

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 15, 2006

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. 2006AP527
STATE OF WISCONSIN**

Cir. Ct. Nos. 2005TR1070
2005TR1112

**IN COURT OF APPEALS
DISTRICT III**

CITY OF STURGEON BAY,

PLAINTIFF-RESPONDENT,

V.

NATHAN W. SCHLEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Door County:
D. T. EHLERS, Judge. *Affirmed.*

¶1 CANE, C.J.¹ Nathan Schley appeals a judgment convicting him of operating while intoxicated (“OWI”), first offense, contrary to WIS. STAT. § 346.63(1)(a). He contends the trial court incorrectly determined that the officer

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.

had probable cause to arrest him. Because we find that the officer's observations in this case were enough to lead a reasonable officer to believe an OWI violation occurred, we affirm the judgment.

BACKGROUND

¶2 On May 3, 2005, off-duty Sturgeon Bay Police Captain Arleigh Porter was helping his friend, another off-duty officer, construct a garage. Porter observed a black Corvette squeal its tires and accelerate rapidly on three occasions. Shortly afterwards, Porter heard a crash approximately 200 yards away. Porter got into his personal vehicle and drove to the crash site where he observed a black Corvette parked partially in the middle of the street at an angle. Schley was standing outside the vehicle. Porter approached Schley, identified himself as a police officer and displayed his official badge. Porter described Schley as having a confused look on his face.

¶3 As Porter called the police dispatch center, Schley got back into his vehicle, drove approximately 200 yards and then stopped in the street, not in a normally parked manner. Porter approached Schley, again displaying his credentials. At Porter's request, Schley produced his driver's license and handed over his keys. Porter described Schley as appearing confused, having "a far away stare in his eyes, and speaking in a slurred and incoherent manner." Porter also noticed an odor of intoxicants emanating from Schley. Schley turned and started to walk rapidly away from the scene, but Porter was able to convince Schley to stop and sit on the lawn. Porter could not remember if he told Schley that he was under arrest but did indicate that Schley was not free to leave.

¶4 At the probable cause hearing, the trial court determined that Schley was under arrest at the time Porter asked him to sit on the lawn and Porter had

sufficient probable cause to arrest Schley for driving while intoxicated. The court concluded that Porter's observations about Schley's confusion, slurred and incoherent speech, odor of intoxicants and his attempt to walk away from Porter as well as the driving incident were sufficient to establish probable cause.

DISCUSSION

¶5 Probable cause exists where the totality of the circumstances within the officer's knowledge at the time would lead a reasonable officer to believe a violation has occurred. *State v. Nordness*, 128 Wis. 2d 15, 35, 381 N.W.2d 300 (1986). The facts need not prove guilt beyond a reasonable doubt, merely that guilt is more probable than not. *State v. Paszek*, 50 Wis. 2d 619, 625, 184 N.W.2d 836 (1971). An officer does not in every case need to perform a field sobriety test. *State v. Kasian*, 207 Wis. 2d 611, 622, 558 N.W.2d 687 (1996). "Whether probable cause to arrest exists based on the facts of a given case is a question of law which we review independently of the trial court." *Kasian*, 207 Wis. 2d at 621.

¶6 Schley argues that the officer did not articulate sufficient facts to establish probable cause and that the officer needed an objective factor such as a field sobriety test or an objective sign of physical impairment. Schley cites a footnote from *State v. Swanson*, 164 Wis. 2d 437, 453 n.6, 475 N.W.2d 148 (1991), to support his position. However, the language in *Swanson* has since been qualified. See *Kasian*, 207 Wis. 2d at 622. Schley's argument that an objective test such as a field sobriety test was needed in this case is incorrect. See *id.* In *Kasian*, the court held that an officer's observations of an accident scene, and an intoxicated smelling man with slurred speech, constituted probable cause for arrest. *Id.* Likewise, the facts that Porter articulated would lead a reasonable

officer to believe a violation occurred. Porter observed erratic driving, heard a crash, observed the vehicle parked in the middle of the street at an angle, then watched as Schley re-entered his vehicle, drove 200 yards and abruptly stopped in the street. Porter further observed that Schley appeared confused, spoke in a slurred and incoherent manner, and smelled of intoxicants. Porter's observations in this case are enough to lead a reasonable officer to believe an OWI violation occurred.

By the Court.—Judgment affirmed.

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

