

**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. 2004AP2233-CR

Cir. Ct. No. 2003CF497

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CARL E. NELSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: SUE E. BISCHHEL, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Carl Nelson appeals a judgment, entered upon his no contest plea, convicting him of operating while intoxicated, fifth offense,

contrary to WIS. STAT. § 346.63(1)(a).¹ Nelson argues the trial court erred by denying his suppression motion because the police lacked probable cause to arrest him. We conclude that the officer had probable cause to arrest Nelson and, therefore, affirm the conviction and the order denying Nelson's suppression motion.

BACKGROUND

¶2 In May 2003, the State charged Nelson with operating after revocation, operating while intoxicated and operating with a prohibited alcohol concentration, the latter two counts as fifth or subsequent offenses. Nelson filed a motion to suppress evidence on grounds that the arresting officer lacked probable cause to arrest him. At the suppression motion hearing, Ashwaubenon public safety officers Kevin Larson and Donald Simons testified about the events leading to Nelson's arrest.

¶3 According to Simons, dispatch informed him that a citizen witness reported driving behind a white van that was "driving recklessly and all over the road." The witness provided dispatch with the license plate number, a vehicle description and the vehicle's location. Larson was the first to encounter Nelson, standing outside his van at a gas station preparing to pump gas. Larson observed that Nelson "appeared to be moving slow," as Larson twice asked Nelson to step to the back of the van before he complied. At that point, Simons arrived at the scene and took over questioning Nelson while Larson obtained a statement from the citizen witness.

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶4 Simons testified that although he initially thought Nelson just seemed tired, he detected the odor of intoxicants and asked Nelson if he had been drinking. Although Nelson did not initially respond, Simons repeated the question and Nelson ultimately indicated he “had a few beers after work.” Simons then arrested Nelson, concluding he had probable cause to arrest without field sobriety testing. Because of weather considerations, Simons transported Nelson to the police station for field sobriety testing. When Nelson refused to perform the field sobriety tests, a blood sample was taken which showed a blood alcohol concentration of .347%. The trial court ultimately denied the suppression motion concluding there was probable cause for Nelson’s arrest.

¶5 In exchange for Nelson’s no contest plea to OWI-fifth, the State agreed to dismiss the remaining counts. Nelson was convicted upon his no contest plea and sentenced to fifteen months’ initial confinement followed by forty-five months’ extended supervision. This appeal follows.

DISCUSSION

¶6 Nelson claims the police lacked probable cause to arrest him. We disagree. Whether the facts of a given case constitute probable cause to arrest is a question of law that we decide independently. *See State v. Kasian*, 207 Wis. 2d 611, 621, 558 N.W.2d 687 (Ct. App. 1996). “Probable cause exists 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 that the defendant probably committed a crime.” *State v. Riddle*, 192 Wis. 2d 470, 476, 531 N.W.2d 408 (Ct. App. 1995). The circumstances within the arresting officer’s knowledge need not be sufficient to make the defendant’s guilt more probable than not. *See id.*

¶7 Nelson cites fact patterns from various other cases in an attempt to distinguish the present case from others where probable cause to arrest was found. Ultimately, however, probable cause does not hinge on any particular requirement but, rather, depends on the totality of the circumstances in individual cases. *See Illinois v. Gates*, 462 U.S. 213, 232 (1983). Here, Simons' decision to arrest Nelson was based on a number of factors: (1) the report of reckless driving by a citizen witness; (2) Nelson's slow speech and movement, as well as inability "to focus on the point at hand"; (3) the odor of intoxicants; and (4) Nelson's admission that he had imbibed "a few beers." Because 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 probably committed a crime, *see Riddle*, 192 Wis.2d at 476, we conclude there was probable cause to arrest Nelson and consequently, affirm the judgment and order.²

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

² To the extent Nelson argues that the State erroneously points to evidence that was admitted at the preliminary hearing rather than the suppression motion hearing, we conclude there was sufficient evidence presented at the suppression motion hearing, as outlined above, to affirm the trial court's denial of the suppression motion.

