COURT OF APPEALS DECISION DATED AND FILED

April 9, 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. 2007AP2185-CR

Cir. Ct. No. 2006CT868

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KARI L. HOEHNER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Fond du Lac County: PETER L. GRIMM, Judge. *Affirmed.*

¶1 SNYDER, J.[1] Kari L. Hoehner appeals from a judgment of conviction for operating a motor vehicle with a prohibited alcohol concentration (PAC), as a second offense. Hoehner pled guilty following the court's denial of her motion to dismiss or, in the alternative, to suppress evidence. She contends that the court erred when it held that the officer had probable cause to arrest, specifically because the court erroneously gave weight to the officer's testimony regarding field sobriety tests and improperly took judicial notice of procedures used in field sobriety tests. We disagree and affirm the judgment of the circuit court.

FACTS AND PROCEDURAL BACKGROUND

¶2 At approximately 7:40 p.m. on October 6, 2006, Officer Dan Wilson of the Fond du Lac Police Department was on patrol when he saw a vehicle driving down Main Street without any headlights on. Wilson eventually identified the driver as Hoehner. When Wilson first pulled the car over he saw Hoehner exit her car, stumble, and fall into the car. Wilson ordered Hoehner to return to her car because he was concerned for her safety, and he had to repeat himself multiple times before Hoehner complied. Wilson then noticed a strong odor of intoxicants coming from the car, and he saw that Hoehner's eyes were "very bloodshot" and her speech was "very slurred." Hoehner admitted to having "one beer."

¶3 Wilson asked Hoehner to perform field sobriety tests and she complied. Wilson testified that he observed six of the six clues available in the horizontal gaze nystagmus test, six of the eight clues available in the walk-and-

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

turn test, and that Hoehner failed the one-legged stand test. Wilson then placed Hoehner under arrest of OWI.

¶4 Hoehner brought a motion to suppress all evidence obtained incident to arrest on grounds that the arrest was not supported by probable cause. At the motion hearing on February 6, 2007, Hoehner argued that Wilson's testimony did not demonstrate probable cause. In particular, Hoehner argued that the court could not properly take judicial notice of the significance of the "clues" for intoxication and that, without those clues, there was no probable cause. The court denied Hoehner's motion to suppress and Hoehner pled guilty to a second offense of driving with a prohibited alcohol concentration, contrary to WIS. STAT. § 346.63(1)(b). She now appeals.

DISCUSSION

¶5 Hoehner contends 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 her 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 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. ***State v. Kasian***, 207 Wis. 2d 611, 621, 558 N.W.2d 687 (Ct. App. 1996). Probable cause to arrest is the sum of evidence within the arresting officer's knowledge at the time of the arrest which would lead a reasonable police officer to believe that the defendant probably committed or was committing a crime. ***State v. Secrist***, 224 Wis. 2d 201, 212, 589 N.W.2d 387 (1999).

¶6 On appeal, Hoehner concedes the following facts support probable cause: she was driving without her headlights on, she stumbled when she exited her car, and she admitted having one beer. She also acknowledges Wilson's observations that her car smelled of intoxicants, her eyes were bloodshot, and her speech was slurred. She argues, however, that Wilson's testimony regarding the clues observed during the field sobriety tests is "meaningless and not a proper foundation upon which this Court can find probable cause." Without the field sobriety tests, she asserts, the State cannot demonstrate probable cause.

¶7 Hoehner frames her appellate issue as "[whether] the circuit court erroneously gave weight to Officer Wilson's testimony regarding her performance of the field sobriety tests." On this, our review is deferential. The weight to be given to evidence presented at trial is squarely within the province of the finder of fact. ***State v. Anson***, 2004 WI App 155, ¶24, 275 Wis. 2d 832, 686 N.W.2d 712. The circuit court, not the appellate court, is the ultimate arbiter of the weight of the evidence. *See* ***Lessor v. Wangelin***, 221 Wis. 2d 659, 667, 586 N.W.2d 1 (Ct. App. 1998) (it is the job of fact finders, not appellate courts, to consider the weight of the testimony).

¶8 Nonetheless, Hoehner argues that the circuit court improperly took judicial notice of what a "clue" is in a field sobriety test. We disagree with Hoehner's characterization that the court took judicial notice of anything, because there is no such indication in the record. It is clear, however, that the court considered Wilson's testimony about the number of clues for intoxication in its assessment of probable cause. We see no error here. Wilson was certified to administer field sobriety tests. He testified about the total number of clues per test and the number required to be considered failing the test. For example, in the horizontal gaze nystagmus test, there are a total of six clues and he observed all

six. Wilson also conducted the walk-and-turn test, which has a total of eight clues but only requires two for a failing grade. Wilson observed six of the eight clues when Hoehner performed the test. He also conducted a one-legged stand test where there were no clues to be counted, but rather "if a subject has to place her foot down after picking up three or more times, it's considered a failure." Wilson testified that Hoehner failed all three tests.

¶9 Field sobriety tests are one means to gather evidence of intoxication. They involve, as do most of the interactions during a traffic stop, the officer's observations and evaluations of the driver's conduct. The tests primarily are based on an officer's observations of physical movements and easily described conduct. The circuit court was sufficiently informed of Hoehner's failure of these tests without having to understand the scientific explanation of why physical abilities change with alcohol consumption or why certain field sobriety tests reveal these changes. Thus, Wilson's testimony about "clues" for intoxication did not need further definition or expert testimony. His testimony that Hoehner failed the tests because she exhibited the requisite number of clues is sufficient and the fact finder is free to assign any weight or no weight to that evidence.[2]

¶10 We also reject Hoehner's argument that, absent the field sobriety tests, probable cause for her arrest did not exist. Case law teaches that probable cause may be established without field sobriety tests. *See* ***State v. Kasian***, 207 Wis. 2d 611, 622, 558 N.W.2d 687 (Ct. App. 1996) (even absent field sobriety tests, probable cause was established by three indicia of intoxication); ***County of***

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[2] Of course, Hoehner had the opportunity to discredit the test results and challenge Wilson's assessment of the clues during cross-examination.

Jefferson v. Renz, 231 Wis. 2d 293 310, 603 N.W.2d 541 (1999) (if observations of the driver are not sufficient to establish probable cause, officer may request the driver to perform field sobriety tests). We need not address this argument further because we have already explained that the circuit court, as finder of fact, properly considered and weighed Wilson's testimony about the field sobriety tests.

CONCLUSION

¶11 Hoehner cannot persuasively argue that Wilson's testimony about field sobriety test clues should be given no weight. Wilson's observations during field sobriety tests are relevant to his conclusion that probable cause existed and the weight to be given his testimony about the tests is squarely within the province of the finder of fact. The clues observed by Wilson during Hoehner's performance of field sobriety tests did not require further definition or expert testimony to assist the finder of fact. We conclude the circuit court properly admitted the evidence of clues for intoxication.

By the Court.—Judgment affirmed.

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