

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**May 22, 2002**

Cornelia G. Clark  
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. 01-2477-CR**

**Cir. Ct. No. 98-CT-77**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**JAMES A. ALBRIGHT,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Green Lake County: WILLIAM M. MCMONIGAL, Judge. *Affirmed.*

¶1 SNYDER, J.<sup>1</sup> James A. Albright appeals from a judgment of conviction for operating a motor vehicle while intoxicated, second offense (OWI). Albright argues that the facts of this case, as evidenced by the videotape played at

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1999-2000). All statutory references are to the 1999-2000 version unless otherwise noted.

the motion hearing, do not constitute probable cause to arrest. We affirm the judgment of conviction.

### **FACTS**

¶2 While on patrol on June 12, 1998, deputy Mark Putzke of the Green Lake County Sheriff's Department observed an oncoming vehicle cross the center line. After he passed the car, through the rear view mirror he again observed it cross the center line. Putzke turned around and followed the vehicle; after observing the vehicle weave, he pursued and stopped the car. As he approached the vehicle, Putzke asked the driver, later identified as Albright, to step from the vehicle.

¶3 While Putzke was administering a field sobriety test to Albright, deputy Georgia Trochinski arrived and took over. Trochinski asked Albright to submit to several field sobriety tests, all of which he failed. Albright was arrested for OWI; he subsequently submitted to a chemical test of his breath which yielded a result above the legal limit. Based upon this test result, Albright was also cited for operating a motor vehicle with a prohibited alcohol concentration (PAC).

¶4 Albright filed several pretrial motions challenging the existence of probable cause to arrest. These motions were heard and denied at a hearing on November 5, 1999. On June 27, 2001, Albright pled no contest to the OWI charge and the PAC charge was dismissed. He appeals the judgment of conviction.

## DISCUSSION

¶5 We will uphold the trial court's findings of fact unless they are clearly erroneous. *State v. Richardson*, 156 Wis. 2d 128, 137, 456 N.W.2d 830 (1990). Whether those facts satisfy the statutory standard of probable cause is a question of law that we review de novo. *Id.* at 137-38.

¶6 On appeal, Albright contends that the facts of this case, as evidenced by the videotape played at the motion hearing, do not constitute probable cause to arrest. He insists that the videotape of both the traffic stop and field sobriety tests directly contradicts statements from the arresting officers and provides direct evidence that he was not under the influence of an intoxicant. Albright argues that the judge relied solely on the observations of Albright's driving to make his decision regarding probable cause. We disagree.

¶7 In assessing the existence of probable cause, we consider whether “under the totality of the circumstances and based on all of the facts available to the arresting officer at the time of arrest, a reasonable officer would believe that the defendant was driving the vehicle while under the influence of an intoxicant.” *State v. Nordness*, 128 Wis. 2d 15, 36-37, 381 N.W.2d 300 (1986). 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. Paszek*, 50 Wis. 2d 619, 625, 184 N.W.2d 836 (1971). This is a low standard; it is only necessary that the evidence would “lead a reasonable officer to believe that guilt is more than a possibility.” *Id.*

¶8 At the hearing on the suppression motion, Putzke testified that he observed Albright's car cross the center line on more than one occasion, weaving inside the lane of travel. Putzke observed Albright's car enter the opposite lane of

traffic with all four wheels and swerve “wildly” back into the correct lane of traffic. When asked to leave the vehicle after the stop, Albright “wasn’t very balanced” and had a slight stagger to his walk. Putzke could detect a slight odor of intoxicants coming from Albright; Albright’s eyes were somewhat tired and droopy and he admitted he had been drinking that evening. Albright admitted that he was uncertain where he had been and how long he had been drinking. During the administration of the horizontal gaze nystagmus (HGN) field sobriety test, Putzke observed six of six clues indicating intoxication above the legal limit.

¶9 Additionally, Trochinski administered the HGN test and also observed six of six clues. Trochinski testified that Albright exhibited seven clues of intoxication during the walk-and-turn test and three clues during the one-leg stand. Trochinski testified that Albright failed all three of these standardized field sobriety tests and a preliminary breath test yielded a result of 0.18%.

¶10 After hearing this testimony and receiving the evidence, including the videotape, the trial court stated:

The Court has heard the testimony of the witnesses from the standpoint of initiating the observation, initiating the stop, conducting the field sobriety testing, and the Court has heard testimony regarding the circumstances surrounding the blood draw at the hospital. *The Court’s further observed the tape that was taken at the scene of the arrest.* With respect to the motion for lack of probable cause or the motion to dismiss for lack of probable cause, the Court denies that motion. The Court is satisfied that there was clearly sufficient basis for the officer to pursue and stop the defendant, that basis primarily -- certainly the crossing of the center line, but also the fairly abrupt deviation within the lane, including crossing the fog line. (Emphasis added.)

¶11 The heart of Albright’s appeal centers on the videotape of the traffic stop; he points out numerous elements of the videotape that he claims “either (a)

directly contradict assertions made by the arresting officers, and/or (b) provide direct evidence that Mr. Albright was not under the influence of an intoxicant.” However, the trial court had the videotape available to it, watched the videotape and, in finding probable cause, relied upon both the videotape and witness testimony. Therefore, Albright, in essence, asks us to second-guess the decision of the trial court regarding the credibility of the witnesses and the videotape. We cannot and will not do so.

¶12 The trial court is the arbiter of the credibility of witnesses. *Chapman v. State*, 69 Wis. 2d 581, 583, 230 N.W.2d 824 (1975). The credibility of witnesses and the weight to be attached to that evidence are matters uniquely within the province of the finder of fact. *Lellman v. Mott*, 204 Wis. 2d 166, 172, 554 N.W.2d 525 (Ct. App. 1996). The trial court properly concluded, based upon both the testimony and evidence presented at the hearing, that there was probable cause to arrest Albright for operating a motor vehicle while under the influence of an intoxicant.

## CONCLUSION

¶13 We conclude that under the totality of the circumstances and all of the facts available to the arresting officers at the time of the arrest, a reasonable officer could believe that Albright was driving the vehicle while under the influence of an intoxicant. The judgment of conviction is therefore affirmed.

*By the Court.*—Judgment affirmed.

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

