COURT OF APPEALS
DECISION
DATED AND FILED

September 29, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP342 **Cir. Ct. No. 2004TR15962**

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

IN THE MATTER OF THE REFUSAL OF LISA L. LAPPLEY:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LISA L. LAPPLEY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Rock County: JAMES P. DALEY, Judge. *Affirmed.*

¶1 DEININGER, J.[1] Lisa Lappley appeals an order revoking her operating privilege for refusing to submit to a chemical test of her blood alcohol concentration under WIS. STAT. § 343.305. Lappley claims the trial court erred in concluding that the arresting officer had probable cause to arrest her for operating a motor vehicle while under the influence of an intoxicant (OMVWI). We disagree and affirm the revocation order.

BACKGROUND

¶2 A Rock County Sheriff's Deputy arrested Lappley for OMVWI on an evening in early November 2004. He transported her to a police station and asked her to submit to a breath test for alcohol concentration. She refused and the deputy gave her a "Notice of Intent to Revoke Operating Privilege." *See* WIS. STAT. § 343.305(9)(a). She filed a timely request for a refusal hearing under WIS. STAT. § 343.305(9)(a)4.

¶3 The arresting deputy testified at the refusal hearing that he reported to the scene of a one-vehicle accident and observed Lappley's truck lying on its side in a ditch on the side of the highway. He inspected the accident scene and concluded, based on skid marks, tire marks in the gravel shoulder and the condition of the truck, that the accident likely happened when Lappley's truck went off the right side of the highway, overcorrected and went into a counterclockwise skid. The deputy believed the truck overcorrected again, skidded clockwise and ended up on its side in the right-hand ditch, facing the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2003-2004). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

direction from which it had come. He further testified that the roads were dry and that it was a clear night. He acknowledged on cross-examination, however, that there was "ice present on the road" but did not describe its extent or location.

¶4 The deputy further testified that, when he arrived at the scene, emergency medical personnel were attending to Lappley in the back of their ambulance. When she exited the ambulance, the deputy detected "a strong odor of intoxicants on her breath, [and her] eyes were glassy and bloodshot." He acknowledged, however, that Lappley was crying and he did not "know if the bloodshot was from the alcohol or from the crying." The deputy also described how Lappley was unable to get out of the ambulance without assistance and needed help in order to walk, noting that her impairment was not "due to any injury that [he] could see." Lappley refused an offer for transport to a hospital.

¶5 The deputy did not request Lappley to perform field sobriety tests, explaining that "her balance was so bad, I didn't want to take any chances of her getting injured by trying to perform field sobriety [tests]." He arrested Lappley for OMVWI based on the following: "the fact that she was in the motor vehicle accident, the odor of intoxicants, and her balance being to the point where she needed assistance in getting around." The deputy also testified that he found a glass containing an alcoholic drink in Lappley's truck, but this discovery occurred after her arrest and thus played no part in his decision to arrest her.

¶6 The circuit court determined that the State had established the existence of probable cause for Lappley's arrest, explaining as follows:

> The accident involved the vehicle rolling on its side. [The deputy] … saw Ms. Lappley, the only occupant of the vehicle…. She could not stand without assistance of two people, one on each arm. There was [*sic*] no obvious injuries to Ms. Lappley. She did not complain of injuries.

> She had been crying. Her eyes were red. The officer smelled an odor of intoxicants on her breath. He observed her eyes to be glassy. He observed her to be so unsteady she could not stand without assistance of two people. Under those circumstances, the field sobriety tests would have been both nonsensical and possibly dangerous to the health of Ms. Lappley.
>
> … The officer testified that her eyes were—while her eyes were red, they may have been red from crying, but it is an indicator, along with the glassy eyes, smell of intoxicants, the fact that an accident occurred, and her inability to stand without the assistance of two people, would lead a reasonable police officer to believe that she is under the influence of an intoxicant, and I do believe, in fact, that's enough under the circumstances of this particular case to merit the arrest and to merit the test, and as a result I do find that she unreasonably refused the test and so conclude.

¶7 Based on these findings and conclusions, the court entered an order revoking Lappley's operating privilege for twelve months. Lappley appeals.

ANALYSIS

¶8 Lappley refused to submit to chemical testing of her breath for alcohol concentration after her arrest for OMVWI, contrary to the requirements of Wisconsin's "implied consent" law. *See* WIS. STAT. § 343.305(2). She requested a refusal hearing under § 343.305(9), where the only issues to be decided were: "(1) whether the officer had probable cause to believe that the person was driving under the influence of alcohol; (2) whether the officer complied with the informational provisions of § 343.305[(4)]; (3) whether the person refused to permit a blood, breath or urine test; and (4) whether the refusal to submit to the test was due to a physical inability unrelated to the person's use of alcohol." ***State v. Wille***, 185 Wis. 2d 673, 679, 518 N.W.2d 325 (Ct. App. 1994). If an OMVWI arrestee prevails on at least one of the four issues "the court shall order that no

action be taken on the operating privilege on account of the person's refusal to take the test in question." § 343.305(9)(d).

¶9 Lappley does not assert that any of the circuit court's factual findings were clearly erroneous. She challenges only the circuit court's conclusion that the arresting officer had probable cause to arrest her for OMVWI. Whether the undisputed facts and those found by the circuit court constitute probable cause for arrest is a question of law that we decide *de novo*. ***State v. Babbitt***, 188 Wis. 2d 349, 356, 525 N.W.2d 102 (Ct. App. 1994). In ***Babbitt***, we described the standard governing the determination of probable cause for arrest at a refusal hearing:

> 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." Probable cause to arrest does not require "proof beyond a reasonable doubt or even that guilt is more likely than not." It is sufficient that a reasonable officer would conclude, based upon the information in the officer's possession, that the "defendant probably committed [the offense]."

Id. at 356-357 (citations omitted).

¶10 "The State's burden of persuasion at a refusal hearing is substantially less than at a suppression hearing." ***Wille***, 185 Wis. 2d at 681. To establish probable cause at a refusal hearing, the State needs to show only that the officer's account is "plausible." ***Id.*** A court does not weigh evidence for and against probable cause or determine the credibility of witnesses. ***Id.*** Lappley contends the State failed to meet its minimal burden in this case because the deputy did not conduct field sobriety testing, including the administration of a

preliminary breath test (PBT), and because he did not fully investigate the cause of the accident. We disagree.

¶11 There is no dispute that the deputy did not conduct field sobriety tests, and we discuss below whether field sobriety tests were required to establish probable cause under the circumstances as they existed prior to Lappley's arrest. Before doing so, however, we reject Lappley's assertion that the deputy failed to properly investigate the accident. The deputy testified that he had been called to the scene of some fifty to one hundred traffic accidents and had received training in accident investigations. He further gave specific testimony regarding his observations of skid and tire marks at the scene, and of the condition and final position of Lappley's vehicle. We conclude this testimony provides a plausible account of why the deputy concluded that Lappley's truck had traveled in the manner he opined and that its movements indicated Lappley was unable to safely operate her vehicle. It is true that innocent explanations for the driver's conduct might exist, such as those advanced by Lappley (an animal crossing the road or a mechanical malfunction). These other possibilities do not defeat probable cause, however, given that the officer's conclusion was a reasonable one. *See* 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 3.2(e) at 78 (4th ed. 2004).

¶12 We turn now to the significance of the arresting deputy's failure to request that Lappley perform field sobriety tests, including a PBT. Lappley relies on the oft-cited footnote in ***State v. Swanson***, 164 Wis. 2d 437, 475 N.W.2d 148 (1991) (abrogated in part for other reasons by ***State v. Sykes***, 279 Wis. 2d 742, 695 N.W.2d 277 (2005)), to argue that the absence of field sobriety tests is fatal to probable cause:

> Unexplained erratic driving, the odor of alcohol, and the coincidental time of the incident form the basis for a

> reasonable suspicion but should not, in the absence of a field sobriety test, constitute probable cause to arrest someone for driving while under the influence of intoxicants. A field sobriety test could be as simple as a finger-to-nose or walk-a-straight-line test. Without such a test, the police officers could not evaluate whether the suspect's physical capacities were sufficiently impaired by the consumption of intoxicants to warrant an arrest.

Id. at 453 n.6. We conclude that the ***Swanson*** footnote, even if it is something more than dictum, is not controlling on the present facts.

¶13 The facts in ***Swanson*** are much less compelling than in this case in that, unlike the deputy who arrested Lappley, the officers in ***Swanson*** witnessed no direct evidence of driver impairment. Lappley could not stand or walk without assistance. Although field sobriety tests may have been necessary in ***Swanson*** to determine the level of the arrestee's impairment, if any, here, sobriety tests would have served no purpose. The officer had already witnessed evidence of Lappley's impaired balance and coordination, rendering field tests, if they were even feasible under the circumstances, unnecessary.

¶14 Moreover, we expressly concluded in ***Wille***, 185 Wis. 2d 673, that the ***Swanson*** footnote does not require field sobriety tests to be performed in all cases before an officer can arrest for OMVWI. ***Id.*** at 684. And, we determined in ***State v. Kasian***, 207 Wis. 2d 611, 558 N.W.2d 687 (Ct. App. 1996), that an arresting officer had probable cause to arrest, without administering field sobriety tests, after he came upon a one-vehicle accident and observed the driver's slurred speech and detected an odor of intoxicants on his breath. ***Id***. at 622. Finally, in ***Babbitt***, 188 Wis. 2d 349, we also concluded, on similar facts, that probable cause to arrest for OMVWI existed without field sobriety tests. ***Id***. at 357.

¶15 Lappley also argues that ***State v. Seibel***, 163 Wis. 2d 164, 471 N.W.2d 226 (1991), supports her claim that the State did not establish probable cause to arrest her for OMVWI. Again, we disagree. The defendant motorcyclist in ***Seibel*** crossed the centerline of a highway and sideswiped a car, causing a multiple vehicle accident that killed two people and injured several others. ***Id.*** at 167. The State conceded that the arresting officer lacked probable cause to arrest the defendant for OMVWI, arguing instead that a sample of the defendant's blood was lawfully obtained and tested for alcohol concentration as a search incident to arrest for an offense other than OMVWI, homicide by negligent use of a vehicle. ***Id***. at 168. The supreme court agreed and sustained the admissibility of the blood test result on that basis. ***Id***. at 179.

¶16 Lappley's reliance on ***Seibel*** is thus misplaced, both because the facts in ***Seibel*** are distinguishable from those now before us, and because the court majority never analyzed the facts in ***Seibel*** under the probable cause standard. Here, the arresting officer smelled a strong odor of intoxicants emanating from the defendant and witnessed her inability to stand or walk without assistance. No similar observations were present in Seibel to support a conclusion that the arrested driver was impaired by alcohol consumption. And, as we have noted, the State conceded in ***Seibel*** the lack of probable cause to arrest for OMVWI. The court, therefore, had no occasion to, and did not, analyze the facts before it in terms of the standard for probable cause. The analysis and holding in ***Seibel*** is simply of no assistance in resolving the present dispute.

¶17 The determination of probable cause is a "commonsense test," requiring a court to assess the reasonableness of an officer's belief that a person has committed the offense of OMVWI. ***County of Dane v. Sharpee***, 154 Wis. 2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990). We are satisfied that, given the

totality of the circumstances in the present record, the facts known to the arresting deputy at the time of Lappley's arrest would lead a reasonable police officer to believe that Lappley had probably driven under the influence of an intoxicant. The deputy observed that a one-vehicle accident had occurred on a clear, dry evening, and evidence at the scene strongly suggested that the driver had been unable to safely control her vehicle. Lappley's eyes were bloodshot and glassy, and she smelled strongly of intoxicants. Most important, she could neither walk nor stand without assistance. We concur with the trial court that, even without conducting field sobriety tests, a reasonable police officer would have reasonably believed that Lappley had committed OMVWI. *See* ***id***.

CONCLUSION

¶18 For the reasons discussed above, we affirm the appealed order.

By the Court.—Order affirmed.

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