COURT OF APPEALS
DECISION
DATED AND FILED

December 5, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1761-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

GEORGE F. APPLEYARD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Eau Claire County: ERIC J. WAHL, Judge. *Affirmed.*

¶1 PETERSON, J.[1] George Appleyard appeals his judgment of conviction for operating a motor vehicle while under the influence of an intoxicant, fourth offense, contrary to WIS. STAT. § 346.63(1)(a). Appleyard

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

argues that the circuit court erred by denying his motion to suppress the results of a blood test because the Eau Claire County Sheriff's Department lacked probable cause to arrest him. We reject Appleyard's arguments and affirm his conviction.

BACKGROUND

¶2 Deputy Patricia Christianson was dispatched to an accident scene in the Town of Pleasant Valley at approximately 7 p.m. on September 4, 1999. Upon arrival, she found a gathering of people along the roadway. Appleyard was lying on his back being attended by paramedics. He was wearing an oxygen mask and was combative. When he knocked off the oxygen mask, Christianson could smell an odor of intoxicants.

¶3 Christianson interviewed witnesses at the scene who said that Appleyard had been driving a moped up and down the roadway and began showing off. He had raised his foot in the air, lost control, and fell to the ground. One witness stated that Appleyard had been drinking alcohol since 11 a.m. Two others, Appleyard's wife and the moped's owner, confirmed that Appleyard had been drinking, although they did not specify when or how much.

¶4 Appleyard was transported to a local hospital. Because of his injuries, Christianson was not able to speak with him or administer any field sobriety tests. After arriving at the hospital, Christianson directed the hospital staff to draw a blood sample from Appleyard. The test revealed a blood alcohol content of .225%.

¶5 Appleyard was charged with operating a motor vehicle while under the influence of an intoxicant, fourth offense. He moved to suppress the blood test

based upon lack of probable cause for arrest. The circuit court denied the motion, and Appleyard pled guilty to the charge. This appeal followed.

STANDARD OF REVIEW

¶6 When we review a circuit court's denial of a suppression motion, we will uphold the circuit court's findings of fact unless they are against the great weight and clear preponderance of the evidence. *See* ***State v. Andrews***, 201 Wis. 2d 383, 388, 549 N.W.2d 210 (1996). However, whether the facts satisfy constitutional guarantees is a question of law we review independently. *See* ***id.*** at 389.

DISCUSSION

¶7 The sole issue on appeal is whether Christianson had probable cause to arrest Appleyard for operating a vehicle while under the influence of an intoxicant. Appleyard argues that Christianson failed to obtain any specific information as to the type and amount of alcohol consumed. He contends that because Christianson was unable to administer any field sobriety tests, a more thorough investigation of any alcohol consumption was necessary before directing the hospital to take a blood sample.

¶8 "Probable cause is a common-sense determination. It is judged by the factual and practical considerations of everyday life on which reasonable people, not legal technicians, act." ***State v. Griffin***, 220 Wis. 2d 371, 386, 584 N.W.2d 127 (Ct. App. 1998). Probable cause to arrest refers to the quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed a crime. *See* ***State v. Paszek***, 50 Wis. 2d 619, 624, 184 N.W.2d 836 (1971). Proof beyond a reasonable doubt need not be established

nor does it need to be more likely than not that the defendant committed a crime. *See* ***State v. Mitchell***, 167 Wis. 2d 672, 681-82, 482 N.W.2d 364 (1992). All that is required is reasonably trustworthy information that is sufficient to warrant a person of reasonable caution to believe a crime has been committed. *See* ***Paszek***, 50 Wis. 2d at 625. In determining probable cause, courts will look at the totality of the facts and circumstances faced by the officer at the time of the arrest to determine whether the officer reasonably believed that the defendant committed an offense. *See* ***County of Dane v. Sharpee***, 154 Wis. 2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990).

¶9 Appleyard cites ***State v. Swanson***, 164 Wis. 2d 437, 475 N.W.2d 148 (1991), to support his argument that the deputy lacked probable cause to execute a lawful arrest. He relies on a footnote in ***Swanson***, which commented:

> Unexplained erratic driving, the odor of alcohol, and the coincidental time of the incident [bar closing time] 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 453-54 n.6. Appleyard contends that there is even less evidence here than in ***Swanson*** to justify an arrest.

¶10 In ***Swanson***, the defendant was observed at 2 a.m. driving onto the sidewalk in front of a bar, nearly hitting a pedestrian. Although he smelled of intoxicants, Swanson had no trouble standing and did not have slurred speech. Before placing Swanson in his squad car to take field sobriety tests, the officer performed a pat-down search and discovered marijuana on him. Swanson was

then arrested, handcuffed and placed in the back of the squad car. *See* ***id.*** at 442-43.

¶11 ***Swanson***, however, does not establish a rule that field sobriety tests are always required in order to have probable cause to arrest for driving while under the influence of intoxicants. *See* ***State v. Wille***, 185 Wis. 2d 673, 684, 518 N.W.2d 325 (Ct. App. 1994). Whether probable cause exists is assessed on a case-by-case basis; sometimes a field sobriety test is required to establish probable cause and sometimes it is not. *See* ***id.***

¶12 In ***Wille***, the defendant struck a vehicle parked on the shoulder of a highway. A firefighter and a deputy smelled intoxicants on Wille's breath at the scene of the accident. Because of his injuries, he was transported to the hospital. At the hospital, the arresting deputy also smelled intoxicants on Wille's breath. Wille was uncooperative with the nurses who were treating his injuries. Upon entering his hospital room, Wille stated that he had "to quit doing this." ***Id.*** The deputy arrested Wille without performing a field sobriety test. *See* ***id.*** We held that probable cause existed to arrest Wille. *See* ***id.***

¶13 In ***State v. Kasian***, 207 Wis. 2d 611, 558 N.W.2d 687 (Ct. App. 1996), the arresting officer came upon the scene of a one-vehicle accident. The officer observed a damaged van next to a telephone pole. The engine of the van was running and smoking. An injured man, whom the officer recognized as Kasian, was lying next to the van. The officer observed a strong order of intoxicants about Kasian. Later at the hospital, the officer observed that Kasian's speech was slurred. Kasian was arrested without field sobriety tests being performed. We held that this evidence constituted probable cause to believe Kasian had operated the vehicle while intoxicated. *See* ***id.*** at 622.

¶14 Here, Christianson smelled an odor of alcohol emanating from Appleyard when he knocked off the oxygen mask. Appleyard was also combative with the paramedics. There was evidence that Appleyard had been drinking since 11 a.m. and that he was driving the moped in an inappropriate way and had lost control. We conclude that the facts support probable cause to believe Appleyard was driving while under the influence of an intoxicant.

By the Court.—Judgment and order affirmed.

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