**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**January 9, 2008**

**David R. Schanker**
**Clerk of Court of Appeals**



**Appeal No. 2007AP1661** **Cir. Ct. No. 2005CT578**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**MICHAEL D. BEASLEY,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Kenosha County: ANTHONY G. MILISAUSKAS and S. MICHAEL WILK, Judges.[1] *Affirmed*.

¶1 BROWN, C.J.[2] Michael D. Beasley appeals a judgment convicting him of operating while intoxicated—third offense following a jury trial.

[1] Judge Milisauskas conducted the motion to suppress, which involves the sole issue in this appeal. Judge Wilk presided over the jury trial in which Beasley was found guilty.

[2] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2005-06).

He claims that the trial court should have granted his motion to suppress because he believes there was insufficient probable cause to arrest him. But we conclude that there was plenty of evidence to support the arrest and affirm.

¶2 A Kenosha sheriff's deputy responded to a report of a vehicular accident on May 1, 2005, at about 11:22 p.m. The deputy observed a white pickup truck in a ditch, rolled over and partially submerged in a pond. He saw Beasley walking up from the truck. Beasley's clothes were wet from the waist down. The deputy asked Beasley what happened. Beasley replied that he was returning home from a saloon, must not have been paying attention and veered off the road into the ditch. The deputy asked Beasley if he had been drinking and Beasley responded that he had. Beasley volunteered that he had had four beers and pleaded with the deputy not to arrest him for drunk driving because it would be his fourth offense.[3] The deputy noticed a strong odor of intoxicants on Beasley's breath and asked him to perform sobriety tests. The tests included the horizontal gaze nystagmus test (HGN) and the walk-and-turn test. After completing these tests, the deputy was satisfied that there was probable cause to arrest Beasley for driving while intoxicated and placed Beasley under arrest. A breath alcohol test later showed a reading of .20. Other facts will be stated as needed.

¶3 Beasley argues that there was no probable cause to arrest him because many of the usual signs of intoxication found in other cases were absent here. He points out that he was walking normally, was not slurring his words and his eyes were not bloodshot. He is dismissive of the officer's having smelled the

[3] Beasley was initially charged with fourth-offense operating while intoxicated and operating with a prohibited alcohol concentration; both charges were subsequently amended to third offenses.

odor of alcohol and also the fact that he drove his car into a ditch based on ***State v. Swanson***, 164 Wis. 2d 437, 475 N.W.2d 148 (1991), *abrogated on other grounds*, ***State v. Sykes***, 2005 WI 48, 279 Wis. 2d 742, 695 N.W.2d 277, which he claims stands for the proposition that the odor of alcohol and unexplained erratic driving are not sufficient, standing by themselves, for probable cause. Finally, he takes issue with the sobriety tests. Regarding the HGN test, he acknowledges that the deputy said he found four of six clues, but faults the deputy for not explaining how those four clues would prove that Beasley was impaired. And while the deputy testified to his observing Beasley swaying and stopping during the walk-and-turn test, Beasley questions how the deputy could conclude that he was impaired because the deputy did not first explain his training and experience to make such a conclusion.

¶4 There are several reasons why Beasley's arguments do not win the day. First, we note that what Beasley is referring to in ***Swanson*** is actually a footnote of the supreme court's opinion. *See* ***id.*** at 453 n.6. A careful reading of the opinion discloses, however, that Swanson was arrested for a crime other than operating under the influence. ***Id.*** at 444. The main issue was the legality of the search that resulted in the discovery of a bag of marijuana. *See* ***id.*** at 440-42. The court specifically stated that it was not addressing whether there was probable cause to arrest Swanson for operating under the influence. ***Id.*** at 453. So, the footnote is dicta because there was absolutely no analysis conducted in conjunction with the footnote. It was more an off-the-cuff statement than a discussion founded on logical rationale. Additionally, later supreme court cases establish that the totality of circumstances test is the correct analysis for deciding whether probable cause to arrest existed. ***State v. Koch***, 175 Wis. 2d 684, 701, 499 N.W.2d 152 (1993). We doubt that we are bound by the ***Swanson*** footnote.

¶5 But we will indulge Beasley and assume that we are so bound. Still, ***Swanson*** would not be of help to him because there is much more here than erratic driving and an odor of intoxicants. Here, Beasley volunteered that he had come from a saloon, had been drinking and had four beers, and pleaded with the deputy not to arrest him for drunk driving because it would be his fourth time. He made his plea an excitable manner. That sounds like an admission of guilt to this court. We note that we had a similar case before us in ***State v. Wille***, 185 Wis. 2d 673, 518 N.W.2d 325 (Ct. App. 1994). There, the indicia of intoxication were that Wille smelled of intoxicants, collided with a parked car, and at the hospital stated, "I've got to quit doing this." ***Id.*** at 683-84. In finding probable cause, we distinguished the ***Swanson*** footnote by referring to the additional fact of this statement that constituted acknowledgement of his guilt. ***Wille***, 185 Wis. 2d at 683-84. Same here.

¶6 Moreover, the ***Swanson*** footnote focused on "unexplained" erratic driving. ***Swanson,*** 164 Wis. 2d at 453 n.6. But here, the erratic driving is explained. Beasley told the deputy that he was coming from *a saloon*, had been *drinking*, had *four beers*, went off the road because he *was not paying attention*, and, in an excited manner, begged the deputy not to arrest him for drunk driving. We are fairly certain we know why his pick-up truck ended up half-submerged and overturned in a pond-filled ditch.

¶7 This should be enough to reject Beasley's argument that the deputy lacked probable cause to arrest. But we will not stop here. Sobriety tests *were* performed—something not done in ***Swanson***. ***Id.*** at 442. Recognizing this, Beasley mounts arguments as to why the deputy's testimony regarding the sobriety tests is insufficient. The arguments, as we will explain, are unavailing.

¶8 As we understand it, one argument is that even though the deputy testified that he observed four of the six clues for intoxication during the HGN test, the deputy had to also testify why the four clues led the deputy to believe that Beasley was intoxicated. We are not sure what Beasley is getting at, but we think he is arguing either that the deputy had no scientific or measurable basis for equating the existence of four clues with intoxication or that he was not qualified to make such a conclusion. Regardless of which argument he is making, he is wrong. Field sobriety tests, including the HGN test, are not "scientific" tests such that measurable bases need be examined by a qualified expert. Rather, the deputy relies on his or her own experience, training, and subjective judgment about whether a suspect can follow directions, can divide his or her attention and can exhibit fine motor skills. A reasonable police officer can perceive that the lack of these three abilities is an indicator of intoxication without employing a scientific test. Field sobriety tests simply give the deputy an opportunity to look for such indicia. They are observational tools, not litmus tests. In addition, the HGN test looks for evidence of a common physiological response to alcohol intoxication. Here, the deputy held a pen fifteen inches in front of Beasley's face and asked him to follow the pen to track the movement of Beasley's eyes. The deputy *observed* the lack of smooth pursuit. He also observed the onset of jerkiness in the eyes immediately when he passed the pen in front of Beasley's eyes. These observations were added indicia that Beasley was impaired. If Beasley had complaints about the deputy's conclusions, his defense was to cross-examine the deputy and he did so.

¶9 Beasley makes a similar argument with regard to the walk-and-turn test. Apparently, Beasley believes that the deputy was somehow not qualified to conclude that he was under the influence when he swayed while doing the test and

could not even finish the test. Again, any reasonable police officer—in fact any reasonable *person*—could reach the conclusion that Beasley's motor skills were affected, that he was unable to follow directions and that he could not divide his attention as needed. Like the HGN test, the deputy's subjective conclusion was subject to cross-examination and could have been rejected by the fact finder as not credible, but was not.

¶10 For all the above reasons, there was probable cause to arrest and this court affirms the judgment.

*By the Court.*—Judgment affirmed.

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