

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 7, 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. 02-2997-CR

Cir. Ct. No. 01-CT-366

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRAD E. GLAUNERT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Ozaukee County:
JOSEPH D. MCCORMACK, Judge. *Affirmed.*

¶1 NETTESHEIM, P.J.¹ Brad E. Glaunert appeals from a judgment of conviction for operating a motor vehicle while intoxicated (OWI) as a third offense. Glaunert argues that the trial court erred in denying his motion to

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

suppress evidence for lack of probable cause to arrest. We reject Glaunert's argument and affirm the judgment.

FACTS

¶2 On November 2, 2001, the State filed a criminal complaint against Glaunert charging him with OWI, as a third offense, and operating a motor vehicle with a prohibited alcohol concentration (PAC), as a third offense.

¶3 On November 27, 2001, Glaunert filed a motion to suppress evidence based on his contention that the arresting officer, Deputy Patrick Daniels of the Ozaukee County Sheriff's Department, lacked probable cause to arrest. The trial court held a motion hearing on December 17, 2001.

¶4 Daniels testified at the suppression hearing that he was performing routine patrol duties on July 28, 2001, when he was dispatched to a report of a traffic accident at approximately 1:30 a.m. Daniels responded to the scene, as did a member of the state patrol and another sheriff's deputy. Upon his arrival, Daniels observed a black truck lying on its roof and an adult male, later identified as Glaunert, lying face down several feet from the roadway. Glaunert's friend, Andrew Tesch, was also present at the scene.

¶5 Daniels attempted to interview Glaunert to determine what caused the accident but Glaunert was able to give only short, one-word answers and appeared to be in serious pain. Glaunert acknowledged having driven the vehicle and appropriately answered Daniels' questions regarding his name and birth date. Daniels could only see a partial profile of Glaunert's face and so could not observe whether Glaunert had bloodshot eyes. Daniels told Glaunert to lie still and not to move. When Daniels spoke to Glaunert he noted a "strong, almost offensive"

odor of intoxicants in “an evident amount ... emanating from the area of his head and mouth.” Because of his injuries, Daniels did not ask Glaunert to perform any field sobriety tests.

¶6 Daniels noted that the road, which curved at the point where the accident occurred, was in good condition. Daniels also noted a large skid mark leading off the roadway which, in his opinion, indicated that the driver had probably entered the curve too fast.

¶7 Daniels also testified as to his conversation with Glaunert’s friend, Tesch, who appeared to be alert and oriented. Tesch informed Daniels that he and Glaunert had been at a tavern for several hours before leaving to return to Tesch’s home. Tesch indicated that he and Glaunert had both consumed approximately the same amount of intoxicants at the tavern but Tesch did not know how much or whether Glaunert had consumed any intoxicants before they met at the tavern at 10:00 p.m. Daniels did not observe Tesch exhibit any signs of intoxication and did not believe Tesch to be intoxicated.

¶8 After the EMTs arrived and were placing Glaunert in an ambulance, Daniels advised them that Glaunert was under arrest for OWI. Daniels based his decision on his observations of the nature of the crash, the strong odor of intoxicants emanating from Glaunert’s breath and Tesch’s statement that Glaunert had been drinking at a tavern prior to the accident. Daniels also took into consideration information he received from the dispatcher while at the scene that Glaunert had two prior OWI convictions.

¶9 Glaunert’s friend Tesch also testified at the motion hearing. According to Tesch, he was driving in front of Glaunert when he noticed Glaunert’s headlights disappear from his rearview mirror. Tesch turned around

and found Glaunert's truck flipped with its flashers going. Tesch located Glaunert lying face down in grass that was one to two feet tall. Tesch called 911 and Daniels arrived within ten minutes and the ambulance arrived within thirty seconds to a minute after Daniels. Tesch indicated that Daniels was between two to three feet from Glaunert's face when questioning Glaunert, not within six inches as Daniels had indicated. Tesch also indicated that he had been within a couple of feet from Glaunert's face and had not detected an odor of intoxicants. Tesch recalled telling Daniels that he did not believe Glaunert was intoxicated to the extent he could not drive.

¶10 Finally, Glaunert testified that there was grass in his face and that Daniels did not bring his face within close proximity to his own. Glaunert testified that Daniels did not try to look at his eyes and did not administer any field sobriety testing. Glaunert testified he and Tesch had passed the turn to Tesch's home and were "looping around" a different way to get there when the accident occurred.

¶11 Following arguments, the trial court denied Glaunert's motion to suppress. The trial court determined that Daniels had knowledge of "the accident, the odor of intoxicants, and Mr. Tesch's statement" prior to arresting Glaunert and that those three things constituted probable cause.

¶12 The matter proceeded to a two-day jury trial in June 2002. At the close of the State's case, Glaunert renewed his probable cause challenge and requested the court to reconsider its ruling. The court declined. The jury

convicted Glaunert of both offenses, OWI and PAC, on July 1, 2002.² Glaunert appeals.

DISCUSSION

¶13 This court reviews a probable cause determination de novo. *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. *County of Dane v. Sharpee*, 154 Wis. 2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990).

¶14 Glaunert argues that the trial court erred in finding probable cause despite the circumstances that prevented Daniels from performing any type of field sobriety testing or meaningful questioning of him. In support of his argument, Glaunert cites to the following language in *State v. Swanson*, 164 Wis. 2d 437, 455, 475 N.W.2d 148 (1991): “Unexplained erratic driving, plus the odor of alcohol, and a coincidental time of the incident after the bars close, forms

² The judgment states that Glaunert was found guilty of both OWI and PAC. However, consistent with WIS. STAT. § 346.63(1)(c), the judgment imposes penalties of a fine, imprisonment, license revocation, alcohol assessment, and ignition interlock only as to the OWI charge. However, the judgment also imposes costs with respect to the PAC charge. Glaunert makes no argument that the imposition of costs violates § 346.63(1)(c), which provides that when the defendant is found guilty of both OWI and PAC, “there shall be a single conviction for purposes of sentencing.” Therefore, we do not further discuss this potential issue.

a basis for reasonable suspicion but should not, in the absence of a field sobriety test, constitute probable cause to arrest one for driving while under the influence of intoxicants.” However, this language was later clarified in *State v. Wille*, 185 Wis. 2d 673, 684, 518 N.W.2d 325 (Ct. App. 1994), in which the court observed that the language in *Swanson* “does not mean that under all circumstances the officer must first perform a field sobriety test, before deciding whether to arrest for operating a motor vehicle while under the influence of an intoxicant.” Thus, the question of probable cause is properly assessed on a case-by-case basis. *State v. Kasian*, 207 Wis. 2d 611, 622, 558 N.W.2d 687 (Ct. App. 1996). In some cases, the field sobriety tests may be necessary to establish probable cause; in other cases, they may not. *Id.*

¶15 Here, the evidence at the suppression hearing supported a finding of probable cause.³ Daniels testified that Glaunert had admitted to driving the vehicle and that he noted a “strong, almost offensive” odor of intoxicants emanating from the area of Glaunert’s head and mouth. Daniels spoke to Tesch who indicated that he and Glaunert had been at a nearby tavern for over three hours before leaving at 1:00 a.m. and that they had been drinking alcohol. Tesch did not know whether Glaunert had been drinking prior to meeting him at the tavern at 10:00 p.m. Glaunert was unable to negotiate a curve in the road despite the fact that the road condition and weather were normal, he was following Tesch, he had some familiarity with the area and Tesch had been able to negotiate the

³ We note that Glaunert’s brief references facts and arguments from his trial. However, Glaunert is arguing that the trial court erred in denying his suppression motion. In the context of a suppression motion, the court’s probable cause determination is based upon the evidence presented at the suppression hearing and its finding of historical facts. *See State v. Wille*, 185 Wis. 2d 673, 682, 518 N.W.2d 325 (Ct. App. 1994). We have therefore limited our review to the evidence presented at the suppression hearing.

curve without incident. Not only did Glaunert fail to negotiate the curve but he also operated his vehicle in a manner that caused it to flip. Finally, Daniels had information that Glaunert had two prior OWI convictions.

¶16 We conclude that the above facts were sufficient to lead Daniels to believe that there was more than a possibility that Glaunert had operated a motor vehicle while intoxicated. *See Sharpee*, 154 Wis. 2d at 518.

CONCLUSION

¶17 We conclude that Daniels had probable cause to arrest Glaunert even absent field sobriety testing. We reject Glaunert's contention that the trial court erred in denying his motion to suppress based on lack of probable cause. We affirm the judgment.

By the Court.—Judgment affirmed.

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

