COURT OF APPEALS
DECISION
DATED AND FILED

June 4, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0188-CR **Cir. Ct. No. 01-CT-197**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEFFREY G. WORKMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Barron County: JAMES C. EATON, Judge. *Affirmed*.

¶1 PETERSON, J.[1] Jeffrey Workman appeals a judgment convicting him of operating a motor vehicle while under the influence of an intoxicant, third offense, contrary to WIS. STAT. § 346.63(1)(a). He argues that the circuit court

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2).

erred by denying his suppression motion. According to Workman, the officer lacked probable cause to arrest him. We disagree and affirm the conviction.

BACKGROUND

¶2 At 1:28 a.m. on August 2, 2001, Barron County deputy sheriff Larry Tripp responded to a dispatch call regarding a motor vehicle accident. When Tripp arrived on the scene, he saw two people standing on the roadside with flashlights and a person, later identified as Workman, lying on the side of the highway. Neither person at the scene had witnessed the accident.

¶3 Tripp approached Workman and noticed that Workman's head was laying in a pool of blood. Tripp also noticed a motorcycle in the ditch.

¶4 Tripp asked Workman whether anyone had been with him and whether he remembered what happened. Workman answered "no" to both questions. Workman was neither uncooperative nor belligerent at the accident scene. He was calm and answered Tripp's questions in a slow monotone voice. Tripp did not notice any slurring of speech. When Workman attempted to sit up, Tripp smelled a slight odor of intoxicants. Workman was taken by ambulance to the local hospital while Tripp remained at the scene.

¶5 Tripp determined that the motorcycle had been traveling north and slowly veered off to the right going into the ditch. However, Tripp could not explain why the motorcycle went off the road.

¶6 At the hospital, Tripp met with Thomas Valley, a physician's assistant. Valley stated that he smelled the odor of intoxicants coming from Workman and that Workman had told him he drank two beers. Valley told Tripp

that Workman did not realize that he was injured and did not feel pain, which indicated to Valley that Workman might be intoxicated.

¶7 Tripp was at the hospital for approximately forty-five minutes while Workman was being treated for his injuries. Tripp noticed that Workman was somewhat combative and would not listen. Workman was making loud comments and kept moving around. Tripp stated that this interfered with the hospital staff's ability to take x-rays and to administer a CAT scan.

¶8 Tripp placed Workman under arrest for operating while under the influence. Tripp requested the lab technician to perform a blood draw. The blood test revealed an alcohol concentration of .135%.

¶9 Workman moved to suppress evidence arguing that Tripp did not have probable cause to arrest him. The circuit court denied the motion and Workman pled guilty.

STANDARD OF REVIEW

¶10 In reviewing a circuit court's order granting or denying a motion to suppress evidence, the court's findings of evidentiary or historical fact will be upheld unless they are clearly erroneous. ***State v. Matejka***, 2001 WI 5, ¶16, 241 Wis. 2d 52, 621 N.W.2d 891. However, whether the court's findings of fact pass statutory or constitutional muster is a question of law that this court reviews independently. ***Id.***

DISCUSSION

¶11 The sole issue on appeal is whether Tripp had probable cause to arrest Workman for operating a vehicle while under the influence of an intoxicant.

"Probable cause is a common-sense determination. It is judged by the factual and practical considerations of everyday life on which reasonable people, not legal technicians, act." ***State v. Griffin***, 220 Wis. 2d 371, 386, 584 N.W.2d 127 (Ct. App. 1998). "Probable cause to arrest refers to the quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed a crime." ***State v. Paszek***, 50 Wis. 2d 619, 624, 184 N.W.2d 836 (1971). Proof beyond a reasonable doubt need not be established nor does it need to be more likely than not that the defendant committed a crime. ***State v. Mitchell***, 167 Wis. 2d 672, 681-82, 482 N.W.2d 364 (1992). All that is required is reasonably trustworthy information that is sufficient to warrant a person of reasonable caution to believe that a crime has been committed. ***Paszek***, 50 Wis. 2d at 625. In determining probable cause, courts will look at the totality of the facts and circumstances faced by the officer at the time of the arrest to determine whether the officer reasonably believed that the defendant committed an offense. ***Dane Cty. v. Sharpee***, 154 Wis. 2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990).

¶12 Workman argues that there are far fewer indicia of intoxication than found in ***State v. Seibel***, 163 Wis. 2d 164, 183-84, 471 N.W.2d 226 (1991), and ***State v. Swanson***, 164 Wis. 2d 437, 453 n.6, 475 N.W.2d 148 (1991). In ***Seibel***, the supreme court examined four factors which the State relied upon to show reasonable suspicion that the defendant was operating a motor vehicle while under the influence of intoxicants. These factors were: (1) the defendant crossed the center line just before a curve in a no-passing zone for no justifiable reason; (2) a strong odor of intoxicants emanating from the defendant's traveling companions; (3) a police chief's belief that he smelled an odor of intoxicants on the defendant; and (4) the defendant's belligerent and unrealistic conduct at the hospital. The

court later stated that ***Seibel*** held that these factors "add up to a reasonable suspicion but not probable cause." ***Swanson***, 164 Wis. 2d at 453 n.6.[2]

¶13 In ***Swanson***, the supreme court concluded that the combined factors of unexplained erratic driving, the odor of alcohol, and an accident occurring at bar time were insufficient to constitute probable cause to arrest someone for driving while under the influence of intoxicants. ***Id.***

¶14 However, there are facts outside the ***Seibel/Swanson*** paradigm that we have found to be sufficient for probable cause. In ***State v. Wille***, 185 Wis. 2d 673, 681, 518 N.W.2d 325 (Ct. App. 1994), we concluded there was probable cause to arrest when the defendant rear-ended a parked car, had an odor of intoxicants and made a statement that he "had to quit doing this." In ***State v. Kasian***, 207 Wis. 2d 611, 622, 558 N.W.2d 687 (Ct. App. 1996), Kasian was involved in a one-car accident, had a strong odor of intoxicants about him, and exhibited slurred speech. ***Id.*** at 622. We concluded that this evidence gave the police probable cause to arrest Kasian. ***Id.***

¶15 Here, the circuit court distinguished the present facts from the facts in ***Swanson***. The court found that up to the time Valley indicated to Tripp that Workman might be intoxicated, there was very little to distinguish this case from ***Swanson***. However, the court then found:

> Workman performed an act or a series of acts that changes the landscape. The physicians and assistants that were trying to treat him, including giving him a CAT scan to see

[2] The State argues that the "***Swanson*** footnote" is really just that: a footnote. ***State v. Swanson***, 164 Wis. 2d 437, 453 n.6, 475 N.W.2d 148 (1991). The State contends that it has nothing to do with the actual decision in the case and was dicta. Because we conclude that there was probable cause, we do not address this issue.

> how badly damaged he was, had a lot of trouble doing that because Mr. Workman, for some reason or another, became combative. …
>
> ….
>
> I think on balance–and I'm finding the above as facts–on balance the combativeness, pugnacity, the unreasoned refusal to let people treat him is enough to push this into the realm of probable cause. And it goes beyond *Swanson* because there is physical evidence that is arguably indicia of intoxication.

¶16 We agree with the circuit court and conclude that there are more indicia of intoxication than in ***Swanson***. Like ***Swanson***, Tripp responded to an accident near bar closing time, observed signs of unexplained erratic driving and detected an odor of intoxicants coming from Workman. However, unlike ***Swanson***, Workman became combative with those trying to treat him, would not listen to them, made loud comments, and made it difficult to perform x-rays or a CAT scan because of his moving around and refusal to listen to their requests.

¶17 Accordingly, we conclude that the facts support probable cause to arrest Workman. The circuit court correctly denied Workman's motion to suppress the evidence.

By the Court.—Judgment and order affirmed.

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