COURT OF APPEALS
DECISION
DATED AND FILED

July 22, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-0037-CR **Cir. Ct. No. 02-CT-35**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PATRICK C. MILLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dunn County: ROD W. SMELTZER, Judge. *Affirmed*.

¶1 PETERSON, J.[1] Patrick Miller appeals a judgment of conviction for operating a motor vehicle while intoxicated. He argues there was insufficient probable cause for his arrest. We disagree and affirm the judgment.

---

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

BACKGROUND

¶2 On January 26, 2002, at approximately 12:15 a.m., state trooper Ryan Dahlgren observed Miller driving in the City of Menomonie. Dahlgren observed Miller fail to stop for a flashing red light at an intersection. Dahlgren followed Miller and activated his emergency lights. Activating the emergency lights automatically started the cruiser's video camera. While Dahlgren followed Miller, Miller obeyed the speed limit, did not swerve within his lane, and pulled over in an appropriate manner.

¶3 Dahlgren testified that when he approached Miller's pickup truck, he noticed a strong odor of an intoxicant, that Miller's eyes were glassy, and that his speech was "thick." He also testified that Miller fumbled while pulling his driver's license out of his wallet.

¶4 Dahlgren returned to his squad car and was advised by dispatch that the pickup truck was registered to Miller and that Miller had one prior OWI conviction. Dahlgren then returned to Miller's truck and asked him to get out of the vehicle in order to perform field sobriety tests. When asked, Miller admitted to drinking four beers.

¶5 One test was the walk and turn test. Dahlgren testified:

> During the instruction portion, [Miller] lost his balance. During the performance portion, he started before he was – before I instructed him to do so. He missed heel-to-toe steps. He made an improper turn. He missed heel-to-toe on the way back. And then also on the way back, he made an improper number of steps and I believe he did this on the way – on the first nine steps, too. He made ten instead of nine and on the way back, it was five instead of nine.

Another test was the one-leg stand. Dahlgren testified that Miller swayed during the performance and put his foot down before counting to thirty and before Dalhgren asked Miller to stop.[2] Dahlgren arrested Miller following these tests.

¶6 Miller filed a motion to suppress evidence resulting from the arrest, claiming there was no probable cause for arrest. The trial court denied the motion. Miller was convicted of OWI, and now appeals.

DISCUSSION

¶7 When reviewing a trial court's ruling on a motion to suppress, this court will uphold the trial court's findings of fact unless they are clearly erroneous. ***State v. Eckert***, 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996). Here, Miller alleged there was no probable cause for his arrest. Whether probable cause to arrest exists based on the facts of a given case is a question of law we review independently of the trial court. ***State v. Truax***, 151 Wis. 2d 354, 360, 444 N.W.2d 432 (Ct. App. 1989). 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, 356-57, 525 N.W.2d 102 (Ct. App. 1994) (citation omitted).

¶8 Miller first argues that Dahlgren decided to make the arrest when he was in his squad car talking to dispatch. While Dahlgren was in his squad, the

[2] Miller also performed the Horizontal Gaze Nystagamous test, although Dahlgren did not testify as to the results of this test. A Preliminary Breath Test was taken after Dahlgren informed Miller he was under arrest. The results of that test were not admitted.

video recorder recorded a voice stating something about whether a blood draw would be done at the scene or at the hospital. Miller contends this was the dispatcher speaking to Dahlgren and argues that the statement shows that Dahlgren had already formed the intent to arrest Miller at that time. Therefore, Miller maintains that anything Dahlgren observed after that time, including the field tests, are not admissible to show probable cause.

¶9 However, Miller raises this argument for the first time on appeal. The trial court made no findings on this issue. As a general rule, we refuse to consider issues raised for the first time on appeal. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 43-44, 287 N.W.2d 140 (1980).

¶10 In addition, Miller cites absolutely no authority for his proposition. However, authority holds to the contrary. For example, in ***State v. Swanson***, 164 Wis. 2d 437, 446-47, 475 N.W.2d 148 (1991), the court held that a person is under arrest in a constitutional sense when "a reasonable person in the defendant's position would have considered himself or herself to be 'in custody,' given the degree of restraint under the circumstances. This is an objective test, and the court must consider what the police officer communicates to the defendant and not the "officers' unarticulated plan." ***Id.*** at 447. Here, Dahlgren never communicated any intent to arrest Miller until after Miller performed the field tests. Nor would a reasonable person in Miller's position believe he was under arrest before performing the field tests.

¶11 Miller argues that even if the results of the field tests can be used, there still was no probable cause for his arrest. He cites a number of cases that

identify factors for whether probable cause existed in those cases.[3] He then states that because he did not meet those specific factors, there was no probable cause. However, Miller ignores the fact that a probable cause determination is made on a case-by-case basis looking at the totality of the circumstances in each particular case. *See* ***State v. Multaler***, 2002 WI 35, ¶34, 252 Wis. 2d 54, 643 N.W.2d 437. The factors discussed in the cases Miller cites are simply the factors applicable in each of those cases. They are not meant to be a definitive list of what must be present in all cases in order for probable cause to exist.

¶12 Further, Miller is ignoring the standard of review. *See* WIS. STAT. § 805.17(2). He argues facts that favor a finding of no probable cause while ignoring those that support probable cause. He also argues facts that were not found by the court while ignoring the facts it did find.

¶13 Dahlgren observed a number of factors that led him to reasonably believe Miller was driving while under the influence of intoxicants. Miller ran a flashing red light. He had glassy eyes, thick speech, a strong odor of intoxicants, and fumbled for his driver's license. He admitted to drinking alcohol. Finally, he performed poorly on the field sobriety tests. There is no question that Dahlgren had probable cause to arrest Miller.

---

[3] These cases include: ***State v. Seibel***, 163 Wis. 2d 164, 471 N.W.2d 226 (1991); ***State v. Babbitt***, 188 Wis. 2d 349, 525 N.W.2d 102 (Ct. App. 1994); ***State v. Wille***, 185 Wis. 2d 673, 518 N.W.2d 325 (Ct. App. 1994).

By the Court.—Judgment affirmed.

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