

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 8, 2010

A. John Voelker
Acting 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. 2010AP222-CR

Cir. Ct. No. 2007CT914

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TRACY M. BLICHARZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County:
BARBARA A. KLUKA, Judge. *Affirmed.*

¶1 REILLY, J.¹ Tracy Blicharz appeals from a decision of the circuit court denying her motion to suppress evidence of the blood test results stemming

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

from her arrest for operating a motor vehicle while intoxicated. The issue on appeal is whether the officer who pulled over Blicharz had reasonable suspicion that Blicharz's ability to operate her vehicle was impaired such that he could request that Blicharz submit to field sobriety tests. As we find that the officer had reasonable suspicion, we affirm the circuit court's denial of Blicharz's motion to suppress.

¶2 On September 28, 2007, at approximately 9:50 p.m., Wisconsin State Trooper Kyle Amlong observed Blicharz driving erratically on the highway. Trooper Amlong witnessed Blicharz change lanes without using a turn signal and cut off another driver. Trooper Amlong pulled over the vehicle and identified Blicharz as the driver. Blicharz also had a passenger in her vehicle. Trooper Amlong noticed the smell of alcohol emanating from the vehicle, and asked Blicharz to perform field sobriety tests. Blicharz stumbled upon exiting the car. After administering the horizontal gaze nystagmus test, Trooper Amlong observed five clues that indicated intoxication. Blicharz refused Trooper Amlong's request to perform additional field sobriety tests. Trooper Amlong arrested Blicharz for operating while intoxicated.

¶3 A blood test subsequent to her arrest revealed that Blicharz had a blood alcohol content of .18 percent. Blicharz motioned the circuit court to suppress the blood test on the grounds that Trooper Amlong did not have reasonable suspicion to request that Blicharz submit to field sobriety tests, and thus arrest her. The circuit court denied Blicharz's motion. Blicharz later pled guilty to operating a motor vehicle while under the influence of an intoxicant in violation of WIS. STAT. § 346.63(1)(a).

¶4 The issue before the court is whether Trooper Amlong had reasonable suspicion to request that Blicharz submit to field sobriety tests.² Blicharz argues that Trooper Amlong did not have reasonable suspicion because either she or her passenger could have been the source of the alcoholic smell. The State, conversely, argues that Trooper Amlong had reasonable suspicion based on the totality of the circumstances.

¶5 Whether reasonable suspicion exists is a question of constitutional fact. *State v. Powers*, 2004 WI App 143, ¶6, 275 Wis. 2d 456, 685 N.W.2d 869. When reviewing questions of constitutional fact, we apply a two-step standard of review. *Id.* First, we will uphold the circuit court’s factual findings unless they are clearly erroneous. *Id.* Second, we will use the facts to conduct a de novo review of whether Trooper Amlong had reasonable suspicion that Blicharz was driving while intoxicated. *Id.*

¶6 Given that Blicharz has not refuted any of the circuit court’s factual findings, we accept the facts as found by the circuit court. We thus examine the record to determine if there was reasonable suspicion for Trooper Amlong to conduct a field sobriety test.

¶7 “The question of what constitutes reasonable suspicion is a common sense test.” *State v. Waldner*, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996). The test is objective, and we will examine the totality of the facts. *Id.* at 58. We ask

² While Wisconsin courts have not resolved whether “reasonable suspicion” or “probable cause” is the proper test needed to request a field sobriety test, Blicharz concedes that reasonable suspicion is an appropriate test to use. Because we agree with Blicharz, we will examine Trooper Amlong’s conduct using the reasonable suspicion standard.

ourselves, “[w]hat would a reasonable police officer reasonably suspect in light of his or her training and experience[?]” *Id.* at 56.

¶8 Using this test, we find that Trooper Amlong had reasonable suspicion to request that Blicharz submit to field sobriety tests. Trooper Amlong observed Blicharz driving erratically, including changing lanes without a turn signal and cutting in front of another driver. After stopping Blicharz, Trooper Amlong noticed the smell of alcohol emanating from the vehicle. The fact that there was another passenger in the car with Blicharz who could have been the source of the alcoholic smell is irrelevant to what a reasonable officer would do in the situation. The erratic driving and the smell of alcohol was sufficient for the officer to have reasonable suspicion that Blicharz’s ability to operate a motor vehicle was impaired.

¶9 The circuit court’s denial of Blicharz’s motion to suppress the results of her blood test is therefore upheld.

By the Court.—Judgment affirmed.

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

