

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 19, 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. 02-1585-CR
STATE OF WISCONSIN**

Cir. Ct. No. 01-CT-199

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

TRAVIS J. DERKS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Wood County:
JAMES M. MASON, Judge. *Affirmed.*

¶1 VERGERONT, P.J.¹ Travis Derks appeals the judgment of conviction for operating while intoxicated in violation of WIS. STAT. § 346.63(1)(a). He contends the trial court erred in denying his motion to suppress

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

evidence on the ground that the officer did not have probable cause to arrest him. We conclude there was probable cause and therefore affirm.

¶2 The parties stipulated to the following facts. On May 12, 2001, at approximately 3:18 p.m. in Wood County, Deputy Sheriff Jim Sutton saw Derks driving a car on U.S. Highway 10 and stopped him for speeding. Derks spoke with slurred speech, had an odor of intoxicants on his breath, and his eyes were extremely bloodshot and glazed. Derks admitted he had been drinking beer and there were open intoxicants in his car. The officer had him perform field sobriety tests. Derks recited the alphabet out of sequence on his first attempt. He performed well on the walk-and-turn test and on the one-leg-stand field sobriety tests.

¶3 The trial court determined that these facts were sufficient to establish probable cause to believe that Derks was driving while under the influence of an intoxicant. The court reasoned that the evidence established that Derks had consumed alcohol and the slurred speech indicated he was under the influence of an intoxicant. This was sufficient for probable cause, the court concluded, even though Derks performed well on two of the field sobriety tests.

¶4 On appeal, Derks argues that passing the two field sobriety tests demonstrated he was not impaired by his consumption of alcohol, and there was therefore no probable cause to arrest him.²

² Derks does not develop an argument that, if there was probable cause to arrest him for driving while under the influence of an intoxicant, it was not permissible under the Fourth Amendment to draw his blood. Accordingly, we confine our discussion to whether there was probable cause to arrest him.

¶5 Whether undisputed facts show probable cause to arrest is a question of law, which we review de novo. *State v. Babbitt*, 188 Wis. 2d 349, 356, 525 N.W.2d 102, 104 (Ct. App. 1994). The inquiry is whether the arresting officer’s knowledge at the time of arrest would lead a reasonable police officer to believe that the defendant was operating a motor vehicle while under the influence of an intoxicant. *Id.* The State need not show evidence sufficient to prove guilt beyond a reasonable doubt, nor even to show that guilt is more probable than not. *State v. Truax*, 151 Wis. 2d 354, 360, 444 N.W.2d 432, 435 (Ct. App. 1989). Rather, we look to the totality of the circumstances, *Babbitt*, 188 Wis. 2d at 356, 525 N.W.2d at 104, to determine whether the objective facts would “lead a reasonable officer to believe that guilt is more than a possibility.” *Truax*, 151 Wis. 2d at 360, 444 N.W.2d at 435.

¶6 Applying this test, we conclude the officer did have probable cause to believe that Derks had been driving while under the influence of an intoxicant. It is true, as Derks asserts, that the consumption of alcohol in itself does not necessarily mean that an individual is impaired. It is also true that Derks’s performance on the walk-and-turn and one-leg-stand tests, viewed in isolation, do not indicate an impairment of his physical abilities. However, when that evidence is considered together with Derks’s slurred speech, extremely bloodshot and glazed eyes, and inability to recite the alphabet correctly, we conclude a reasonable officer would believe that it is more than a possibility that Derks had consumed enough alcohol to render him under the influence of an intoxicant. The performance of the two field sobriety tests may affect what a reasonable officer would believe about Derks’s degree of intoxication, but they do not remove the reasonable inference that he has consumed enough alcohol to be under the influence of an intoxicant.

¶7 We do not agree with Derks that *State v. Swanson*, 164 Wis. 2d 437, 475 N.W.2d 148 (1991), supports his position. The court in *Swanson* concluded there was no probable cause, but the officer there did not observe that the driver had slurred speech or extremely bloodshot and glazed eyes, and did not have the evidence from a field sobriety test that the driver could not properly recite the alphabet.

¶8 Since the trial court correctly concluded that the officer had probable cause to arrest Derks, it properly denied the motion to suppress evidence.

By the Court.—Judgment affirmed.

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

