COURT OF APPEALS
DECISION
DATED AND FILED

September 10, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0869-CR **Cir. Ct. No. 00-CT-112**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LARRY A. COON,

DEFENDANT-APPELLANT.

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

¶1 CANE, C.J.[1] Larry Coon appeals from a judgment convicting him of operating a motor vehicle while under the influence of an intoxicant (OWI), second offense, in violation of WIS. STAT. § 346.63(1)(a), and an order denying

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

his motion to suppress the blood test results. The primary issue is whether the police had probable cause to arrest Coon prior to taking a sample of his blood. Because the police had probable cause to arrest Coon for OWI, the judgment and order are affirmed.

BACKGROUND

¶2 The undisputed underlying facts were established at the suppression hearing. On a perfectly nice afternoon with no unusual road conditions, Coon approached a wide curve on his motorcycle and inexplicably slid off the roadway, injuring himself. Chetek police chief Robert Breidenbach was the first officer to arrive at the accident scene and observed no visible injuries on Coon. When he asked Coon if he was okay, Coon responded, "I don't know what happened. I don't know how this happened." Coon appeared confused, agitated and unsure of how he had got to the side of the road. Breidenbach observed motorcycle tire tracks showing Coon made a large sweeping turn on a curve, lost control and went off the road through the gravel where his cycle crashed. Because the accident scene was outside the chief's jurisdiction, he focused on caring for Coon and protecting the area from other vehicles. The EMTs arrived, and Chetek police officer Mark Petersen and Barron County sheriff's deputy David Moin arrived shortly after.

¶3 One of the EMTs informed Petersen that Coon had been drinking and was the sole operator of the motorcycle. Petersen relayed this information to Moin who was investigating the accident. Moin talked to Coon who had been placed in the ambulance, and Moin could smell the odor of alcohol coming from the area where Coon was placed in the ambulance. Because Coon was on a gurney in the ambulance and receiving medical treatment, no field sobriety tests

were performed. However, Moin believed Coon was under the influence of an intoxicant. Moin remained at the accident scene to conduct further investigation of the accident, but radioed ahead for Barron County sheriff's deputy Kurt Beranek to meet the ambulance at the hospital and to investigate the possibility of having Coon's blood tested for alcohol content and arresting Coon for OWI. Beranek met Coon at the hospital and after detecting an odor of alcohol on Coon, placed him under arrest for OWI and instructed the medical personnel to test Coon's blood. The test revealed a blood alcohol content of .18%.

¶4 Following the testimony at the suppression hearing, the circuit court in a written decision concluded that under the totality of the circumstances, the police had probable cause to arrest Coon for OWI. This finding was based on Coon admitting to driving the motorcycle, displaying erratic driving by unexplainably losing control of his motorcycle, having difficulty communicating with the officers while being confused and agitated and having an odor of alcohol. The court reasoned that because Coon was receiving medical attention, the officers could not reasonably conduct field sobriety tests before arresting him. Coon subsequently entered a no contest plea to OWI and appealed.

DISCUSSION

¶5 When reviewing a suppression motion, we uphold the trial court's findings of fact unless they are clearly erroneous. ***State v. Roberts***, 196 Wis. 2d 445, 452, 538 N.W.2d 825 (Ct. App. 1995). We review a probable cause determination de novo. ***State v. Babbitt***, 188 Wis. 2d 349, 356, 525 N.W.2d 102 (Ct. App. 1994). Thus, we will focus only on what we conclude are the facts from which a probable cause determination might arise. Probable cause to arrest exists where the circumstances are such that a reasonable law enforcement officer could

conclude that an arrestee probably had committed an offense. ***State v. Wille***, 185 Wis. 2d 673, 682-83, 518 N.W.2d 325 (Ct. App. 1994). This is a commonsense test. It is based on probabilities. The facts need only be sufficient to lead a reasonable officer to believe guilt is more than a possibility. ***County of Dane v. Sharpee***, 154 Wis. 2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990).

¶6 Coon argues that the indicia of intoxication the EMT and officers observed were similar to the indicia of intoxication discussed in ***State v. Seibel***, 163 Wis. 2d 164, 471 N.W.2d 226 (1991), and ***State v. Swanson***, 164 Wis. 2d 437, 475 N.W.2d 148 (1991). He asserts that in each of these cases, the court found the indicia of intoxication sufficient to support a reasonable suspicion determination, but not one of probable cause.

¶7 In ***Seibel***, the court noted four indicia of drinking: (1) unexplained erratic driving; (2) a strong odor of intoxicants emanating from Seibel's traveling companions; (3) a police chief's belief that he smelled an intoxicant on Seibel's breath; and (4) Seibel's belligerence and lack of contact with reality at a hospital. ***Seibel***, 163 Wis. 2d at 181-82. In ***Swanson***, the court observed that these indicia were sufficient to support reasonable suspicion, but not probable cause. ***Swanson***, 164 Wis. 2d at 453 n.6.

¶8 The ***Swanson*** court noted that the following factors or indicia of intoxication were sufficient to provide reasonable suspicion, but were arguably insufficient to show probable cause: (1) unexplained erratic driving; (2) an odor of intoxicants about Swanson; and (3) an incident at about bar time. ***Id.*** In its note 6, the ***Swanson*** court added:

> Unexplained 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. A field sobriety test could be as simple as a finger-to-nose or walk-a-straight-line test. Without such a test, the police officers could not evaluate whether the suspect's physical capacities were sufficiently impaired by the consumption of intoxicants to warrant an arrest.

Id. at 454 n.6.

¶9 Coon relies upon ***Swanson*** to support his argument that the police did not have probable cause to arrest him. *See* ***id.*** He argues the comments of the supreme court in ***Swanson***, at note 6, illustrate the proper mechanism for an officer to follow an investigation of suspected drunk driving. He further argues this statement in ***Swanson*** controls the outcome in this case because no field sobriety tests were administered and we are left only with the facts of unexplained erratic driving and the odor of alcohol.

¶10 Indeed, ***Swanson*** plays a significant role in Coon's argument. However, in ***State v. Kasian***, 207 Wis. 2d 611, 622, 558 N.W.2d 687 (Ct. App. 1996), we observed that note 6 of ***Swanson*** is not absolute. ***Kasian*** explains:

> Citing ***State v. Swanson***, 164 Wis. 2d 437, 475 N.W.2d 148 (1991), Kasian contends that, absent the administration of field sobriety tests confirming a suspicion of intoxication, the officer did not have probable cause to arrest. We acknowledge that ***Swanson*** contains certain language which supports this argument. *See* ***id.*** at 453-54 n.6, 475 N.W.2d at 155. However, this language has since been qualified. It "does not mean that under all circumstances the officer must first perform a field sobriety test, before deciding whether to arrest for operating a motor vehicle while under the influence of an intoxicant." ***Wille***, 185 Wis. 2d at 684, 518 N.W.2d at 329. Thus, the question of probable cause is properly assessed on a case-by-case basis. In some cases, the field sobriety tests may be necessary to establish probable cause; in other cases, they may not. This case, we conclude, falls into the latter category.

Id. at 622.

¶11 Thus, it is not necessary under all circumstances that police officers perform field sobriety tests before probable cause to arrest exists for operating while under the influence of an intoxicant. ***Wille***, 185 Wis. 2d at 684. We also find ***Wille*** instructive. There, an officer smelled an odor of intoxicants about Wille at a hospital. He knew that a fire fighter and another officer had smelled intoxicants on and near Wille. The officer knew that Wille had rear-ended another automobile and heard Wille say that he had "to quit doing this." This information was sufficient to provide probable cause to arrest Wille. *See* ***Wille***, 185 Wis. 2d at 683-85. The factors that produced probable cause were therefore an odor of intoxicants, erratic driving and a confession.

¶12 Additionally, in ***Kasian***, an officer observed a damaged van, its motor still running, up against a telephone pole with an injured male lying next to the van. This person smelled of alcohol and at the hospital was noted to have slurred speech. We concluded these facts were sufficient to support a probable cause to arrest for OWI. ***Id.*** at 622.

¶13 Here, Coon's indicia of intoxication include unexplained erratic driving on a perfectly nice afternoon under normal road conditions, an odor of intoxicants, and difficulty in communicating while appearing confused and agitated. When these indicia of intoxication are added to the indicia found in ***Seibel*** and ***Swanson***, the scales tip the other way.

¶14 The officers' conclusion that Coon was intoxicated could have been wrong, yet probable cause could still exist. Probable cause does not demand any showing that the officers' conclusion was correct, or more likely true than false. ***Texas v. Brown***, 460 U.S. 730, 742 (1983). All that is necessary is that there be

more than a possibility or suspicion that a person committed an offense. ***State v. Mitchell***, 167 Wis. 2d 672, 681-82, 482 N.W.2d 364 (1992).

¶15 Admittedly, this is a close case. However, as the circuit court concluded, the police could reasonably believe that Coon was under the influence of an intoxicant when they found Coon had lost control of his motorcycle on a perfectly nice afternoon while turning on a wide curve with normal road conditions, could not explain how the accident happened or how he got off the road, was confused and agitated after the accident, and smelled of intoxicants both at the accident scene and the hospital. Thus, we agree with the circuit court's conclusion that probable cause existed to arrest Coon for OWI. Accordingly, the judgment and order are affirmed.

By the Court.—Judgment and order affirmed.

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