COURT OF APPEALS
DECISION
DATED AND FILED

March 11, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2715 **Cir. Ct. Nos. 2008TR541**
2008TR542

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

COUNTY OF WINNEBAGO,

PLAINTIFF-RESPONDENT,

V.

JACK W. ROEPKE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: THOMAS J. GRITTON, Judge. *Affirmed*.

¶1 BROWN, C.J.[1] Jack W. Roepke appeals his operating while intoxicated conviction by claiming that probable cause to arrest was largely based on a positive Preliminary Breath Test (PBT) reading and that, because the deputy

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

lacked the threshold facts that must exist before a law enforcement officer may request a PBT, there was insufficient probable cause. But we hold that since Roepke was in a roll-over accident while speeding, had alcohol on his breath, and admitted to drinking, there existed "a quantum of proof greater than the reasonable suspicion necessary to justify an investigative stop … but less than the level of proof required to establish probable cause for arrest." ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 316, 603 N.W.2d 541 (1999). Thus, under ***Renz***, the deputy had authority to request that Roepke take a PBT. We affirm.

¶2 A Winnebago county sheriff's deputy responded to a report of a traffic accident near the intersection of U.S. Highways 10 and 441 at the Racine Street off-ramp on December 8, 2007. Upon arriving, the deputy saw car parts across one lane of traffic, a vehicle that was pulled over on the side of the road and another vehicle which was upside down, in the gorge area between the highways and the ramp. The driver of the car in the ditch had extricated himself from the vehicle and was identified as Roepke. Roepke told the deputy that he was going seventy miles per hour and lost control of his vehicle, but was unsure how. He also admitted that he had drunk about two beers prior to driving his vehicle. The deputy smelled the odor of alcohol on him. It was determined that he was in need of medical assistance and therefore the deputy decided that field sobriety tests would not be appropriate because his dexterity was impaired from the collision. Instead, Roepke administered a PBT test which showed a 0.179 blood alcohol content. Then, while Roepke was in the ambulance, waiting to be conveyed to the hospital, the deputy informed him that he was under arrest for operating while intoxicated.

¶3 ***Renz*** is the law regarding the use of PBTs. In that case, the supreme court held that a law enforcement officer is not required to have probable cause as

a condition precedent to asking a suspect to submit to a PBT. ***Renz***, 231 Wis. 2d at 295. Rather, when a law enforcement officer has facts that are stronger than those justifying an initial stop but not enough facts to determine whether the driver was driving while intoxicated, then the PBT may be used as a "tool to determine whether to arrest a suspect and to establish that probable cause for an arrest existed." ***Id.*** at 304.

¶4 In ***Renz***, the defendant was stopped because of loud exhaust coming from his vehicle. ***Id.*** at 296. During the initial conversation, the officer smelled a strong odor of alcohol. ***Id***. The defendant admitted that he had three beers earlier in the evening and, when asked, agreed to perform field sobriety tests. ***Id***. at 296-97. The defendant recited the alphabet correctly, his speech was not slurred, and he exhibited only one of four possible clues of intoxication in the one-legged stand test and two of eight possible clues of intoxication in the heel-to-toe test. ***Id***. at 297-98. He did not do all that well on the finger-to-nose test and fared worst with the horizontal gaze nystagmus test, where he exhibited all six clues for intoxication. ***Id.*** at 298. The supreme court decided that, given the mixed results and because the defendant "was able to substantially complete all of the tests," the officer was in that grey area between reasonable suspicion to stop and probable cause for an arrest which justified giving the PBT. ***Id.*** at 316-17.

¶5 Roepke argues that he was not in that grey area. He points out, unlike the facts in ***Renz***, no field sobriety tests were given and all the deputy really had to go on was the odor of intoxicants on his breath. He cites ***State v. Swanson***, 164 Wis. 2d 437, 453 n.6, 475 N.W.2d 148 (1991), *abrogated on other grounds by* ***State v. Sykes***, 2005 WI 48, 279 Wis. 2d 742, 695 N.W.2d 277, for the proposition that unexplained erratic driving, an odor of alcohol and the coincidental time of the incident may provide reasonable suspicion, but do not, in the absence of any

other evidence, rise to the level of probable cause. He apparently suggests that ***Swanson*** should also be read to prohibit a law enforcement officer from using those same facts in an effort to jump from the reasonable suspicion level to the intermediate level between reasonable suspicion and probable cause.

¶6 We have five responses to Roepke's attempt to make this a ***Swanson***-controlled case. First, the proposition from ***Swanson*** that Roepke wants us to use is from a footnote that really had nothing whatsoever to do with the issues in the case itself. *See* ***Swanson***, 164 Wis. 2d at 453 n.6. In fact, a careful reading of ***Swanson*** shows that the supreme court specifically stated it was not addressing whether there was probable cause to arrest for operating under the influence: "[W]e need not address whether probable cause existed to arrest Swanson for any of the other offenses [aside from possession of a controlled substance]." ***Id.*** at 453. The footnote was *obiter dictum* and we decline to follow it. Second, the dictum did not discuss how the hypothetical facts contained therein would find usefulness in a PBT situation such as what we have here. Third, later cases establish that the totality of the 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). Fourth, we have concluded that probable cause to arrest, over and above any grey area, may exist even if there were no field sobriety tests. *See, e.g.*, ***State v. Kasian***, 207 Wis. 2d 611, 621, 622, 558 N.W.2d 687 (Ct. App. 1996). Fifth, more than erratic driving occurred in this case. The vehicle had gone off the road and overturned. Roepke admitted he had lost control and could not explain why. This makes the situation much more serious than the mere "erratic driving" comment by the supreme court in its dictum.

¶7 Wisconsin courts speak of probable cause as a commonsense concept. It is judged by the factual and practical considerations of everyday life

on which reasonable and prudent persons, not legal technicians, act. ***State v. Truax***, 151 Wis. 2d 354, 360, 444 N.W.2d 432 (Ct. App. 1989). As a result, it is not possible to compare cases and generic hypotheticals with dissimilar facts and draw a conclusion as to whether probable cause exists. The same can be said for that grey area in between reasonable suspicion to stop a vehicle and probable cause to arrest.

¶8 We are satisfied that based on the facts of this case, the deputy made a commonsense decision that he was in a grey area with respect to whether to charge Roepke with operating while intoxicated. The deputy observed the severity of the collision and smelled alcohol on Roepke. Roepke told the deputy that he had been travelling at seventy miles per hour, did not know why he lost control of his vehicle, and had been drinking. Roepke could not perform field sobriety tests because of his medical condition. Once the deputy determined that these facts left him in that grey area, he had every right to request that Roepke take the PBT so that he could have some degree of certainty, one way or the other, about whether to arrest. We affirm.

By the Court.—Judgment affirmed.

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