COURT OF APPEALS
DECISION
DATED AND FILED

July 17, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-3359-CR **Cir. Ct. No. 02-CT-3**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DENNIS J. MILLARD,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Iowa County: WILLIAM D. DYKE, Judge. *Affirmed*.

¶1 DYKMAN, J.[1] Dennis Millard appeals from a judgment convicting him of operating a motor vehicle while intoxicated, second offense, in violation of WIS. STAT. § 346.63(1)(a). Millard moved to suppress all evidence obtained

[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.

during and subsequent to his arrest, asserting that the officer did not have reasonable suspicion to stop and detain him nor probable cause for his arrest. The court denied the motion and Millard pleaded no contest. The sole issue on appeal is whether probable cause to arrest Millard existed. Because we conclude that it did, we affirm.

BACKGROUND

¶2 On November 30, 2001, at approximately 10:34 p.m., Officer Lonnie Drinkall received a dispatch call regarding a citizen complainant driving behind a possible drunk driver on Highway 14. When Drinkall caught up to the suspect, later identified as Dennis Millard, he observed Millard's vehicle straddle the centerline of the highway approximately four times. At this point, Drinkall activated his emergency lights and pulled Millard over. Traveling at roughly fifty miles per hour, Millard pulled over to the shoulder of the highway within approximately one hundred feet and then continued on the shoulder for another hundred feet before coming to a complete stop.

¶3 Drinkall noted that Millard seemed to avoid eye contact while they spoke. When Millard eventually made eye contact with Drinkall, he appeared to be in a daze. Millard denied drinking at first, but admitted to having had a couple of drinks after Drinkall stated that he could smell alcohol on Millard's breath. Drinkall also noted that Millard's speech was slurred.

¶4 Drinkall asked Millard to exit the vehicle so that he could conduct a few tests to see if Millard was okay to drive. When Millard got out of his vehicle, he stumbled backwards and used the vehicle to keep his balance. Millard continued to use the vehicle for balance by placing his hand on the bed of the truck as he walked.

¶5 Drinkall first administered the horizontal gaze nystagmus test. Drinkall noted that both of Millard's eyes lacked smooth pursuit and observed the onset of nystagmus at maximum deviation in both eyes but did not complete the test because Millard began asking questions.[2] Drinkall next gave Millard three opportunities to complete the walk-and-turn test. However, Millard could not complete more than one step. When he placed his right foot in front of his left, he immediately pulled it back to maintain his balance. The final test Drinkall administered was the one-leg-stand test. Millard raised his right foot but put it down almost immediately, only completing a count of 1,001. Drinkall terminated the test after Millard again failed to keep his foot up on his second attempt.

¶6 At this point Drinkall placed Millard under arrest for operating a motor vehicle while intoxicated. At 11:59 p.m., over an hour after being pulled over, a blood sample revealed Millard's blood alcohol level to be .199 percent.

DISCUSSION

¶7 When reviewing a trial court's determination regarding probable cause we use two standards of review. First, the trial court's finding of facts must be evaluated, and will be upheld unless they are clearly erroneous. ***State v. Richardson,*** 156 Wis. 2d 128, 137, 456 N.W.2d 830 (1990). Second, if we determine the trial court's finding of facts are not clearly erroneous, whether they satisfy constitutional standards is a question of law we review de novo. ***Id.*** at 137-38. In this case, the trial court's findings of fact are not clearly erroneous,

[2] This was Drinkall's testimony during trial. The police report, however, stated that the exercise was terminated because Millard would not keep his eyes focused on the pen and kept moving his head.

therefore it is only necessary to consider whether those facts satisfy the constitutional standard of probable cause to arrest.

¶8 Under both the United States and Wisconsin Constitutions, an arrest must be supported by probable cause. ***State v. Riddle***, 192 Wis. 2d 470, 475-76, 531 N.W.2d 408 (Ct. App. 1995). In determining whether probable cause exists, the totality of the circumstances must be analyzed 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). The conclusion must be based on more than a suspicion that the defendant committed the crime, but the evidence need not reach the level that guilt is more likely than not. ***State v. Mitchell***, 167 Wis. 2d 672, 681-82, 482 N.W.2d 364 (1992).

¶9 Millard asserts that ***State v. Swanson***, 164 Wis. 2d 437, 475 N.W.2d 148 (1991), supports his claim that the officer did not have probable cause to arrest him. He relies on a frequently cited ***Swanson*** footnote which states in part: "Unexplained erratic driving, the odor of alcohol, and the coincidental time of the incident form the basis for a reasonable suspicion but should not, in the absence of a field sobriety test, constitute probable cause to arrest someone for driving while under the influence of intoxicants." ***Id.*** at 454 n.6. Millard contends that because the field sobriety tests were not completed, no field tests were performed. Therefore, based on the footnote in ***Swanson***, the arrest was without probable cause.

¶10 However, the information that constitutes probable cause is measured by the facts of each particular case. ***Mitchell***, 167 Wis. 2d at 682. We

have previously explained that the language of the ***Swanson*** footnote is not as broad as Millard contends. "The ***Swanson*** footnote 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." ***State v. Wille***, 185 Wis. 2d 673, 684, 518 N.W.2d 325 (Ct. App. 1994). "In some cases, the field sobriety 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). To determine if probable cause to arrest Millard existed we do not need to address whether the termination of a field sobriety test before completion is equivalent to the test not being administered because the circumstances must be looked at in their entirety.[3] What constitutes a field sobriety test is irrelevant so long as a reasonable police officer would believe Millard was operating a motor vehicle while intoxicated, given the totality of the circumstances.

¶11 Millard also contends that ***State v. Seibel***, 163 Wis. 2d 164, 471 N.W.2d 226 (1991), supports the view that the facts in this case do not reach the level of probable cause. In ***Seibel***, the supreme court held that the facts were sufficient to provide reasonable suspicion of intoxication, but arguably not probable cause, when the driver caused an accident after crossing the centerline for no justifiable reason, the driver's companions smelled strongly of intoxicants, the officer thought the driver smelled of intoxicants as well, and the defendant was belligerent. ***Id.*** at 180-183; *see* ***Swanson***, 164 Wis. 2d at 453 n.6.

[3] Footnote six in ***Swanson*** defines a field sobriety test as something "as simple as a finger-to-nose test or a walk-a-straight-line test." ***State v. Swanson,*** 164 Wis. 2d at 453-54 n.6. Under this definition, although Officer Drinkall terminated the tests given to Millard before completion, the portions of the tests completed by Millard still constituted field sobriety tests.

¶12 Millard exhibited more indicia of intoxication than did Swanson or Seibel. In each of those cases the officer witnessed erratic driving and an odor of alcohol on the defendant. However, unlike Swanson and Seibel, Millard appeared to be in a daze, admitted to having had a couple of drinks, was unsteady on his feet, had slurred speech, and either failed or was unable to complete all three field sobriety tests. These circumstances are similar to those in ***Babbitt***, 188 Wis. 2d 349, where we concluded that probable cause to arrest existed, and ***State v. Nordness***, 128 Wis. 2d 15, 381 N.W.2d 300 (1986), where the supreme court determined that probable cause to arrest existed. In ***Babbitt***, the defendant was seen driving erratically, smelled of alcohol, was unsteady on her feet, had glassy and bloodshot eyes and was uncooperative with the officer. 188 Wis. 2d at 357. In ***Nordness***, the defendant was seen driving erratically, had bloodshot eyes, slurred speech, and failed field sobriety tests. 128 Wis. 2d at 37.

¶13 Under the totality of the circumstances, we conclude that a reasonable police officer could believe Millard was operating a motor vehicle while intoxicated. Therefore, Officer Drinkall had probable cause to arrest Millard and the trial court correctly denied Millard's motion to suppress.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.