

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 28, 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. 2005AP243
STATE OF WISCONSIN**

Cir. Ct. No. 2004CT459

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RUTH M. DAVIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
DIANE M. NICKS, Judge. *Affirmed.*

¶1 VERGERONT, J.¹ Ruth Davis appeals the judgment of conviction for operating a motor vehicle while under the influence of an intoxicant, third offense, in violation of WIS. STAT. § 346.63(1)(a). The dispositive issue is

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

whether there was probable cause to arrest Davis at the time the officer transported her to the police department for field sobriety tests. We conclude there was and therefore affirm.

¶2 The facts relevant to this appeal come from the testimony of Officer Danielle Fazel, the only witness at the hearing on Davis' motion to suppress evidence based on an unlawful arrest. Officer Fazel testified as follows. She was on duty for the Fitchburg Police Department at 2:15 a.m. on January 21, 2004. She was in her squad car traveling southbound on Fish Hatchery Road approaching the intersection with Caddis Bend Road. The weather was clear and the road conditions were clear and dry. She observed a semi pulled over on the shoulder of the road with its hazard lights on and the driver exiting the cab. Officer Fazel stopped and spoke to the driver, who told her that about three minutes previously, a woman driving a blue car came up behind him southbound, went into the median and into the northbound lanes of Fish Hatchery Road and then came back across in front of him and turned onto Caddis Bend Road from Fish Hatchery Road. He said he thought that driver might have hit the back of his truck. He pointed to a blue car parked at the intersection, saying that was the vehicle.

¶3 Officer Fazel observed the blue vehicle about 200 feet away and saw a woman, later identified as Davis, running around the car trying to close the trunk of the vehicle. The officer also observed that the hood was up. The officer went up to the blue vehicle and spoke to Davis. Davis told her that she was coming home from work at a restaurant in Middleton and she had a flat tire. The officer noticed that Davis' speech was thick and slurred; there was an odor of intoxicants coming from her; she had bloodshot, dilated eyes; and she was using her vehicle to "hold herself up, steady herself." The officer asked if she had been drinking and

Davis answered yes, she had had three drinks at work. The officer asked if she was sure she had not struck anything and Davis said she just had a flat tire. The officer went to the front of the car and noticed that both front tires were flat and the front corner of the car on the passenger's side was damaged, with dents and missing parts. There was a hot smell, which the officer described as a "distinct smell of when you hit something when your car is moving...." When the officer saw the damage to the front of the car, she asked Davis again if she was sure she just had a flat tire or if she did hit something and Davis repeated that she just had a flat tire.

¶4 The officer decided to administer field sobriety tests to Davis and decided to do that at the Fitchburg Police Station because it was cold. She transported Davis in her squad car. At the conclusion of the field sobriety tests, Officer Fazel placed Davis under arrest for operating a motor vehicle while under the influence of an intoxicant.

¶5 At the hearing on her motion, Davis conceded through counsel that there was probable cause to arrest her after the field sobriety tests. Her position was that she was arrested when she was placed in the squad car and at that time the officer did not have probable cause to arrest her, only reasonable suspicion to detain her.

¶6 The circuit court concluded there was probable cause to arrest Davis at the time the officer transported her to the police department for field sobriety tests and therefore did not reach the question, also argued by the parties, whether an arrest occurred at that time.

DISCUSSION

¶7 On appeal Davis renews her argument that she was arrested when the officer placed her in the squad car to transport her to the police department for field sobriety tests and there was no probable cause to arrest at that time.

¶8 In determining whether probable cause exists, we must look to the totality of the circumstances to determine whether 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. Babbitt*, 188 Wis. 2d 349, 356, 525 N.W.2d 102 (Ct. App. 1994). Probable cause is neither a technical nor a legalistic concept; rather, it is a “flexible, common-sense measure of the plausibility of particular conclusions about human behavior.” *State v. Petrone*, 161 Wis. 2d 530, 547-48, 468 N.W.2d 676 (1991), *cert. denied*, 502 U.S. 925 (1991). While the circumstances within the arresting officer's knowledge need not be sufficient to make the defendant's guilt more probable than not, the defendant's guilt must be more than a mere possibility for the arrest to be constitutional. *State v. Paszek*, 50 Wis. 2d 619, 625, 184 N.W.2d 836 (1971). Whether undisputed facts show probable cause to arrest is a question of law, which we review de novo. *Babbitt*, 188 Wis. 2d at 356.

¶9 We agree with the circuit court that there was probable cause to arrest at the time Davis got into the squad car. From the slurred speech, bloodshot and dilated eyes, odor of intoxicants, and admission that she had had three drinks and was on her way home from work, a reasonable officer could infer that Davis had recently been consuming alcohol. From the damage to the front of the vehicle, a reasonable officer could infer that the driver of the semi was giving an

accurate description of what had occurred. From the slurred speech, use of the vehicle to steady herself, and otherwise unexplained erratic driving, a reasonable officer could infer that Davis had consumed enough alcohol to impair her ability to drive safely. *See* WIS. STAT. § 346.63(1)(a) (“[u]nder the influence of an intoxicant ... to a degree which renders [one] incapable of safely driving”). In addition, from her insistence that she had only a flat tire and had not hit anyone when there was obvious additional damage to the front of her car, a reasonable officer could infer that Davis was intentionally hiding what had occurred, from which a reasonable officer could infer consciousness of guilt. Alternatively, a reasonable officer could infer that Davis was not aware of what had actually happened, which would reinforce the conclusion that she had consumed enough alcohol to impair her ability to drive safely.

¶10 Davis points to Officer Fazel’s testimony that she did not form the opinion that there was probable cause to arrest until after the field sobriety tests. However, the standard is what a reasonable officer would believe, an objective test, and therefore Officer Fazel’s view of when she had probable cause to arrest is not dispositive. *Babbitt*, 188 Wis. 2d at 356.

¶11 Because we conclude there was probable cause to arrest at the time Davis was transported to the police station, we do not address whether an arrest in fact occurred at that time.

By the Court.—Judgment affirmed.

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

