COURT OF APPEALS
DECISION
DATED AND FILED

December 7, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP874-CR **Cir. Ct. No. 2004CF235**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KIRK L. GRIESE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Fond du Lac County: DALE L. ENGLISH, Judge. *Affirmed.*

¶1 NETTESHEIM, J.[1] Kirk L. Griese appeals from a judgment convicting him of operating a motor vehicle while under the influence of an intoxicant, fourth offense, contrary to WIS. STAT. § 346.63(1)(a). On appeal,

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

Griese challenges the circuit court's denial of his motions to suppress evidence on grounds that the officer did not have reasonable suspicion to stop him or probable cause to arrest him.[2] This court sees no error, and affirms.

Facts

¶2 The facts are undisputed. It actually was a dark and stormy night when, on June 11, 2004, Fond du Lac county patrol officer David Tackett was traveling southbound on State Highway 26 shortly after 1:00 a.m. He observed the van ahead of him cross the centerline and travel wholly in the northbound lane to within a couple of feet of some construction barrels near the intersection of Highway 26 and U.S. Highway 151. The van entered the intersection, slowed and stopped. It then appeared to Tackett as though the van was going to turn north into the southbound lane of Highway 151. The van corrected its path, maneuvered around the barriers, and headed north in the northbound lane. At this point Tackett stopped the van.

¶3 The driver produced his license, which identified him as Griese. Griese told Tackett he did not realize he had crossed the centerline. Tackett detected a strong odor of alcohol on Griese's breath and observed that Griese's eyes were bloodshot, glossy and dilated. Also, Griese's speech was slurred. Griese acknowledged that he had had "a couple of beers" an hour to an hour and a half earlier.

[2] Griese also sets forth an argument relating to his refusal to submit to a blood alcohol test, contrary to WIS. STAT. § 343.305(10). He argues that here the police officer did not fully inform him of the implications of refusing. Since the refusal charge was dismissed pursuant to his plea, that issue is not before this court and thus will not be addressed.

¶4 Griese did not object to performing field sobriety tests. Tackett began to administer the horizontal gaze nystagmus test. The rain and wind caused Griese to squint, making it difficult for Tackett to see Griese's eyes. Tackett testified at the suppression hearing that he was taught to administer the tests in a prescribed order and so did not attempt a different test. He also testified that, while he typically gives all the tests at one location, the hard rain made continuing difficult, so he gave Griese the option of continuing the tests on the scene or going to another location. Griese made no verbal response. Tackett then asked Griese to get in the squad car, informed him that he was not under arrest, and took him to the Waupun Police Department, about five minutes away, to administer the tests. On the way to the police department, Tackett learned from dispatch that Griese had four prior arrests for operating while under the influence.

¶5 Once at the police department, Tackett repeated that Griese was not under arrest, and Griese said he understood. Tackett then attempted to begin the sobriety tests again, but Griese refused, saying that he was not taking any more tests, and that Tackett "might as well lock him up." At that point Tackett told Griese he was arresting him, and handcuffed him. Tackett took Griese to Waupun Memorial Hospital where he read Griese the Informing the Accused form and told Griese he was "going to be commanding a blood draw." Griese refused. However, a blood test ultimately was drawn and Griese was charged with violating WIS. STAT. § 346.63(1)(a) and (b). He also was issued a Notice of Intent to Revoke Operating Privilege for refusing to submit to a blood test.

¶6 Griese moved to suppress the results of all chemical tests on the grounds that he was stopped without reasonable suspicion and arrested without probable cause. He also challenged his refusal to have his blood drawn, arguing

that it is "grossly unfair" to punish him for refusing if, in spite of his refusal, his blood is drawn anyway.

¶7 The circuit court denied Griese's motions, concluding that reasonable suspicion supported the stop. Also, assuming that the arrest occurred at the scene when Griese was placed into the back of the squad car, the court concluded that probable cause supported the arrest. As to Griese's refusal challenge, the court concluded that Tackett had sufficient grounds on which to request a test, Griese was properly informed, Griese refused and, his claims of unfairness notwithstanding, "the law is what it is." Upon Griese's plea of no contest, he was convicted of operating while intoxicated, fourth offense.[3] He now appeals, renewing his same objections to the evidence against him.

Reasonable Suspicion

¶8 Griese's motions to suppress evidence arose pursuant to an investigative stop and thus implicate constitutional concerns. *See* ***State v. Williams***, 2001 WI 21, ¶18, 241 Wis. 2d 631, 623 N.W.2d 106. Our review of the circuit court's ruling, therefore, raises questions of constitutional fact to which this court applies a two-step standard of review. ***Id.*** This court first reviews the circuit court's findings of historical fact, upholding them if not clearly erroneous, and then reviews the determination of reasonable suspicion de novo. ***Id.***

¶9 The circuit court concluded that there was reasonable suspicion for the stop because Tackett observed Griese driving in the wrong lane, a violation of

[3] The refusal charge was dismissed.

WIS. STAT. § 346.05.[4] It also found that Griese was approaching an intersection of two highways while in the wrong lane and that, although he corrected his path, he appeared set to turn into the wrong lane at the intersection. Especially since these findings stem from undisputed facts, we cannot say that they are clearly erroneous.

¶10 Griese argues, however, that the stop was unconstitutional because the combination of the darkness, construction and extreme weather produced conditions anyone might have found challenging. He contends that Tackett's apparent failure to take these adverse conditions into account makes the stop an unreasonable one. We disagree. "[A] police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest." ***Terry v. Ohio***, 392 U.S. 1, 22 (1968). WISCONSIN STAT. § 968.24 is the statutory expression of the ***Terry*** constitutional requirements. ***State v. Waldner***, 206 Wis. 2d 51, 55, 556 N.W.2d 681 (1996).

¶11 As a general matter, determining what constitutes reasonableness is a commonsense test, ***id.*** at 56, where this court gives weight to the specific reasonable inferences the officer is entitled to draw. *See* ***Terry***, 392 U.S. at 27. Griese's situation, however, does not present the usual scenario. Here, Tackett observed Griese travel in the wrong lane toward the intersection of two highways, stop at the intersection and appear poised to take up driving on the other highway, again in the wrong lane. This wrong-lane driving in itself constituted a violation of WIS. STAT. § 346.05, leaving no "specific reasonable inferences" to be drawn

[4] WISCONSIN STAT. § 346.05 provides that vehicles must be driven on the right side of the roadway, except in certain specified situations. The conditions existing here are not among the statutory exceptions.

by Tackett. Although police officers are not required to rule out the possibility of innocent behavior before initiating a brief stop, ***Waldner***, 206 Wis. 2d at 60, Tackett did not have to consider that possibility. He observed a law being broken. Accordingly, the hour, the weather and the construction do not diminish the reasonableness of Tackett's decision to stop Griese under these facts.

Probable Cause

¶12 Griese next contends that, despite Tackett's assurances to the contrary, he was placed under arrest when Tackett stopped the field sobriety tests and put him into the squad car. He argues that ***State v. Seibel***, 163 Wis. 2d 164, 181-83, 471 N.W.2d 226 (1991), and ***State v. Swanson,*** 164 Wis. 2d 437, 453 n.6, 475 N.W.2d 148 (1991), *abrogated on other grounds by* ***State v. Sykes***, 2005 WI 48, ¶¶23-26, 279 Wis. 2d 742, 695 N.W.2d 277, teach that probable cause to arrest for driving while under the influence could not exist at that point because field sobriety tests had not been done.

¶13 While not conceding that Griese was arrested before refusing to submit to the tests at the police department, the State argues that even if Griese was arrested earlier, probable cause existed to do so. The circuit court also assumed for purposes of its decision that Griese was under arrest when he was placed into the squad car. The court concluded that probable cause existed based on Tackett's observation of Griese driving in the wrong lane and being in position at an intersection to turn again into the wrong lane; the odor of alcohol on Griese's breath; Griese's slurred speech and glossy, bloodshot, and dilated eyes; and his admission that he had been drinking less than two hours before.

¶14 We need not determine when Griese actually was arrested. Rather, we will take the issue as Griese presents it—that he was arrested when he was

placed in the squad car—and answer whether there existed probable cause at that time. We conclude that it did.

¶15 The circuit court's findings of fact will be upheld unless clearly erroneous, WIS. STAT. § 805.17(2), but whether a given set of facts constitutes probable cause to arrest presents a question of law which this court reviews independently of the circuit court. ***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 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). Furthermore, in determining whether probable cause exists, this court is not bound by the officer's subjective assessment or motivation. ***Kasian***, 207 Wis. 2d at 621.

¶16 Relying on ***Seibel*** and ***Swanson***, Griese argues that probable cause to arrest cannot exist in the absence of field sobriety tests. This court disagrees. ***Seibel*** set out "four indicia of drinking" which served as bases in that case for the officer's reasonable suspicion that the defendant's blood contained evidence of the crime of homicide by negligent operation of a motor vehicle. ***Seibel***, 163 Wis. 2d at 180-81. The question there, however, was whether reasonable suspicion or probable cause is the standard for drawing blood incident to an arrest, not whether

those four indicia satisfy the meaning of probable cause. *See* ***id.*** at 166.[5] We do not read ***Seibel*** as being a field sobriety tests case.

¶17 As for ***Swanson***, the defendant in that case drove erratically and bore the odor of intoxicants but had no difficulty standing, nor any slurred or impaired speech. ***Swanson***, 164 Wis. 2d at 442. Moreover, while its footnoted language about the necessity of field sobriety tests facially supports Griese's contention, *see* ***id.*** at 453 n.6, it has been qualified by later cases.

¶18 In ***State v. Wille,*** 185 Wis. 2d 673, 518 N.W.2d 325 (Ct. App. 1994), for example, the defendant smelled of intoxicants, rear ended a parked car and was heard by the officer to say, "I've got to quit doing this." ***Id.*** at 683-84. Field sobriety tests were not done due to a facial laceration. ***Id.*** at 678. The court of appeals nonetheless held that probable cause existed, saying, "The ***Swanson*** footnote does not mean that under all circumstances the officer must first perform a field sobriety test …." ***Wille***, 185 Wis. 2d at 684.

¶19 Similarly, in ***Kasian***, the officer discovered the defendant lying next to a damaged vehicle, smelling of intoxicants and later exhibiting slurred speech. ***Kasian,*** 207 Wis. 2d at 622. The court of appeals held that even without field sobriety tests, that evidence constituted probable cause to believe Kasian had operated the vehicle while intoxicated. ***Id.*** "[T]he question of probable cause is properly assessed on a case-by-case basis. In some cases, the field sobriety tests may be necessary to establish probable cause; in other cases, they may not." ***Id.***

[5] In the narration of the procedural history, the ***Seibel*** court recites that the circuit court found and the State had conceded below that probable cause did not exist to draw the defendant's blood, but there is no further discussion and no direct holding in that regard. ***State v. Seibel***, 163 Wis. 2d 164, 170-71, 471 N.W.2d 226 (1991).

¶20 Here, the circuit court found that Tackett observed Griese cross the centerline of the highway and appear ready to continue in the wrong lane on another highway. Tackett also observed Griese's slurred speech and bloodshot, glossy, and dilated eyes. Griese, smelling of intoxicants, admitted to Tackett that he recently had been drinking. These findings are not clearly erroneous. Furthermore, these observations were sufficient under the circumstances to form probable cause to arrest. Under the totality of the circumstances, Tackett reasonably could have believed that Griese was operating a motor vehicle while under the influence of an intoxicant. That is sufficient for this court to conclude that probable cause to arrest existed when Griese was placed in the squad car.[6]

Conclusion

¶21 Griese's violation of a traffic law by traveling on the wrong side of the highway provided ample reason for Tackett to stop him. That driving behavior coupled with slurred speech, bloodshot, glossy and dilated eyes, the smell of alcohol on his breath and his admitted recent drinking constitute probable cause in this case to arrest him without having had the field sobriety tests completed at the scene. The judgment is affirmed.

By the Court.—Judgment affirmed.

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

[6] Tackett's statement that Griese was not under arrest is not controlling because (1) the question is whether probable cause to arrest existed at that point, not whether he did arrest Griese, and (2) this court is not bound by the officer's subjective assessment or motivation. *See* ***State v. Kasian***, 207 Wis. 2d 611, 621, 558 N.W.2d 687 (Ct. App. 1996).