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

**February 14, 2002**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 01-1726-CR** **Cir. Ct. No. 00-CT-2180**

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

---

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**HEIDI L. WILLIAMS,**

**DEFENDANT-APPELLANT.**

---

APPEAL from a judgment and an order of the circuit court for Dane County: STUART A. SCHWARTZ, Judge. *Affirmed*.

¶1 ROGGENSACK, J.[1] Heidi L. Williams was charged with operating a motor vehicle while intoxicated and operating a motor vehicle with a prohibited

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). Additionally, all further references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

alcohol concentration, both as second offenses. She moved to suppress the results of a blood-alcohol test administered after her arrest, arguing that the police lacked probable cause to arrest. The circuit court denied the motion and Williams pled no contest. Because we conclude that the police officer had probable cause to arrest Williams, we affirm the judgment and the order of the circuit court.

## BACKGROUND

¶2 On August 5, 2000 at approximately three-thirty in the morning, Heidi Williams was involved in a one-vehicle accident. She had driven her car across the lane for oncoming traffic, off the road and into a ditch. Although she was injured in the accident, she was able to go to a nearby home owned by Robert Farber.

¶3 Deputy Brad Lindsley of the Dane County Sheriff's Department was dispatched to the scene and arrived to find Williams lying on the floor of Farber's home. Farber told Lindsley that when Williams showed up at his door, she told him that she had been in an accident and that she was in pain, but she also told him that she did not want the police to be involved.

¶4 Lindsley observed that Williams's eyes were bloodshot and glossed over. Williams also complained of back and neck pain. She was also moaning and loudly repeated several times that "it hurts." When Farber attempted to move Williams to show Lindsley her arm injuries, she again yelled loudly. Lindsley determined that he should wait for medical assistance to arrive before attempting to touch or move Williams. He did not consider doing any field sobriety tests because he was concerned about her physical injuries and because she was largely unresponsive to his questioning.

¶5 Deputy Daniel Roberts arrived at the scene shortly after Lindsley, and he attempted to question Williams about the accident. She told him that she did not know what happened. When Roberts asked her whether she had been drinking, she replied, "Obviously," in a sarcastic tone. He then asked Williams to consent to a preliminary breath test, but she refused.[2]

¶6 Lindsley followed the ambulance to the hospital to continue the investigation, and he overheard Williams tell the medical personnel, "I guess I did this to myself" and "I only had three beers." Lindsley then asked Williams to submit to a preliminary breath test. She refused, saying, "I'm not going to blow into that thing."[3] At that point, Lindsley informed Williams that she was under arrest for operating a motor vehicle while intoxicated (OMVWI), and a blood sample was obtained.

¶7 Williams moved to suppress the results of the blood test, contending that the police lacked probable cause for her arrest. The circuit court determined that the officers had probable cause to believe that Williams violated WIS. STAT. § 346.63(1) and denied the motion to suppress. Williams then pled no contest to

[2] In part, Williams attempts to tie her claim of error to the testimony of the officers at the suppression hearing that they asked her to take preliminary breath tests, but she refused. She attempts to build a second probable cause hurdle based on the admission of this testimony by arguing that there was not sufficient probable cause to request her to take the tests and therefore, the circuit court should not have considered the testimony in its deliberations at the suppression hearing. Because we conclude below that there was sufficient evidence to support probable cause to arrest without considering the refusal to take the preliminary breath tests, and because the quantum of proof required for probable cause to arrest is higher than that needed to support probable cause to request a preliminary breath test, ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 317, 603 N.W.2d 541, 551-52 (1999), we do not address this secondary issue further.

[3] See note 2 above.

OMVWI, and the circuit court entered a judgment of conviction. Williams appeals the circuit court's ruling on the motion to suppress.

## DISCUSSION

### Standard of Review.

¶8 We sustain a circuit court's findings of fact related to a suppression motion unless they are clearly erroneous. ***State v. Roberts***, 196 Wis. 2d 445, 452, 538 N.W.2d 825, 828 (Ct. App. 1995). Whether the established facts constitute probable cause to arrest is a question of law that we review *de novo*. ***State v. Babbitt***, 188 Wis. 2d 349, 356, 525 N.W.2d 102, 104 (Ct. App. 1994).

### Probable Cause.

¶9 The test for probable cause is a common sense test. ***County of Dane v. Sharpee***, 154 Wis. 2d 515, 518, 453 N.W.2d 508, 510 (Ct. App. 1990). An officer has probable cause to arrest when the totality of the circumstances within that officer's knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant committed an offense. ***State v. Koch***, 175 Wis. 2d 684, 701, 499 N.W.2d 152, 161 (1993). The officer's observations supporting an arrest need not be sufficient to prove guilt beyond a reasonable doubt, nor adequate to prove that guilt is more likely than not. ***State v. Mitchell***, 167 Wis. 2d 672, 681-82, 482 N.W.2d 364, 367-68 (1992); ***Babbitt***, 188 Wis. 2d at 357, 525 N.W.2d at 104. It is only necessary that the evidence would lead a reasonable officer to believe that guilt is more than a mere possibility. ***State v. Paszek***, 50 Wis. 2d 619, 625, 184 N.W.2d 836, 839-40 (1971).

¶10 At the time that Lindsley placed Williams under arrest at the hospital, he had the following information upon which to base a belief that

Williams had probably committed an OMVWI offense: (1) Williams had driven her car off a straight, level road and into a creek without explanation; (2) her eyes were bloodshot and glossy; (3) she had told hospital personnel that "I guess I did this to myself" and "I only had three beers"; (4) she had told Farber that she did not want the police involved; and (5) her answers to the officers' questions were frequently non-responsive and some answers were made with a sarcastic or hostile attitude. Under these circumstances, we conclude that there was more than a mere possibility that Williams had been operating an automobile while intoxicated. Accordingly, Lindsley had probable cause to arrest Williams.

¶11 Williams contends that the absence of certain indicators of intoxication, including the absence of field sobriety tests, is significant and demonstrates that Lindsley lacked probable cause to arrest. Williams relies on a footnote in ***State v. Swanson***, 164 Wis. 2d 437, 475 N.W.2d 148 (1991), which opines that the facts present in an earlier case, ***State v. Seibel***, 163 Wis. 2d 164, 181-83, 471 N.W.2d 226, 234 (1991),[4] fell short of establishing probable cause to arrest, and also that:

> [u]nexplained erratic driving, the odor of alcohol, and the coincidental time of the incident form the basis for a reasonable suspicion but should not, in the absence of a field sobriety test, constitute probable cause to arrest someone for driving while under the influence of intoxicants.

***Swanson***, 164 Wis. 2d at 453 n.6, 475 N.W.2d at 155 n.6.

[4] The relevant indicia of intoxication involved in ***Seibel*** were unexplained erratic driving, a strong odor of intoxicants emanating from defendant's traveling companions, a possible odor of an intoxicant from the defendant and the defendant's behavior at the hospital. ***State v. Seibel***, 163 Wis. 2d 164, 181-83, 471 N.W.2d 226, 234 (1991).

¶12 Williams properly acknowledges in her reply brief that the footnote in ***Swanson***, at most, stands for the proposition that *in some cases* the absence of field sobriety tests will be significant to a probable cause determination.[5] It does not stand for the proposition that field sobriety tests are always necessary to establish probable cause to arrest. The totality of the circumstances test remains the correct analysis for deciding whether probable cause to arrest exists. ***Koch***, 175 Wis. 2d at 701, 499 N.W.2d at 161. We have concluded in several cases that probable cause to arrest may exist where no field sobriety tests were given. *See, e.g.*, ***State v. Kasian***, 207 Wis. 2d 611, 621-22, 558 N.W.2d 687, 691-92 (Ct. App. 1996) (concluding there was probable cause to arrest suspect injured in a one-vehicle accident where the officer noted a strong odor of intoxicants coming from the defendant and slurred speech); ***Babbitt***, 188 Wis. 2d at 357, 525 N.W.2d at 104 (concluding that probable cause to arrest existed even without considering defendant's refusal to submit to field sobriety tests); ***State v. Wille***, 185 Wis. 2d 673, 683, 518 N.W.2d 325, 329 (Ct. App. 1994) (holding that an officer had probable cause to arrest a suspect who hit the rear of a parked car, smelled of intoxicants and stated in his hospital room that he had "to quit doing this"). Therefore, as we stated above, we are persuaded that a reasonable officer confronted with the totality of the circumstances known to Lindsley could believe that it was more than a mere possibility that Williams had violated WIS. STAT. § 346.63(1), even in the absence of field sobriety tests and the other indicators of intoxication identified by Williams.

[5] We note that a careful reading of ***Swanson*** shows the supreme court specifically stated that it was not addressing whether there was probable cause to arrest Swanson 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]." ***State v. Swanson***, 164 Wis. 2d 437, 453, 475 N.W.2d 148, 155 (1991).

¶13 Williams also argues that certain facts known to Lindsley add little to the probable cause analysis because a reasonable officer could infer either intoxication or some other explanation from those facts.[6] We disagree. When a circuit court examines probable cause in the context of a suppression hearing, it takes evidence, which is subject to cross-examination. However, in so doing, it is not to choose between reasonable inferences if one of those inferences supports a basis for probable cause. *See* ***State ex rel. McCaffrey v. Shanks***, 124 Wis. 2d 216, 236, 369 N.W.2d 743, 754 (Ct. App. 1985) (citing ***State v. Dunn***, 121 Wis. 2d 389, 398, 359 N.W.2d 151, 155 (1984)). Therefore, while facts consistent with a person's innocence are part of the totality of the circumstances, an arresting officer is not deprived of the ability to draw reasonable adverse inferences merely because there is an alternative innocent explanation.

## CONCLUSION

¶14 Because we conclude that the police officer had probable cause to arrest Williams, we affirm the judgment and the order of the circuit court.

*By the Court.*—Judgment and order affirmed.

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

[6] Williams argues, for example, that the circumstances surrounding her unexplained accident were consistent not only with the inference that she was operating a motor vehicle while intoxicated, but also with the inference that she fell asleep while driving.