

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 21, 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. 2010AP1324

STATE OF WISCONSIN

Cir. Ct. Nos. 2009TR18753
2009TR18754

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL A. BARAHONA,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Dane County: WILLIAM E. HANRAHAN, Judge. *Affirmed.*

¶1 SHERMAN, J.¹ Michael Barahona appeals judgments of conviction for operating a motor vehicle while under the influence of an intoxicant, first

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

offense (OWI), contrary to WIS. STAT. § 346.63(1)(a),² and operating with a prohibited alcohol concentration (PAC), contrary to WIS. STAT. § 346.63(1)(b).³ He also appeals an order denying his motion to suppress evidence obtained as a result of his detention and/or arrest. Barahona contends on appeal that the circuit court erred when it denied his motion to suppress because the evidence was not sufficient to establish probable cause for his arrest. We disagree and affirm.

BACKGROUND

¶2 The facts are undisputed. At approximately 2:07 a.m. on August 7, 2009, Andrew Marks, a police officer with the Village of Shorewood Hills, observed a vehicle driven by Barahona traveling westbound in the eastbound lane of Campus Drive. At the time, Campus Drive was under construction. Marks testified that at the point on Campus Drive where Barahona was initially observed,

² WISCONSIN STAT. § 346.63(1)(a) provides:

(1) No person may drive or operate a motor vehicle while:

(a) Under the influence of an intoxicant, a controlled substance, a controlled substance analog or any combination of an intoxicant, a controlled substance and a controlled substance analog, under the influence of any other drug to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving[.]

³ WISCONSIN STAT. § 346.63(1)(b) provides:

(1) No person may drive or operate a motor vehicle while:

....

(b) The person has a prohibited alcohol concentration.

Campus Drive was divided by a concrete median and Barahona was traveling on the wrong side of that median.

¶3 Marks testified that he situated his vehicle behind Barahona's vehicle and proceeded to follow Barahona's vehicle for approximately one block before initiating a traffic stop. Marks testified that while he followed behind Barahona's vehicle, he observed Barahona cross over the white dotted line that divided the center and right most lanes by at least one foot, and proceed to drive down the middle of the white dotted line dividing those lanes for just "shy of one block" before finally merging into the center lane.

¶4 Marks testified that when he approached Barahona, he observed that Barahona's eyes were bloodshot and that Barahona's breath smelled of intoxicants. Marks testified that when asked, Barahona admitted to having consumed one drink. Marks testified that when he informed Barahona that he had been stopped for traveling the wrong way in the eastbound lane, Barahona denied that he had done so. Marks further testified that Barahona informed him that he was on his way home, which was located on Hammersley Road. According to Marks, Barahona argued with him over the distance, claiming he was only a few blocks from his home when in fact Hammersley Road was at least four or five miles away.

¶5 Upon Marks's request, Barahona exited his vehicle and performed the standardized field sobriety tests—the Horizontal Gaze Nystagmus test, the Walk-and-Turn test, and the One Leg Stand test. Marks testified that during the Horizontal Gaze Nystagmus test, Barahona exhibited all six clues of intoxication, and had to be reminded twice to follow Marks's finger with his eyes only. Marks testified that during the Walk-and-Turn test, Barahona exhibited seven of possible

eight clues of intoxication. According to Marks, Barahona was argumentative during the Walk-and-Turn test which, according to Marks, was another indication of impairment. Marks testified that during the One Leg Stand test, Barahona exhibited all four possible clues of intoxication.

¶6 After Barahona completed the field sobriety tests, Marks asked him to submit to a preliminary breath test. The result of this test indicated that Barahona had a blood alcohol concentration of 0.109 percent. Barahona was then placed under arrest for OWI and PAC.

¶7 Barahona moved the circuit court to suppress all evidence obtained as a result of his detention and arrest on the basis that Marks lacked reasonable suspicion to stop his vehicle and lacked probable cause to arrest him. At the hearing on his motion to suppress, at which testimony was given by Marks, Barahona argued that the result of his preliminary breath test should be excluded from evidence and that without the preliminary test in evidence there was not sufficient probable cause to believe that he was operating his motor vehicle while under the influence of an intoxicant or with a prohibited alcohol concentration.

¶8 The circuit court denied Barahona's motion. The court ruled that there was reasonable suspicion to stop Barahona in light of Barahona's improper driving. The court also ruled that there was probable cause for Barahona's arrest. The court did not address Barahona's claim that the result of his preliminary breath test were inadmissible. It did, however, explain that its ruling as to probable cause was predicated largely upon Marks's observations, which included a strong odor of intoxicants emitting from Barahona, glossy eyes, and reduced physical dexterity.

¶9 Barahona was subsequently found guilty by the court of both OWI, first offense, and PAC, first offense.⁴ Barahona appeals.

DISCUSSION

¶10 Barahona challenges the judgments of conviction and the order of the circuit court denying his motion to suppress on the basis that the evidence was insufficient to establish probable cause for his arrest.

¶11 For an arrest to be lawful, it must be based on probable cause. *State v. Secrist*, 224 Wis. 2d 201, 209, 589 N.W.2d 387 (1999). Whether undisputed facts constitute probable cause is a question of law that we review without deference to the circuit court. *State v. Babbitt*, 188 Wis. 2d 349, 356, 525 N.W.2d 102 (Ct. App. 1994). To determine whether probable cause existed, “we must look to the totality of the circumstances to determine whether the arresting officer’s knowledge at the time of the 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.* (internal quotation omitted).

¶12 Barahona contends that evidence of the result of his preliminary breath test was inadmissible and that absent evidence of his preliminary breath test result, the remaining evidence was not sufficient to establish probable cause. We will assume for the sake of argument that Barahona is correct that the preliminary breath test result was inadmissible to establish probable cause. However, we

⁴ CCAP, Wisconsin’s online records of court proceedings within the state, indicates that Barahona was also found guilty of driving the wrong way on a divided highway, contrary to WIS. STAT. § 346.15, and deviating from his designated lane, contrary to WIS. STAT. § 346.13(3).

nevertheless conclude that the remaining evidence was sufficient to establish probable cause.

¶13 Barahona's sole contention with respect to the remaining evidence is that Marks's testimony regarding his performance on the field sobriety tests "should be given little weight" in determining whether Marks had probable cause to believe he was operating his vehicle while impaired because Marks failed to testify as to how or why those clues "equated to possible impairment" and because Marks failed to testify that Barahona in fact failed the field sobriety tests. We infer from this contention that it is Barahona's position that absent evidence regarding his performance of the field sobriety tests, the remaining evidence is insufficient to establish probable cause. We disagree.

¶14 The undisputed facts as disclosed from the record reveal the following: (1) Marks observed Barahona's vehicle driving in the wrong direction in the eastbound lane of Campus Drive; (2) Marks observed Barahona's vehicle cross the dotted line dividing two lanes of traffic by approximately one foot and drive over that line for approximately one block when he was pulled over by Marks; (3) Marks detected the odor of intoxicants emanating from Barahona's breath; (4) Barahona admitted to having consumed alcohol; (5) Barahona's eyes were bloodshot; (5) Barahona appeared confused as to his location and was argumentative. These facts are sufficient to allow a reasonable police officer to conclude that Barahona was probably driving under the influence of an intoxicant in violation of WIS. STAT. § 346.63(1)(a) and (b). *See, e.g., Babbitt*, 188 Wis. 2d at 357.

¶15 In summary, we conclude that even assuming for the sake of argument that the result of Barahona's preliminary breath test was inadmissible

and that Marks's testimony with respect to Barahona's performance of the field sobriety tests should be given "little weight," the remaining evidence was sufficient to establish probable cause. The judgments of conviction and order denying Barahona's motion to suppress are therefore affirmed.

By the Court.—Judgments and order affirmed.

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

