

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 23, 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. 02-1533-CR
STATE OF WISCONSIN**

Cir. Ct. No. 02-CT-46

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

ARTHUR W. SANGER, JR.,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Washington County:
DAVID C. RESHESKE, Judge. *Reversed and cause remanded.*

¶1 NETTESHEIM, P.J.¹ The State of Wisconsin appeals from a trial court order granting Arthur W. Sanger, Jr.'s motion to suppress evidence based on

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.

a lack of probable cause to arrest for operating while intoxicated. The State contends that the trial court erred in granting Sanger's motion to suppress because the totality of the circumstances supported a finding of probable cause to arrest. We agree. We reverse the trial court's order and remand for further proceedings.

¶2 The facts pertaining to Sanger's arrest are undisputed.² On March 4, 2001, at approximately 11:35 a.m., Officer Richard VonDrasek of the Town of Trenton Police Department received a call regarding a vehicle in the ditch and a driver who was possibly intoxicated. When VonDrasek arrived at the scene, he observed a vehicle in the ditch, a tow-truck that had just pulled up, and a gentleman in a pickup truck parked on the road. VonDrasek located and identified Sanger, who was standing by the vehicle in the ditch. VonDrasek noticed that Sanger was "very unsteady on his feet, he couldn't stand in one place." VonDrasek observed Sanger trip over his feet and fall into his vehicle. He also noticed a "very strong odor of an intoxicant coming from [Sanger's] breath."

¶3 VonDrasek asked Sanger if the vehicle in the ditch belonged to him and Sanger replied that it did and that he was the driver. Sanger indicated that he was on his way home when he took a corner too fast and went off the road. Sanger also indicated that he had worked third shift, was coming from work and had stopped to have a few cocktails before going home. VonDrasek examined the vehicle for damage and noted the keys in the ignition. VonDrasek believed Sanger to be under the influence of intoxicants so he requested that Sanger perform field

² We note that in presenting their arguments, both parties refer to facts that became known only after the arrest. We have not included those facts in our recitation nor do we consider those facts for purposes of the issue of probable cause to arrest.

sobriety tests. VonDrasek administered three field sobriety tests before Sanger indicated that he would not do another test. VonDrasek concluded that Sanger failed all three tests. After administering a breath test, which indicated a prohibited alcohol concentration, VonDrasek placed Sanger under arrest for OWI.³ VonDrasek conceded that the vehicle was not running when he arrived at the scene, he had not spoken with anyone who had seen the vehicle go into the ditch and he had not felt the hood of the vehicle to determine whether it was warm and had recently been driven.

¶4 Noting that the case was “close,” the trial court found that while VonDrasek had probable cause to believe Sanger was intoxicated, he did not have probable cause to believe that Sanger had driven or operated a motor vehicle while intoxicated.

¶5 The question of whether probable cause exists to justify an arrest requires the application of a constitutional standard to a given set of facts. *State v. Riddle*, 192 Wis. 2d 470, 475, 531 N.W.2d 408 (Ct. App. 1995). When the facts are undisputed, we review this question de novo. *Id.*

Probable cause to arrest is the quantum of evidence within the arresting officer’s knowledge at the time of the arrest which would lead a reasonable police officer to believe that the defendant probably committed or was committing a crime.... There must be more than a possibility or suspicion that the defendant committed an offense, but the evidence need not reach the level of proof beyond a reasonable doubt or even that guilt is more likely than not.

³ Based on a lack of certification, the trial court declined to consider the results of the preliminary breath test.

State v. Secrist, 224 Wis. 2d 201, 212, 589 N.W.2d 387 (1999). Further, when a police officer is confronted with two reasonable competing inferences, one justifying arrest and the other not, the officer is entitled to rely on the reasonable inference justifying the arrest. *Cf. State v. Tompkins*, 144 Wis. 2d 116, 125, 423 N.W.2d 823 (1988).⁴

¶6 Here, Sanger does not dispute the evidence that he was intoxicated when he encountered VonDrasek. Rather, Sanger contends that VonDrasek lacked knowledge of when the accident occurred and, therefore, lacked probable cause to believe that Sanger operated his motor vehicle while intoxicated.

¶7 We agree with the trial court that the facts of this case present a close call. However, we are not persuaded that VonDrasek's failure to ascertain the exact time of the accident resulted in a lack of probable cause to arrest Sanger. VonDrasek testified that he arrived at the scene only a few minutes after receiving the report of a vehicle in a ditch. Sanger informed VonDrasek that the vehicle in the ditch belonged to him and that he had been driving it. He also told VonDrasek that he went off the road when he was coming home after working the third shift and had stopped for a few cocktails. We do not read the trial court's ruling to say that these facts do not allow a plausible conclusion that Sanger had operated his vehicle while intoxicated. However, the trial court found it equally plausible that Sanger's vehicle went off the road the day before and Sanger was back at the scene to retrieve his vehicle. As such, the court concluded that the requisite nexus

⁴ *State v. Tompkins*, 144 Wis. 2d 116, 423 N.W.2d 823 (1988), addressed probable cause to search; however, we see no reason why the rule should be any different when the issue is probable cause to arrest.

between Sanger's intoxication and his driving while under the influence of that intoxication had not been established.

¶8 We agree with the trial court that a nexus between intoxication and operation is necessary in an operating while intoxicated case. However, as we have indicated, one plausible interpretation of the facts known to VonDrasek is that Sanger went off the road that morning while he was intoxicated. The information provided by Sanger is consistent with a conclusion that the accident occurred shortly before VonDrasek arrived—Sanger would have been heading home in the morning following a third shift, he could have been intoxicated following a “few cocktails” and, in explaining the incident to VonDrasek, Sanger never indicated that the accident happened at any other time.⁵

¶9 As *Secrist* instructs, the evidence to justify Sanger's arrest is not required to reach the level of proof of guilt beyond a reasonable doubt or even that guilt is more likely than not. *Secrist*, 224 Wis. 2d at 212. Based on the facts then known and observed by VonDrasek, we conclude that a reasonable police officer would plausibly and reasonably conclude that Sanger had operated his vehicle while intoxicated. *See id.* Whether the State can ultimately establish that Sanger committed the offense under the higher burden of proof at trial is another matter not presently before us.

¶10 We reverse the trial court's order and remand for further proceedings.

⁵ By noting Sanger's failure to explain that the accident had occurred at an earlier time, we are not suggesting that he had the burden of disproving probable cause at the suppression hearing. Rather, we are simply assessing the totality of the information known to VonDrasek at the moment of arrest.

By the Court.—Order reversed and cause remanded.

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

