

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 30, 2008

David R. Schanker
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. 2007AP1792-CR

Cir. Ct. No. 2007CT236

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JERALD J. FERMANICH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sheboygan County: TERENCE T. BOURKE, Judge. *Affirmed.*

¶1 SNYDER, J.¹ Jerald J. Fermanich appeals from a judgment of conviction for his third offense of operating while under the influence of an intoxicant. His sole contention on appeal is that the arresting officer did not have probable cause to make the arrest and therefore certain evidence should have been suppressed. We disagree and affirm the judgment.

¶2 The facts are brief and essentially undisputed. At approximately 2:00 a.m. on February 21, 2007, City of Plymouth Police Officer Jesse Parker drove past Fermanich's car and saw Fermanich leaning over in the front seat. Concerned that there might be a medical problem, Parker turned back to check. By the time Parker returned, he noted that the vehicle had pulled onto the road. Parker followed the vehicle because it was going the same direction he was. He reported that he followed Fermanich for "several blocks" and observed Fermanich make incomplete, or "rolling," stops at two stop signs. Parker activated his emergency lights and pulled the car over.

¶3 Parker spoke with Fermanich, who presented his driver's license for identification. Parker observed that Fermanich had slurred speech, glassy eyes and an odor of intoxicants about him. Based on these observations, Parker asked Fermanich to perform field sobriety tests and Fermanich complied. Following the field tests, Parker took Fermanich into custody for OWI.

¶4 Fermanich filed a motion to suppress evidence on grounds his detention was not founded on reasonable suspicion and his arrest was not supported by probable cause. At the motion hearing, Parker testified to the facts

¹ This is a one-judge appeal pursuant to WIS. STAT. § 752.31(2)(f) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version.

described above. The court, noting that “[i]t would have been nice to know how [Fermanich] did on the field tests,” and that “[w]ithout that information, it becomes a pretty close call,” ultimately denied the motion to suppress. Fermanich then entered a plea of no contest and was convicted of his third OWI offense. He now appeals.

¶5 Fermanich presents a single issue for our review.² He argues that the evidence offered at the motion hearing did not rise to the level of probable cause for arrest and therefore the circuit court erred when it denied his motion to suppress evidence. When reviewing a motion to suppress evidence, we will uphold a trial court’s findings of historical fact unless they are clearly erroneous. *State v. Eckert*, 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996). However, whether the court’s findings of fact meet the constitutional requirement of reasonableness is a question of a law, which we review de novo. *Id.*

¶6 Every warrantless arrest must be supported by probable cause. *State v. Nieves*, 2007 WI App 189, ¶11, ___ Wis. 2d ___, 738 N.W.2d 125, *review denied*, 2007 WI 134, ___ Wis. 2d ___, 742 N.W.2d 526. Probable cause is demonstrated by that quantum of evidence that would lead a reasonable law enforcement officer to believe that the defendant probably committed a crime. *Id.* The test is whether the information available would lead a reasonable officer to believe that “guilt is more than a possibility” and is assessed on a case-by-case

² In his motion to suppress, Fermanich argued that the initial traffic stop was not supported by reasonable suspicion. He does not renew this argument on appeal. Fermanich originally filed a motion to suppress “all evidence.” He filed a second motion to ascertain the admissibility of statements he made to officers, but withdrew this motion orally at the hearing. On appeal, having abandoned his challenge to the initial traffic stop, it is unclear precisely what evidence Fermanich seeks to suppress.

basis. *State v. Paszek*, 50 Wis. 2d 619, 625, 184 N.W.2d 836 (1971). Probable cause includes the totality of the circumstances within the officer's knowledge at the time and need not reach the level of proof beyond a reasonable doubt or even show that guilt is more likely than not. *State v. Nordness*, 128 Wis. 2d 15, 35, 381 N.W.2d 300 (1986).

¶7 The crux of Fermanich's argument is that the State failed to introduce the results of his field sobriety tests to demonstrate that Parker had probable cause to arrest him. Fermanich asserts, "Without specific facts as to how [Fermanich] performed on the field sobriety tests, the test provides little help in the probable cause determination. We can only speculate as to which tests were performed or how [he] fared on each test."

¶8 We agree with Fermanich that without the results of the field sobriety tests, probable cause becomes less clear. We also agree with the circuit court that the test results "would have been nice to know," and that without them, probable cause becomes a closer call. Indeed, the State could have put in more evidence; however, we do not review what could have been done but rather what was done.³ The totality of the facts presented by the record here are such that a reasonable officer would have believed that it was more than a possibility that Fermanich was driving while intoxicated. Parker first observed Fermanich hunched over inside the car, then he observed him make two illegal rolling stops

³ We emphasize that the proceeding below was a motion to suppress, which placed the burden on Fermanich to show that evidence was improperly obtained. See *State v. Noble*, 2002 WI 64, ¶19, 253 Wis. 2d 206, 646 N.W.2d 38 ("On a motion to suppress, the defendant generally bears the burden of producing evidence to support a constitutional violation."). At the motion hearing, Fermanich failed to call any witnesses and declined the opportunity to cross-examine Parker. His criticism of the sparse record ("[t]he whole of Parker's testimony takes up only four and one half pages in the record") reflects on his role as proponent of the motion as well.

through intersections. After pulling Fermanich over to investigate, Parker noted that Fermanich had slurred speech, glassy eyes, and the odor of intoxicants on his breath. We know from the record that Parker performed field sobriety tests, and it is reasonable to infer that Fermanich did not pass at least one test because his arrest followed. Evidence indicating the results of field sobriety tests is not required for the arrest to be supported by probable cause. See *State v. Wille*, 185 Wis. 2d 673, 684, 518 N.W.2d 325 (Ct. App. 1994). We are satisfied that the facts rise to the level of probable cause.

¶9 Having reviewed the record and the arguments of the parties, we now affirm. Parker's decision to place Fermanich under arrest for OWI was supported by probable cause and the circuit court properly denied the motion to suppress.

By the Court.—Judgment affirmed.

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

