COURT OF APPEALS
DECISION
DATED AND FILED

January 14, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2154-CR **Cir. Ct. No. 01-CT-163**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JERRY B. ROONI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Lincoln County: GLENN H. HARTLEY, Judge. *Affirmed*.

¶1 HOOVER, P.J.[1] Jerry Rooni appeals a judgment of conviction entered on his guilty plea to one count of operating while intoxicated (OWI), third offense, contrary to WIS. STAT. § 346.63(1)(a), and an order denying a motion to

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

suppress evidence. Specifically, Rooni argues that the sheriff's deputy lacked probable cause to arrest him. We disagree and affirm the judgment and order.

Background

¶2 On September 29, 2001, at approximately 5 a.m., Lincoln County deputy sheriff Dan Heisel was dispatched to a hospital in Tomahawk after hospital personnel reported they were treating a man who had been in a car accident. Heisel arrived and found Rooni, whose face was covered mostly by an ice pack, being treated for facial injuries. Heisel noted a strong smell of alcohol coming from Rooni at a distance of two to three feet. Heisel also noted that he had difficulty understanding Rooni's slurred speech.

¶3 Heisel questioned Rooni, and Rooni admitted he had been drinking that night, leaving the tavern at 2:30 a.m. Although the time of the accident itself is unknown, Rooni told Heisel he began walking for help. At 3:45 a.m., Rooni woke Margo Perrodon at her residence and she transported him to the hospital. There was no indication that Rooni consumed any alcohol after he left the tavern.

¶4 When asked to explain how the accident occurred, Rooni told Heisel that he was driving on Highway T and, because of dense fog, had missed a stop sign at the intersection of Highways T and 8. The intersection is T-shaped and Rooni collided with the trees on the other side of Highway 8. Perrodon testified that the fog was so thick she could not see Heisel's vehicle when she drove past the accident site on the way to the hospital.

¶5 Because of Rooni's condition—lying on a hospital bed being treated for facial injuries—Heisel did not ask Rooni to complete any field sobriety tests. Still, Heisel concluded that Rooni had been driving while under the influence of

alcohol and that this influence, not the fog, was the major contributor to the accident. Heisel arrested Rooni for OWI as a third offense. Rooni's blood was drawn and came back with a .182% alcohol concentration. Heisel mailed Rooni a citation for operating a motor vehicle with a prohibited alcohol concentration.

¶6 Rooni filed a motion to suppress based on two grounds. He first moved to suppress all evidence obtained by law enforcement, including Rooni's "very identity," alleging a violation of the doctor-patient privilege as defined in WIS. STAT. § 905.04(2). This argument, however, is not presented to us. Rooni also moved to suppress all evidence obtained after he was read the "Informing the Accused" form. Rooni argues error because Heisel informed him of an arrest for which Rooni claims there was no probable cause. Rooni does not address his motion separately. In any event, because we determine there was probable cause for the arrest, the motion was properly denied. Rooni then pled to the OWI charge, and as part of the plea agreement the second citation was dismissed. Rooni was convicted on the basis of his plea and now challenges whether Heisel had probable cause to arrest him for OWI.

Discussion

¶7 On appeal, this court reviews a probable cause determination de novo. *See* ***State v. Babbitt***, 188 Wis. 2d 349, 356, 525 N.W.2d 102 (Ct. App. 1994). In OWI cases, probable cause will be found "where 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 … 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). This is a commonsense test, based on probabilities. The facts need only be sufficient to lead a reasonable officer to

believe that guilt is more than a possibility. *See* ***County of Dane v. Sharpee***, 154 Wis. 2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990).

¶8 We initially note that Rooni "urge[s] this Court to review what it concludes the facts are from which a probable cause determination might arise." This court is not a trier of fact. We do not determine what the facts are, and we do not overturn a trial court's factual findings unless they are clearly erroneous. WIS. STAT. § 805.17(2). In reaching its finding of probable cause, the trial court found that Rooni had been drinking; that he left a tavern at closing time; that there was an accident; that there was a strong odor emanating from Rooni at the hospital; and that Rooni's speech was slurred.

Field Sobriety Tests

¶9 Rooni contends that there cannot be probable cause if field tests are not performed and although he may not have been able to perform certain tests such as the one-leg stand, Heisel should have administered alternate tests, such as the alphabet recitation. Field sobriety tests, however, are not required in all circumstances. ***State v. Wille***, 185 Wis. 2d 673, 684, 518 N.W.2d 325 (Ct. App. 1994). In some cases, the tests may be necessary to establish probable cause; in other cases, they may not. ***State v. Kasian***, 207 Wis. 2d 611, 622, 558 N.W.2d 687 (Ct. App. 1996). For reasons below, we conclude that the tests were not necessary in this case and discuss them no further.

Timing of Events and Alcoholic Odor

¶10 Rooni contends that there is no evidence to prove how much or how long he had been drinking. Heisel first made contact with Rooni two and a half hours after Rooni claimed to have left the tavern and still noticed a strong odor of

alcohol on Rooni's breath from two to three feet away. When asked to classify the odor as faint, strong, or medium, Heisel called it "strong." Because an odor of alcohol is often an indicator of intoxication, Heisel could have reasonably inferred how much stronger that odor—and therefore likelihood of intoxication—would have been at the time of the accident.

¶11 Rooni also had his blood drawn under our informed consent law. *See* WIS. STAT. § 343.305(2). Because Heisel would have had to read Rooni the "Informing the Accused" notice, the earliest the blood could have been drawn was at 5 a.m. when Heisel arrived. Even at 5 a.m., Rooni's blood-alcohol concentration was .182%. The blood test result was not known to Heisel at the time he encountered Rooni. Nevertheless, the test result corroborates Heisel's conclusion that Rooni was highly intoxicated at the time of the accident.

Slurred Speech

¶12 Rooni challenges the trial court's finding that he had slurred speech. He argues that the court adopted Heisel's opinion, which was improperly presented as an answer to a leading question. Whether a challenged question is truly leading and suggestive and whether circumstances justify its use are matters of trial court discretion. ***State v. Barnes***, 203 Wis. 2d 132, 136, 552 N.W.2d 857 (Ct. App. 1996). The transcript shows this exchange:

> Q [DISTRICT ATTORNEY]: Through the mumbles, could you tell if [Rooni] was slurring or not?
>
> [DEFENSE COUNSEL]: I object, it's leading.
>
> Q [DISTRICT ATTORNEY]: Doesn't suggest an answer.
>
> THE COURT: Overruled, doesn't suggest the answer.

A [Heisel]: It was mumbling, slurring, yes.

Rooni claims the question was leading because it prompted Heisel to testify that Rooni slurred his speech. However, the question asks whether Heisel could differentiate between impaired speech attributable to Rooni's ice pack and injuries as opposed to alcohol. The district attorney did not ask Heisel to confirm any contention by the prosecutor that Rooni's speech was slurred.

¶13 Regardless whether the question actually was leading, Heisel testified Rooni's voice was "soft and mumbling." We think this is as much an indicator of intoxication here as "slurring" would be. Although "slurred" speech is how we most often characterize impaired speech in OWI cases, we normally decline to require recitation of "magic words." *See* ***Michael A.P. v. Solsrud***, 178 Wis. 2d 137, 151, 502 N.W.2d 918 (Ct. App. 1993). Rooni argues that his soft, mumbling speech was explained by the ice pack. The trial court evidently rejected this contention.

¶14 While Heisel testified that the ice pack covered most of Rooni's face from his forehead to "down below his nose," there is no indication that Rooni's mouth or jaw were covered or affected. The trial court's determination to accept Heisel's implicit conclusion that Rooni's speech was impaired by alcohol, not the ice pack, is ultimately one of credibility. We cannot conclude that such a determination is clearly erroneous.

Erratic Driving

¶15 Rooni argues that his accident or erratic driving is not a sufficient indicator of intoxication based on ***State v. Swanson***, 164 Wis. 2d 437, 453 n.6, 475 N.W.2d 148 (1991). There, the supreme court held unexplained erratic

driving, odor of intoxicant, and the timing of an accident's coincidence with closing time constituted reasonable suspicion but not probable cause for an arrest absent field sobriety tests.

¶16 In this case, however, the trial court noted that neither Perrodon nor Heisel had difficulty driving in the fog, casting doubt on Rooni's explanation for the crash. The court also noted Rooni had an obligation to reduce his speed in the fog, inferring that someone sober would have made the adjustment and been less likely to have an accident. In any event, Rooni's accident appeared to have occurred sometime after bar closing, his odor of alcohol was notably strong, his speech was slurred, and he admitted he had been drinking. Even without field sobriety tests, Heisel had greater indicia of OWI than the officer in ***Swanson***.

Summary

¶17 Although Rooni argues that there are explanations unrelated to intoxication for his accident and speech impairment, this is irrelevant to a probable cause determination. The mere fact that an innocent explanation for the driver's conduct and condition may be advanced is not enough to defeat probable cause. *See* ***State v. Welsh***, 108 Wis. 2d 319, 347, 321 N.W.2d 245 (1982) (Abrahamson, J., dissenting), *rev'd on other grounds*, 466 U.S. 740 (1984). In making a determination of probable cause, the relevant inquiry is not whether the particular conduct is "innocent" or "guilty." ***United States v. Sokolow***, 490 U.S. 1, 10 (1989).

¶18 Here, the facts are sufficient to lead a reasonable police officer to conclude that Rooni had probably been operating a motor vehicle while under the influence of an intoxicant. Rooni admitted he had consumed alcohol and had not left the tavern until closing. He operated his vehicle without regard to the weather

conditions, causing him to drive through a stop sign and collide with a tree. He had a strong odor of intoxicants on his breath hours after the accident, and his speech was slurred. Taken together, these circumstances are sufficient to establish probable cause for the arrest.

By the Court.—Judgment and order affirmed.

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