COURT OF APPEALS
DECISION
DATED AND FILED

August 15, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP277 **Cir. Ct. No. 2006TR49**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GAYLORD W. SPAULDING,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Manitowoc County: DARRYL W. DEETS, Judge. *Affirmed*.

¶1 ANDERSON, P.J.[1] He's back. After unsuccessfully challenging the order revoking his operating privileges for refusing to submit to an evidentiary

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

chemical test,[2] Gaylord W. Spaulding returns to this court challenging the circuit court's determination that officers had probable cause to arrest him for drunk driving and denial of his motion to suppress. Because we have already held there was probable cause to believe that Spaulding was operating a vehicle while intoxicated and that it was proper to administer the preliminary breath test (PBT),[3] we conclude that when the results of the PBT are added to the probable cause to believe, there was probable cause to arrest. Therefore, we affirm.

¶2 As a preliminary matter, our citation to and reliance upon ***State v. Spaulding***, No. 2006AP566, unpublished slip op. (Wis. Ct. App. Oct. 4, 2006) (***Spaulding I***), does not run afoul of the prohibition against citing unpublished cases, WIS. STAT. RULE 809.23(3)[4] because we will be citing to that case as the *law of the case*. In ***Spaulding I***, we decided, as a matter of law, that there was probable cause to administer the PBT. ***Spaulding I***, No. 2006AP566, ¶9. Our decision on the question of law raised in that appeal becomes the *law of the case*.

> The law of the case doctrine is a "longstanding rule that a decision on a legal issue by an appellate court establishes the law of the case, which must be followed in all subsequent proceedings in the trial court or on later appeal." Thus, a circuit court is generally bound to apply decisions made by the court of appeals or supreme court in a particular case. The purpose of the law of the case

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[2] ***State v. Spaulding***, No. 2006AP566, unpublished slip op. (Wis. Ct. App. Oct. 4, 2006) (***Spaulding I***).

[3] ***Spaulding I***, No. 2006AP566, ¶¶8-9.

[4] WISCONSIN STAT. RULE 809.23(3), provides:

> An unpublished opinion is of no precedential value and for this reason may not be cited in any court of this state as precedent or authority, *except to support a claim of* claim preclusion, issue preclusion, or *the law of the case.* (Emphasis added.)

> doctrine is not complex: "The doctrine of 'law of the case' is rooted in the concept that courts should generally follow earlier orders in the same case and should be reluctant to change decisions already made, because encouragement of change would create intolerable instability for the parties."

State v. Stuart, 2003 WI 73, ¶23, 262 Wis. 2d 620, 664 N.W.2d 82 (citations omitted).

¶3 When we review a motion to suppress evidence, we will uphold the circuit court's findings of fact unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2); ***State v. Eckert***, 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996). However, whether those facts establish reasonable suspicion to stop or probable cause to arrest are questions of law which we review de novo. *See* ***State v. Waldner***, 206 Wis. 2d 51, 54, 556 N.W.2d 681 (1996); ***State v. Babbitt***, 188 Wis. 2d 349, 356, 525 N.W.2d 102 (Ct. App. 1994).

¶4 In ***Dane County v. Sharpee***, 154 Wis. 2d 515, 453 N.W.2d 508 (Ct. App. 1990), we set out the test for probable cause.

> Probable cause to arrest exists where the officer, at the time of the arrest, has knowledge of facts and circumstances sufficient to warrant a person of reasonable prudence to believe that the arrestee is committing, or has committed, an offense. As the very name implies, it is a test based on probabilities; and, as a result, the facts faced by the officer "need only be sufficient to lead a reasonable officer to believe that guilt is more than a possibility." It is also a commonsense test.

Id. at 518 (citations omitted).

¶5 As in ***Spaulding I***, Spaulding asserts that the arresting deputy's failure to require Spaulding to perform field sobriety tests made the administration of the PBT unreasonable. Spaulding contends that without the PBT results and the results of field sobriety tests there was no probable cause to arrest him. Because

the administration of the PBT violated the implied consent law, WIS. STAT. § 343.303, Spaulding seeks suppression of any evidence seized at the time of his arrest.

¶6 In ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 603 N.W.2d 541 (1999), the supreme court discussed the various levels of reasonable suspicion and probable cause in the drunk driving laws.

- An officer may make an investigative stop pursuant to WIS. STAT. § 968.24 if the officer *reasonably suspects* that a person has committed or is about to commit a crime or *reasonably suspects* that a person is violating the noncriminal traffic laws. ***Renz***, 231 Wis. 2d at 310.

- After stopping the vehicle and contacting the driver, the officer's observations may cause the officer to suspect the driver of operating the vehicle while intoxicated. ***Id.***

- If the observations of the driver are not sufficient to establish probable cause for arrest for an OWI violation, the officer may request the driver to perform various field sobriety tests. ***Id.***

- However, the driver's performance on these tests may not produce enough evidence to establish probable cause for arrest.

> The legislature has authorized the use of the PBT to assist an officer in such circumstances…. For non-commercial drivers, the officer may request a PBT if there is "probable cause to believe" that the person has been violating the OWI laws. If the driver consents to the PBT, the result can assist the officer in determining whether there is probable cause for the arrest.

Id. at 310-11 (citations omitted).

- The officer may arrest the driver under WIS. STAT. § 345.22 or WIS. STAT. § 968.07(1)(d) if, under the accumulated facts, there is *probable cause to arrest* the person for violating the drunk driving laws. ***Renz***, 231 Wis. 2d at 311.

¶7 In ***Spaulding I***, No. 2006AP566, ¶9, we decided the first four levels against Spaulding:

> Here, a witness called in a report of an erratic driver and directed authorities to the scene. [Manitowoc County Deputy Sheriff Dan] Hartwig arrived and spotted the vehicle in the ditch. He noticed Spaulding's slurred speech, watery and bloodshot eyes, and an odor of intoxicants. [Deputy Todd] Cummings joined Hartwig at the scene and also noticed an odor of intoxicants in Spaulding's vehicle. Hartwig told Cummings what he had observed and gave Cummings the witness statement. Cummings asked Spaulding whether he had been drinking. Spaulding responded that he had had "a few" alcoholic beverages that evening. Cummings also investigated the area leading up to the ditch where fresh tire marks indicated an erratic path of travel by the vehicle in the ditch. We are satisfied that the arresting officers had probable cause to believe that Spaulding was operating a motor vehicle while under the influence of an intoxicant. *See* [***State v.***]***Nordness***, 128 Wis. 2d [15,] 35[, 367 N.W.2d 243 (1986)].

Therefore, all that remains for us to decide is whether additional evidence gathered after the deputy administered the PBT supports a finding of probable cause to arrest.

¶8 That evidence consists of the testimony of Deputy Cummings that he administered the PBT to Spaulding and the PBT result was "0.198 percent breath composition." The OWI statutes prohibit operation of a motor vehicle with a blood alcohol concentration of 0.08 percent or more. WIS. STAT. §§ 346.63(1)(b), 341.01(46m)(a). Spaulding's blood alcohol concentration was more than twice the legal limit. When this high blood alcohol concentration is considered with the

evidence supporting probable cause to administer the PBT, there is more than ample evidence to permit a reasonably prudent person to conclude that Spaulding was operating a motor vehicle in violation of the OWI laws. *See* ***Sharpee***, 154 Wis. 2d at 518.

¶9 The law of the case binds us to our conclusion in ***Spaulding I*** "that the officers' account of the circumstances and scene of the accident and of Spaulding's condition, the odor of intoxicants, and Spaulding's admission of having had alcoholic beverages earlier in the evening established probable cause to believe Spaulding had been operating under the influence." ***Spaulding I***, No. 2006AP566, ¶11. To that, we now add the PBT result of 0.198 percent and conclude there was probable cause to arrest Spaulding for operating under the influence. Accordingly, we affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

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