mader and that his speech was slurred. Unlike in *Kasian*, Mader did perform field sobriety tests and Holbrook observed some indicators of impairment. Thus, we conclude Holbrook had probable cause to believe Mader was intoxicated based on the totality of the circumstances.

¶8 Relying on *Sharpee*, Mader next argues that the result of the PBT showed that he was not under the influence of an intoxicant and, consequently, there was no probable cause to arrest him. However, in *Sharpee*, Sharpee's PBT result was .01%. *Sharpee*, 154 Wis. 2d at 517. Sharpee conceded the officer had probable cause to arrest him before the PBT, but argued that the PBT result voided any grounds for arrest. *Id.* We determined that the result of a PBT are not the sole determinant of whether probable cause exists. Instead, it is another factor to be considered in an officer's examination of the totality of the circumstances. *Id.* at 518-20. Similarly here, Holbrook had sufficient probable cause to believe Mader was operating while intoxicated before he administered the PBT. That the PBT result was slightly below the legal limit of .08% does not void the grounds for arrest.

¶9 Finally, Mader argues he gave a plausible explanation for the result—that his throttle stuck and he was unable to stop his vehicle. However, the mere fact that an innocent explanation for the driver’s conduct may be advanced is not enough to defeat probable cause. *See* 2 WAYNE R. LAFAVE, *Search & Seizure*, § 3.2(e), at 78 (2004); *see also State v. Welsh*, 108 Wis. 2d 319, 347, 321 N.W.2d 245 (1982) (Abrahamson, J., dissenting), *rev’d on other grounds*, 466 U.S. 740 (1984).

By the Court.—Judgment affirmed.

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

