

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 19, 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. 2005AP228

Cir. Ct. No. 2004TR4109

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GARY L. STENE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dunn County:
WILLIAM C. STEWART, JR., Judge. *Affirmed.*

¶1 HOOVER, P.J.¹ Gary Stene appeals an order suspending his driver's license because he unlawfully refused to submit to a chemical test after being arresting for operating while under the influence of an intoxicant. At the refusal hearing, the circuit court determined that the arresting officer had probable

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.

cause to arrest Stene for driving while intoxicated and therefore his refusal was unreasonable. We affirm.

BACKGROUND

¶2 On February 19, 2004, at approximately 10:55 p.m., Village of Colfax Officer Brett Kohnke observed Stene's vehicle stuck in a snow bank outside Stene's home. Stene was inside the vehicle rocking it back and forth in an attempt to get the vehicle out of the snow bank. Kohnke pulled up behind Stene's vehicle. Stene approached Kohnke, who had exited his squad. Kohnke noted a strong odor of intoxicants coming from Stene. Kohnke asked Stene if he had been drinking and Stene admitted to having consumed two or three beers.

¶3 Stene then went into his garage to get a shovel. Kohnke testified that Stene appeared to be staggering. After about a minute of shoveling, Stene fell down. He got up and continued shoveling. Then he got in the car and rocked it again. Kohnke then asked Stene to perform field sobriety tests. Stene did not want to do the tests and asked what would happen if he did not. Kohnke responded that he would arrest him for OWI based on his observations at that point. Stene agreed to do the field tests. Kohnke testified that Stene performed poorly on all but one test.

¶4 Kohnke then asked Stene to do a preliminary breath test, which Stene refused. Kohnke arrested Stene and took him to a hospital for chemical testing. Stene refused to submit to a blood test. At the subsequent refusal hearing, the circuit court found there was probable cause for Kohnke to believe that Stene was operating while intoxicated. Therefore, the court found Stene's refusal to submit to a blood test unreasonable and ordered Stene's license revoked for one year.

DISCUSSION

¶5 We will uphold a circuit court’s findings of fact if the findings are not clearly erroneous. *State v. Roberts*, 196 Wis. 2d 445, 452, 538 N.W.2d 825 (Ct. App. 1995). Whether a set of facts constitutes probable cause is a question of law that we review independently. *State v. Babbitt*, 188 Wis. 2d 349, 356, 525 N.W.2d 102 (Ct. App. 1994).

¶6 The issue before us on appeal is whether Kohnke had probable cause to believe that Stene was operating while intoxicated. 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 Stene asserts that Kohnke made the decision to arrest him before administering field sobriety tests and that there were not sufficient indicia of intoxication at that time to establish probable cause that he was operating while intoxicated. Stene further maintains that even taking the field sobriety tests into account, there still was not probable cause because the tests were performed on a snow-covered, slippery surface.

¶8 Based on the totality of the circumstances, we conclude there was probable cause that Stene was operating while intoxicated even before Stene performed the field sobriety tests. Kohnke noted an odor of intoxicants coming

from Stene. Stene admitted to driving into the ditch and to consuming alcohol. Kohnke observed that Stene had difficulty walking, and that Stene fell while shoveling. Stene argues there is an innocent explanation for his being in the snow bank and falling while shoveling—the road was slippery. However, the mere fact that an innocent explanation for a driver’s conduct may be advanced is not enough to defeat probable cause. *State v. Schaefer*, 2003 WI App 164, ¶17, 266 Wis. 2d 719, 668 N.W.2d 760. Further, too many indicia of impairment converge to be dismissed by a simple, noninclusive innocent explanation.

¶9 Stene additionally lists several cases where there were more or different indicia of intoxication than there are in this case. He therefore argues there can be no probable cause here. However, the factors in those cases are not meant to be a definitive list of what must be present in all cases in order for probable cause to exist. Nor can we approve a laundry list of indicators that can be checked off until a certain number equals probable cause. Rather, a probable cause determination is made on a case-by-case basis looking at the totality of the circumstances in each particular case. *See State v. Multaler*, 2002 WI 35, ¶34, 252 Wis. 2d 54, 643 N.W.2d 437.

¶10 Finally, Stene challenges Kohnke’s recollection of the events. For example, although Kohnke testified that Stene had difficulty walking, Kohnke does not mention this observation in his police report. Stene therefore concludes that the accuracy of Kohnke’s testimony is questionable. The circuit court acknowledged the discrepancy between Kohnke’s testimony and his report. However, it concluded that based on Kohnke’s testimony there was probable cause that Stene was operating while intoxicated. The credibility of a witness is for the circuit court to determine, and we will not upset such a finding unless clearly erroneous. WIS. STAT. § 805.17(2).

¶11 After reviewing Kohnke's testimony and the information available to him at the time of the arrest, we conclude that a reasonable officer would believe Stene was operating while under the influence of an intoxicant. Because there was probable cause to arrest Stene, his subsequent refusal to submit to chemical testing was unreasonable. We therefore affirm the order suspending Stene's driver's license.

By the Court.—Order affirmed.

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