COURT OF APPEALS
DECISION
DATED AND FILED

December 11, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0960 **Cir. Ct. No. 01-TR-4537**

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

VILLAGE OF ELM GROVE,

PLAINTIFF-RESPONDENT,

V.

TINA FLEMING,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: JAMES R. KIEFFER, Judge. *Affirmed.*

¶1 SNYDER, J.[1] Tina Fleming appeals from a judgment of conviction for operating a motor vehicle while under the influence (OWI). Fleming argues

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

that the trial court erroneously denied her motion to suppress evidence because there was no probable cause to give her a preliminary breath test (PBT) and therefore no probable cause for her arrest. We disagree and affirm the judgment.

FACTS

¶2 At 1:47 a.m. on February 23, 2001, Officer Brian Gasse of the Village of Elm Grove Police Department observed a blue Mustang speeding and following a black Oldsmobile too closely. He took a radar reading and found that the Mustang was going thirty-five miles per hour in a twenty-five miles per hour zone. He observed both cars speeding, driving erratically and weaving.

¶3 Gasse then tried to stop both cars, but only one, the Mustang, yielded to his emergency equipment. The Oldsmobile kept going, so Gasse pulled up next to the Mustang. He told the driver, later identified as Fleming, to drive east for three more blocks and wait there for another squad car to speak with her. Gasse advised the dispatcher that he had stopped a blue Mustang in the 12600 block of Watertown Plank Road and needed assistance. He also provided the license plate number to the dispatcher and asked that officers make contact with the Mustang. Gasse then left to pursue the Oldsmobile.

¶4 Both Officer Jeffrey Lenderman and Sergeant T. M. Mackesey arrived on the scene to assist with the stop. After making contact with Fleming, Lenderman noted that her eyes were bloodshot and glassy and that an odor of intoxicants emanated from her person and inside her vehicle. While Fleming did not have trouble finding her driver's license and showing it to Lenderman, upon questioning by Mackesey, Fleming admitted that she had had a couple of beers that evening. She stated that she was following her friend, in the Oldsmobile,

home to her residence to make sure that she got home safely because her friend was too drunk to drive home.

¶5 Lenderman and Mackesey advised Fleming to exit the vehicle and asked if she had any condition that would affect her ability to perform field sobriety tests. Fleming denied any such condition; Lenderman did not recall observing Fleming show any imbalance, staggering or leaning when she exited her vehicle or when she walked to the spot between her car and the squad. Prior to the administration of field sobriety tests, Lenderman and Mackesey first gave Fleming a PBT, which demonstrated .14% blood alcohol concentration. Subsequently, Fleming failed one field sobriety test and had trouble with parts of another but passed all the verbal tests. Fleming was then arrested.

¶6 Fleming was charged with OWI. On October 1, 2001, she moved to suppress the evidence of her statements and admissions, the results of her field sobriety tests and the chemical test results on the grounds that she was arrested without probable cause. The trial court denied this motion. Fleming then stipulated to a bench trial and to the facts for the purpose of the bench trial. The court found her guilty of OWI. Fleming appeals.

DISCUSSION

¶7 Fleming argues that the trial court erred in holding that there was probable cause for a PBT, that she was effectively under arrest without probable cause during the stop, and that there was no probable cause for her arrest. We disagree with each of these contentions.

¶8 The appellate court will uphold the trial court's findings of fact if the findings are not clearly erroneous. ***State v. Roberts***, 196 Wis. 2d 445, 452, 538

N.W.2d 825 (Ct. App. 1995). Whether a set of facts constitutes probable cause is a question of law that the court of appeals will review de novo. ***State v. Babbitt***, 188 Wis. 2d 349, 356, 525 N.W.2d 102 (Ct. App. 1994). To determine if probable cause exists, the court must consider whether "the totality of the circumstances would lead a reasonable police officer to believe ... that the defendant was operating a motor vehicle while under the influence of an intoxicant." ***State v. Nordness***, 128 Wis. 2d 15, 35, 381 N.W.2d 300 (1986). The threshold to establish probable cause is low; it is only necessary that the evidence "lead a reasonable officer to believe that guilt is more than a possibility." ***State v. Paszek***, 50 Wis. 2d 619, 625, 184 N.W.2d 836 (1971).

¶9 The first question before us is whether there was probable cause to administer a PBT. In interpreting the statute on preliminary breath tests, WIS. STAT. § 343.303,[2] the Wisconsin Supreme Court held that the level of probable cause required before an officer may request a PBT is greater than the reasonable suspicion necessary for an investigative stop and lower than the level of probable

[2] WISCONSIN STAT. § 343.303 provides, in part:

> If a law enforcement officer has probable cause to believe that the person is … [operating while intoxicated] … the officer, prior to an arrest, may request the person to provide a sample of his or her breath for a preliminary breath screening test using a device approved by the department for this purpose. The result of this preliminary breath screening test may be used by the law enforcement officer for the purpose of deciding whether or not the person shall be arrested … and whether or not to require or request chemical tests as authorized under s. 343.305(3). The result of the preliminary breath screening test shall not be admissible in any action or proceeding except to show probable cause for an arrest, if the arrest is challenged, or to prove that a chemical test was properly required or requested of a person under s. 343.305(3). Following the screening test, additional tests may be required or requested of the driver under s. 343.305(3).

cause required for arrest. ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 317, 603 N.W.2d 541 (1999).

¶10 In ***Renz***, the defendant exhibited several signs of intoxication, such as: a car smelling of intoxicants, his own admission that he drank three beers earlier in the evening, and poor performance on the one-legged stand, heel-to-toe and finger-to nose tests. ***Id.*** at 316-17. However, he did not speak in a slurred manner, "and he was able to substantially complete all of the tests." ***Id.*** at 317. The court held that this was "exactly the sort of situation in which a PBT proves extremely useful in determining whether there is probable cause for an OWI arrest." ***Id.***

¶11 Fleming's situation is nearly identical to Renz's. Gasse had previously observed her driving erratically and committing traffic violations. Lenderman observed several signs of intoxication. Fleming's eyes were bloodshot and glassy and an odor of intoxicants emanated from her person and inside her vehicle. Fleming admitted to having had a couple of beers that evening and had trouble with parts of the field sobriety tests. Based upon these factors, we conclude that Lenderman had probable cause to request a PBT. *See* ***id.***

¶12 Fleming further argues that she was effectively under arrest without probable cause during the stop. We disagree. A detainee is under arrest in a constitutional sense when "a reasonable person in the defendant's position would have considered himself or herself to be 'in custody,' given the degree of restraint under the circumstances." ***State v. Swanson***, 164 Wis. 2d 437, 446-47, 475 N.W.2d 148 (1991). This is an objective test, and the court must consider what the police officers communicate to the defendant by their words or actions, and not

the "officers' unarticulated plan." ***Id.*** at 447. Routine traffic stops, for investigatory purposes, are not arrests. ***Id.*** at 448-49.

¶13 The Wisconsin Supreme Court held that a defendant was not under arrest during a traffic stop when he "was merely asked to perform some field sobriety tests, was never told that he was under arrest nor given any ***Miranda*** warnings, and not handcuffed." ***Swanson***, 164 Wis. 2d at 448. Furthermore, we have held that a defendant was not under arrest when the officers told him he was being detained for purposes of the investigation and he performed sobriety tests at the accident scene, even though he had left the scene and an officer had transported him back there. ***State v. Quartana***, 213 Wis. 2d 440, 450, 570 N.W.2d 618 (Ct. App. 1997).

¶14 Lenderman did not arrest Fleming until after she had completed and performed poorly on the field sobriety tests. Prior to that, Fleming was never told she was under arrest, was never given ***Miranda*** warnings and was never handcuffed. Fleming was not under arrest until after her poor performance on the field sobriety tests.

¶15 Finally, Fleming argues that there was no probable cause to arrest her for OWI. Police officers have probable cause to arrest when they receive police-channel communications showing cause and act on them in good faith. ***Desjarlais v. State***, 73 Wis. 2d 480, 491, 243 N.W.2d 453 (1976). Here, Lenderman received a radio report from a fellow officer that he suspected Fleming's vehicle was being operated under the influence. Gasse gave the color, make, and license plate number of the vehicle to Lenderman and the dispatcher.

¶16 Gasse's observations and description of the vehicle could be enough probable cause for an arrest. *See* ***id.*** at 492-93. If the evidence would "lead a

reasonable officer to believe that guilt is more than a possibility," then there is probable cause to arrest. ***Paszek***, 50 Wis. 2d at 625. If "the totality of the circumstances within the arresting officer's knowledge at the time of the arrest would lead a reasonable police officer to believe ... that the defendant was operating a motor vehicle while under the influence of an intoxicant," there is probable cause to arrest for OWI. ***Nordness***, 128 Wis. 2d at 35.

¶17 Fleming's PBT results were over the legal limit and she either failed or had trouble with the field sobriety tests. Lenderman noticed Fleming's eyes were bloodshot and glassy and an odor of intoxicants emanated from her and her car. Fleming admitted drinking that evening. The totality of the circumstances would have led a reasonable officer to believe that Fleming was operating while intoxicated. *See* ***County of Dane v. Sharpee***, 154 Wis. 2d 515, 518, 453 N.W.2d 508 (Ct. App 1990). Probable cause existed to arrest Fleming.

By the Court. —Judgment affirmed.

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