COURT OF APPEALS
DECISION
DATED AND FILED

September 8, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP687 **Cir. Ct. No. 2009TR277**

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

COUNTY OF WASHINGTON,

PLAINTIFF-RESPONDENT,

V.

MICHAEL D. BRAZEE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Washington County: DAVID C. RESHESKE, Judge. *Affirmed*.

¶1 ANDERSON, J.[1] Michael D. Brazee appeals from a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant

[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.

contrary to WIS. STAT. § 346.63(1)(a). Brazee argues that his arrest was unlawful because the arresting deputy did not have probable cause to arrest. Because this court agrees with the circuit court that, based on an objective standard and viewing the evidence both in its totality and in a continuum, there was sufficient probable cause, we affirm.

¶2 After his arrest for operating under the influence, Brazee filed a motion to suppress for lack of reasonable suspicion to stop and lack of probable cause to arrest. At the motion hearing, Washington County Sheriff's Deputy Charles Vanderheiden testified to the following. At approximately 12:05 a.m., on January 18, 2009, he was traveling southbound on U.S. Highway 41 when he observed a tan SUV deviate from its lane, swerve right over the fog line, correct, and then swerve left, well over the fog line, so that its tires were in the left-hand lane. As Vanderheiden began to follow, the SUV driver activated his turn signal, indicating intent to exit onto State Highway 33. Upon approaching the entrance to the off-ramp, Vanderheiden observed the SUV continue past the entrance and then swerve over the white-striped area dividing the off-ramp and the highway, at which point the SUV almost struck his squad car. Immediately thereafter, Vanderheiden initiated a traffic stop.

¶3 Upon making contact and identifying Brazee, Vanderheiden "immediately observed" that Brazee spoke with a "very thick tongue," in broken and rough speech that was, at times, hard to understand. Vanderheiden could also smell the odor of intoxicants on Brazee's breath. Brazee told Vanderheiden that he had consumed approximately eight to ten beers earlier that evening.

¶4 After an additional officer arrived, Vanderheiden administered three standardized field sobriety tests. The first test was the horizontal gaze nystagmus

test (HGN test). Brazee was instructed to stand with his feet together, arms down by his side and, without moving his head, follow a stimulus with only his eyes. The deputy used a penlight as the stimulus. During the test, the deputy looked for "clues" to indicate Brazee's level of intoxication. Vanderheiden indicated that the first clue that he looked for was a smooth pursuit of the stimulus by each eye. The deputy testified that he also checked for distinct nystagmus at maximum deviation in both eyes and also for the onset of nystagmus prior to forty-five degrees in both eyes. During the test, the deputy observed that Brazee's "eyes did not track smoothly," he had distinct and sustained nystagmus at maximum deviation in both eyes, and the onset of nystagmus prior to forty-five degrees in both eyes.

¶5 The second test was the walk-and-turn test. For the walk-and-turn test, which is a divided attention test, Brazee was instructed to use the road's fog line and walk nine steps with his hands by his side, turn using a series of small steps, walk nine more steps with his hands by his side, and count his steps out loud. During the test, the deputy observed that, on the first nine steps, Brazee "stepped off the line" on steps one and three, and "missed a heel-to-toe" on step seven. Finally, Brazee "made an improper turn by taking one large step around instead of a series of small steps" as prescribed. Additionally, rather than by his side as instructed, Brazee held his arms approximately twelve to eighteen inches away from his side the whole time. Vanderheiden testified that Brazee exhibited four out of the eight clues relevant in this test.

¶6 The third test administered was the one-leg-stand test. For the one-leg-stand test, which is also a divided attention test, Brazee was instructed to keep his arms by his side and raise his leg approximately six to ten inches off the ground and, while keeping his leg raised, count out loud. During the test, Vanderheiden observed that immediately after Brazee raised his leg, his arms

came approximately twelve inches away from his sides. Additionally, Vanderheiden observed that Brazee put his foot down on counts thirteen, fourteen and fifteen. The test was then stopped at count twenty-two. In direct response to the question of "how many clues or indicia of intoxication are you looking for in that test," Vanderheiden testified that he was looking for four and "observed two."

¶7 Vanderheiden testified that "based on [Brazee's] performance in the standardized field sobriety tests, I believed the defendant to be intoxicated." He placed Brazee under arrest for operating while intoxicated. Vanderheiden did not testify to administration of a preliminary breath test (PBT), and the record does not reflect that one was administered.

¶8 In denying the motion to suppress, the circuit court held that, based on the totality of Vanderheiden's testimony describing Brazee's erratic driving, the deputy not only had reasonable suspicion, but probable cause to stop Brazee. In regard to the issue of whether there was probable cause to arrest, the court explained that the standard is an objective standard and that the question was not whether the deputy believed he had probable cause to arrest Brazee, but whether objectively there was sufficient evidence upon which the deputy's decision to arrest Brazee was sustained by the record. The court explained that it must view the evidence in a continuum and look to the totality of the circumstances for its determination of probable cause. The court concluded that "[i]t is clear here, under the totality of the circumstances, that there is probable cause … to believe that [Brazee] was [operating] under the influence of an intoxicant, and/or operating with a prohibited alcohol concentration, with or without the PBT test." Based on its conclusion, the court denied Brazee's motion to suppress. Brazee appeals, renewing only his probable cause to arrest argument.

¶9 In reviewing a motion to suppress, we must take a two-step approach. ***State v. Matejka***, 2001 WI 5, ¶16, 241 Wis. 2d 52, 621 N.W.2d 891. First, we will uphold and accept the findings of historical fact made by the circuit court unless they are clearly erroneous. ***Id.*** Second, we independently apply constitutional principles to those facts, presenting a question of law that we review de novo. ***State v. Eason***, 2001 WI 98, ¶9, 245 Wis. 2d 206, 629 N.W.2d 625. Finally, whether probable cause to arrest exists in a given case is a question of law that we determine independently of the circuit court but benefit from its analysis. *See* ***Washburn County v. Smith***, 2008 WI 23, ¶16, 308 Wis. 2d 65, 746 N.W.2d 243.

¶10 In the present case, Brazee does not challenge the circuit court's finding of historical fact, but rather argues that the court erred in concluding that the facts presented established probable cause for his arrest.

¶11 "Under both the Fourth Amendment and Article I, § 11 of the Wisconsin Constitution, probable cause must exist to justify an arrest." ***State v. Secrist***, 224 Wis. 2d 201, 209, 589 N.W.2d 387 (1999). The burden of persuasion is on the State to show that the officer had probable cause to arrest. ***State v. Wille***, 185 Wis. 2d 673, 682, 518 N.W.2d 325 (Ct. App. 1994).

¶12 Probable cause to arrest for operating a vehicle while under the influence of an intoxicant refers to that quantum of evidence that would lead a reasonable law enforcement officer to believe that, under the totality of the circumstances, the defendant was operating a motor vehicle while under the influence of an intoxicant. ***State v. Kasian***, 207 Wis. 2d 611, 621, 558 N.W.2d 687 (Ct. App. 1996). Such evidence need not be sufficient to prove guilt beyond a reasonable doubt "or even that guilt is more likely than not." ***State v. Babbitt***, 188

Wis. 2d 349, 357, 525 N.W.2d 102 (Ct. App. 1994). It is sufficient that the evidence known to the investigating officer at the time of the arrest "would lead a reasonable officer to believe that the defendant probably was under the influence of an intoxicant while operating his vehicle." ***State v. Lange***, 2009 WI 49, ¶38, 317 Wis. 2d 383, 766 N.W.2d 551. The determination of probable cause is made on a case-by-case basis, considering the totality of the circumstances. ***Kasian***, 207 Wis. 2d at 621-22.

¶13 On appeal, Brazee argues that, without also having a PBT result, Vanderheiden's observations did not provide the requisite level of probable cause to support his arrest. The problem, Brazee asserts, is that Vanderheiden did not provide any guidance as to what the results of the field sobriety tests meant in terms of impairment. Furthermore, Vanderheiden did not tie his observations to Brazee's ability to safely operate a motor vehicle. Consequently, Brazee argues, the State failed to prove the significance of Vanderheiden's observations regarding the field sobriety tests because the deputy did not testify as to the significance of his observations and did not state that Brazee failed any test. Thus, he contends that, without some explanatory testimony about the field sobriety tests, the remainder of Vanderheiden's observations does not rise to the level of probable cause needed to arrest him for operating a motor vehicle while impaired.

¶14 For support, Brazee relies both on ***County of Jefferson v. Renz***, (***Renz I***), 222 Wis. 2d 424, 588 N.W.2d 267 (Ct. App. 1998), and on the supreme court case which reversed it, ***County of Jefferson v. Renz***, (***Renz II***), 231 Wis. 2d

293, 603 N.W.2d 541 (1999).[2] There, as here, the arresting officer testified about the observations he made while the defendant performed field sobriety tests, but the officer did not testify about the significance of the defendant's performance during the field sobriety tests in relation to the defendant's level of impairment or ability to safely operate a vehicle. ***Renz I***, 222 Wis. 2d at 445. Renz argued that, because of this lack of testimony, there was not probable cause *to believe* that he was operating his vehicle while under the influence of an intoxicant when the arresting officer requested the PBT. ***Id.*** at 446-47.

¶15 We agreed with Renz and held that "without any testimony indicating the relevance of touching the bridge of one's nose rather than the tip, or any trial court findings, we cannot attach much significance to the discrepancy as an indicator of incapacity to drive safely." ***Id.*** at 445. Additionally, in discussing Renz's performance on the walk-and-turn test, we stated:

> [The arresting officer] did not explain the significance of leaving a space of one-half to one inch between heel and toe, and the court made no findings on that. We assume this goes to either balance or ability to follow directions. However, in the absence of some explanatory testimony this evidence, too, has minimal significance for the capacity to drive safely.

Id.

[2] Two months after the parties filed their appellate briefs, our supreme court held that "when the supreme court overrules a court of appeals decision, the court of appeals decision no longer possesses any precedential value, unless this court expressly states otherwise." ***Blum v. 1st Auto & Cas. Ins. Co.***, 2010 WI 78, ¶42, No. 2008AP1324. However, because the supreme court reversed ***Renz I*** and did not expressly overrule the case, ***Blum*** does not apply. *See* ***County of Jefferson v. Renz***, (***Renz II***), 231 Wis. 2d 293, 295-96, 317, 603 N.W.2d 541 (1999).

¶16 Because of the lack of testimony indicating the relevance of Renz's performance during the field sobriety tests, we concluded that the arresting officer did not have probable cause to arrest at the time he asked Renz to submit to the PBT, and the results of the PBT were inadmissable. ***Id.*** at 447. Accordingly, we reversed the trial court. ***Id.*** at 448. On appeal, the supreme court reversed our decision. ***Renz II***, 231 Wis. 2d at 295-96. It distinguished between what is necessary for proof of probable cause to believe versus proof of probable cause to arrest. It concluded that

> the legislature intended "probable cause to believe" in the first sentence of WIS. STAT. § 343.303[3] to refer to a quantum of proof that is greater than the reasonable suspicion necessary to justify an investigative stop, and greater than the "reason to believe" necessary to request a PBT from a commercial driver, but less than the level of proof required to establish probable cause for arrest.

Renz II, 231 Wis. 2d at 317 (footnote added). In reversing our decision and remanding for reinstatement of the judgment of conviction, the supreme court held that the officer had the required degree of probable cause to request Renz to

[3] WISCONSIN STAT. § 343.303 provides in pertinent part:

> If a law enforcement officer has probable cause to *believe* that the person is violating or has violated s. 346.63(1) or (2m) or a local ordinance in conformity therewith, or s. 346.63(2) or (6) or 940.25 or s. 940.09 where the offense involved the use of a vehicle, or if the officer detects any presence of alcohol, a controlled substance, controlled substance analog or other drug, or a combination thereof, on a person driving or operating or on duty time with respect to a commercial motor vehicle or has reason to believe that the person is violating or has violated s. 346.63(7) or a local ordinance in conformity therewith, 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. (Emphasis added.)

submit to a PBT: i.e., the officer had probable cause to *believe* Renz was under the influence and, thus, had the required degree of probable cause to request a PBT. *See* ***id.***

¶17 Brazee seems to be asserting that under ***Renz I*** and ***Renz II***, because Vanderheiden did not request and obtain PBT results, Vanderheiden's testimony falls short of providing the requisite higher quantum of evidence needed for probable cause to arrest. *See* ***Renz II***, 231 Wis. 2d 293, 317. We do not agree and hold that the record reflects the requisite quantum of evidence needed to show the officer had probable cause to arrest.

¶18 Vanderheiden's testimony not only indicates the relevance of the defendant's field sobriety tests, it indicates the relevance of the totality of the circumstances before the officer at the time. Despite the fact that Vanderheiden did not use the word "fail" in his testimony, he clearly related that Brazee failed the tests and that this failure indicated Brazee was operating while under the influence of intoxicants. For the HGN test—after explaining in his testimony that, in this test, he is looking for smooth pursuit of the eyes—Vanderheiden stated that Brazee's "eyes did not track smoothly"; for the walk-and-turn test—after explaining in his testimony that he told Brazee to walk in a straight line, heel-to-toe—Vanderheiden stated that Brazee "stepped off the line," "missed a heel-to-toe" and "made an improper turn"; and in the one-leg-stand test—after explaining that he told Brazee to raise his leg in the air and keep it up while counting out loud—Vanderheiden testified that Brazee "put his foot down several times." Additionally, in direct response to the question of "how many clues or indicia of intoxication are you looking for in that test," Vanderheiden stated that he was looking for four and observed two. Finally, Vanderheiden testified that, "based on [Brazee's]

performance in the standardized field sobriety tests, I believed the defendant to be intoxicated."

¶19 Vanderheiden's testimony relates the significance of Brazee's performance on the field sobriety tests and provides the requisite proof that he had probable cause to arrest Brazee. Vanderheiden testified that he was faced with a driver whom he observed swerving over solid lines, who almost crashed into his squad, whose breath smelled of intoxicants, who admitted to having consumed eight to ten beers before driving and whose performance on the field sobriety tests caused Vanderheiden to "believe[] the defendant to be intoxicated." Thus, while a PBT would have added to the quantum of evidence, under these facts, it was not necessary to provide Vanderheiden with probable cause to arrest.

By the Court.—Judgment affirmed.

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