

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 1, 2003

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. 02-2499-CR

Cir. Ct. No. 00-CT-475

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

TIM G. FRAUCHIGER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sauk County:
PATRICK TAGGART, Judge. *Affirmed.*

¶1 VERGERONT, P.J.¹ Tim Frauchiger appeals the judgment of conviction for operating with a prohibited alcohol concentration, third offense, in violation of WIS. STAT. § 346.63(1)(b) (2001-02). He contends the trial court

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

erred in denying his motion to suppress evidence based on lack of probable cause to arrest. We affirm.

¶2 The arresting officer, Steven Smith, police officer of the Village of Lake Delton, testified at the motion hearing as follows. On September 26, 2000, at approximately 8:25 p.m., he was stopped at a traffic light when he noticed a truck approaching the intersection, traveling southbound on Highway 12. The truck went through the red traffic light without stopping at the intersection. It appeared to the officer that the truck was traveling slower than the posted speed limit of forty-five miles per hour, but too fast to stop for the traffic signal as it changed from yellow to red. The truck made no attempt to stop for the red light.

¶3 The officer followed the truck and initiated a traffic stop by turning on his emergency lights. A videotape introduced into evidence showed that the driver of the truck, later identified as Frauchiger, pulled over for the officer. The officer noticed that the driver was slow to react to his emergency lights. The officer approached the truck and when Frauchiger turned to him, the officer observed that his eyes were bloodshot and very glassy. The officer did not detect the smell of alcohol. The officer asked Frauchiger if he had been drinking at all that evening. Frauchiger said no, but when the officer repeated the question, Frauchiger admitted he had had “maybe three drinks” at “around 6:00, 7:00 o’clock.” The officer asked Frauchiger if he had seen the “stop sign” and Frauchiger said he had not. Frauchiger also told the officer that he had been working on a house earlier that day.

¶4 The officer asked Frauchiger to step out of the car. The videotape shows Frauchiger exiting the truck by keeping his body upright. The videotape also shows that immediately upon exiting the vehicle, Frauchiger told the officer

that he had “a bad leg.” He explained that he had bone cancer when he was eighteen. The videotape shows Frauchiger walking from his truck without a limp and using his truck and a lamppost for support. The officer testified that he observed Frauchiger sway slightly from side-to-side as he walked and that he took very slow, hesitant steps.

¶5 The officer asked Frauchiger to perform field sobriety tests, and Frauchiger said “sure.” The field sobriety tests are not visible on the tape. The officer testified that this was because he felt a level spot out of the roadway was a better location for the tests. The sound portion of the tape during the field sobriety tests remains audible.

¶6 The officer began to instruct Frauchiger on the one-leg stand test. According to the audio portion of the tape, Frauchiger said one leg was a lot shorter than the other. The officer asked which one; Frauchiger acknowledged he could stand on both legs; and the officer told him to stand on whichever one was most comfortable. During the instructions, the officer testified, Frauchiger did not stand with his feet together and arms to the side as instructed. After the instructions, Frauchiger’s performance did not meet any of the criteria. The officer instructed Frauchiger again. Frauchiger raised his foot briefly, did not keep his arms to his side, failed to count aloud, even after being reminded to do so, and swayed during this test. According to the audio tape, during this time Frauchiger said again that one leg was a lot shorter and also “I can’t do this”; the officer told him to try with whichever leg was easier. When Frauchiger said he did not feel it was fair because he had a disability in his leg, the officer said they would try another test.

¶7 The officer then began to instruct Frauchiger on the walk-and-turn test. According to the audio portion of the tape, during this instruction, Frauchiger said a couple of times it would not work for him because of his leg and that one of his legs was an inch-and-one-half shorter than the other. In response to Frauchiger's comments, the officer stopped instructing on the walk-and-turn test and asked Frauchiger to recite the alphabet, and Frauchiger did so.

¶8 The officer testified that he could not visually tell whether one of Frauchiger's legs was shorter than the other. The officer believed Frauchiger was wearing tennis shoes and did not see extenders on the soles.

¶9 After Frauchiger recited the alphabet, the officer arrested him for operating a motor vehicle while intoxicated.

¶10 Frauchiger also testified at the hearing. He had had bone cancer in 1988 and as a result of surgery to remove the cancer, his hip is fused to his spine and his right leg is shorter than the other. He does not have use of all the muscles in either leg. Because of these limitations, he cannot stand on one leg as the officer asked him to do and he cannot put one heel to the other toe.

¶11 The trial court issued a written decision denying the defendant's motion to suppress. The court concluded that, based on the undisputed facts, the officer did have probable cause to arrest Frauchiger. The court summarized the totality of the circumstances constituting probable cause as follows: Frauchiger's driving slower than the posted speed limit; his failure to stop at a red light, or failure to slow for a yellow light; his admission that he did not see the traffic signal; his glassy and bloodshot eyes; his use of the truck and lamppost for support when getting out of his truck; his denial and later admission of drinking; his inability to perform field sobriety tests, including his failure to count as instructed,

and his failure to stand in the instructional stance as directed. The court acknowledged that Frauchiger may not have been able to physically perform the two field sobriety tests, but stated that did not explain his failure to follow instructions to count or to stand as instructed. The court rejected Frauchiger's argument that the officer was obligated to accept his explanation of his disability at face value and that the officer lacked probable cause because he had not at the time of the arrest been certified to perform field sobriety tests.

¶12 On appeal, Frauchiger argues that, prior to requesting Frauchiger to perform the field sobriety tests, the officer did not have probable cause to arrest him, and the two physical dexterity field sobriety tests could not be used to support probable cause because Frauchiger could not physically perform them and gave a concrete reason why he could not do so. He also argues that the officer's lack of training and certification in field sobriety tests requires the conclusion that there was no probable cause.

¶13 In determining whether probable cause exists, 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. *State v. Babbitt*, 188 Wis. 2d 349, 356, 525 N.W.2d 102 (Ct. App. 1994). Probable cause is neither a technical nor a legalistic concept; rather, it is a "flexible, common-sense measure of the plausibility of particular conclusions about human behavior," *State v. Petrone*, 161 Wis. 2d 530, 547-48, 468 N.W.2d 676, 682, *cert denied*, 502 U.S. 925 (1991). While the circumstances within the arresting officer's knowledge need not be sufficient to make the defendant's guilt more probable than not, the defendant's guilt must be more than a mere possibility for the arrest to be constitutional. *State v. Paszek*, 50 Wis. 2d 619, 625, 184 N.W.2d

836, 839-40 (1971). Whether undisputed facts show probable cause to arrest is a question of law which we review de novo. *Babbitt*, 188 Wis. 2d at 356.

¶14 We agree that the undisputed facts cited by the trial court in combination establish probable cause for the officer to believe that Frauchiger was operating a vehicle while under the influence of an intoxicant. We also agree that the officer was not obligated to accept Frauchiger's explanation for his inability to perform the tests and disregard his inability to perform. First, when Frauchiger initially told the officer that one of his legs was shorter than the other, he did not say that the bad leg would prevent him from performing field tests until after he began performing them. Second, the fact that one of his legs was shorter than the other did not explain why he had to use the truck and a lamppost to maintain his balance as he walked from the truck to the sidewalk, and why he swayed as he walked and took slow, hesitant steps, nor does it explain why he was not able to stand with his feet and arms as directed by the officer during the instructions for the one-leg stand and why he failed to count aloud as instructed. Third, Frauchiger told the officer that he had been working on a house earlier that day. Fourth, the officer observed Frauchiger walking from the truck to the sidewalk without a limp. Fifth, the officer already knew that Frauchiger had not been completely truthful because he initially denied drinking but later admitted drinking. From all this information, the officer could reasonably infer that Frauchiger's disability did not entirely explain his manner of physical movement and his inability to perform the physical tests. The mere fact that there may be an innocent explanation for that conduct is not sufficient to defeat probable cause. *See* 1 WAYNE R. LAFAYE, SEARCH & SEIZURE § 3.2(e), at 483-84 (1978), *reversed on other grounds*, 466 U.S. 740 (1984). In addition, the fact that Frauchiger initially denied drinking alcohol but later admitted to having three drinks,

makes it reasonable to infer that he had had more to drink than the three drinks he acknowledged.

¶15 Frauchiger also argues that because the officer testified that at the time of the arrest he had not yet received certification for training on field sobriety tests, the arrest “lacks foundation” and is unlawful. Although he cites a number of statutes and regulations on appointment and training of law enforcement officers, none of them support this proposition. To the extent Frauchiger is arguing that the officer’s testimony with respect to his performance on the physical field sobriety tests is inadmissible because he lacks certification, we reject that as did the trial court. Frauchiger did not perform the heel-to-toe test and therefore the officer’s testimony concerning this test related only to Frauchiger’s statement that he was unable to do it and the fact that he did not do it. With respect to the one-leg stand, the officer’s testimony related to Frauchiger’s unsuccessful efforts to follow the instructions given by the officer. We conclude no foundation other than the officer’s ability to observe Frauchiger’s words and actions was necessary for this testimony.

By the Court.—Judgment affirmed.

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

