

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 17, 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. 03-0198-CR

Cir. Ct. No. 01-CT-000372

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CRAIG A. KVALO,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Columbia County:
DANIEL GEORGE, Judge. *Affirmed.*

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

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.

and subsequent to his arrest, asserting that the officer did not have reasonable suspicion to detain him for the purpose of conducting field sobriety tests, nor did the officer have probable cause for his arrest. The court denied the motion and Kvalo pleaded no contest. The sole issue on appeal is whether the officer had probable cause to arrest Kvalo. Because we conclude that he did, we affirm.

BACKGROUND

¶2 On September 23, 2001, at approximately 1:00 a.m., Officer Jeffrey Pamenter, while parked on the westbound side of Highway 16-60, witnessed a vehicle, later determined to be driven by Craig Kvalo, traveling eastbound on the highway at a high speed. The posted speed limit at the location was thirty-five miles per hour. Pamenter activated his radar and measured Kvalo's speed to be fifty-nine miles per hour. By the time Pamenter turned on his emergency lights and turned around to follow Kvalo, Kvalo had slowed down to the speed limit. Pamenter caught up to Kvalo as he turned right onto Dix Street, stopped at a stop sign, and turned left onto Maple Avenue. Once on Maple Avenue, Kvalo pulled over.

¶3 Pamenter approached the vehicle to identify Kvalo and noticed a strong odor of intoxicants coming from inside the car. Pamenter asked Kvalo if he had been drinking and Kvalo replied that he had, having just left a wedding reception. Pamenter also noticed that Kvalo's speech was slurred. Pamenter asked Kvalo to get out of the car to perform field sobriety tests. At the time of the stop, Pamenter was not certified to administer field sobriety tests, but he had received training on the tests at a technical college.

¶4 Pamenter administered the one-leg-stand test first. Kvalo exhibited two clues of intoxication during this test: he raised his hands away from his sides

to maintain his balance and could not keep his leg raised off the ground for the full thirty seconds. Pamerter terminated the test after Kvalo nearly fell over on his final attempt. Next Pamerter administered the walk-and-turn test. Again Kvalo exhibited two clues of intoxication, this time by raising his hands away from his sides and stepping off the line numerous times. Kvalo was able to perform the final test by reciting the alphabet. At this point, Pamerter placed Kvalo under arrest for operating a motor vehicle while under the influence of an intoxicant.

DISCUSSION

¶5 When reviewing a trial court's determination regarding probable cause we use two standards of review. First, the trial court's findings of fact 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 findings of fact are not clearly erroneous, whether they satisfy the constitutional standard of probable cause is a question of law that we review de novo. *Id.* at 137-138. In this case, the trial court's findings of fact are not clearly erroneous, therefore it is only necessary to consider whether those facts satisfy the constitutional standard of probable cause to arrest.

¶6 Under both the United States and Wisconsin Constitutions, an arrest must be supported by probable cause. *State v. Riddle*, 192 Wis. 2d 470, 476, 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).

¶7 Kvalo relies on a frequently cited footnote in *State v. Swanson*, 164 Wis. 2d 437, 475 N.W.2d 148 (1991), to support his claim that Pamerter did not have probable cause to arrest him. The footnote states that the circumstances in both *Swanson* and *State v. Seibel*, 163 Wis. 2d 164, 471 N.W.2d 226 (1991), gave rise to a reasonable suspicion but did not constitute probable cause to arrest someone for driving under the influence because field sobriety tests were not administered. *Swanson*, 164 Wis. 2d at 453 n.6. In *Swanson* those circumstances included unexplained erratic driving, the odor of alcohol on the defendant's breath, and the time of the accident. *Id.* In *Seibel*, the facts included unexplained erratic driving, the odor of intoxicants coming from the defendant and the passengers in his car, and the belligerence of the defendant. *Seibel*, 163 Wis. 2d at 181-83. Although Kvalo recognizes that the question of probable cause is a case specific determination, *State v. Kasian*, 207 Wis. 2d 611, 622, 558 N.W.2d 687 (Ct. App. 1996), he argues that probable cause to arrest him did not exist because the facts in this case are substantially less indicative of intoxication than those found not to establish probable cause in *Seibel* and *Swanson*.

¶8 To support his argument, Kvalo points out that, although field sobriety tests were administered in this case, Pamerter was not certified to conduct them. Kvalo contends the lack of certification made Pamerter unqualified to conduct the tests and therefore Pamerter's observations regarding the tests are unreliable to demonstrate that Kvalo was intoxicated. However, no particular scientific knowledge is required to recognize whether a person is intoxicated. A lay witness may give his opinion of whether or not he believes a person was

intoxicated at a particular time. *City of Milwaukee v. Antczak*, 24 Wis. 2d 480, 484, 129 N.W.2d 125 (1964). While Pamentner's testimony regarding the field sobriety tests would carry more weight if he had been certified to conduct them, it still supports the conclusion that Kvalo was intoxicated at the time.

¶9 Kvalo also points out that, although he was speeding, it was in a location where the speed limit had just dropped from fifty-five miles per hour and therefore his speeding should not be considered as a factor relevant to whether he was intoxicated. But, while speeding alone does not give rise to the inference that Kvalo was intoxicated, it still factors into the totality of the circumstances.

¶10 Finally, Kvalo argues that the facts in this case are less indicative of intoxication than in *Swanson* and *Seibel*. Although the driving witnessed in *Swanson* and *Seibel* may have been more indicative of intoxication than in Kvalo's case, when the totality of the circumstances is considered, Kvalo exhibited more indicia of intoxication than either *Swanson* or *Seibel*. In addition to the strong odor of intoxicants noticed in those cases, Kvalo admitted to drinking that night, had slurred speech, and exhibited signs of intoxication when performing field sobriety tests, almost falling over at one point. While some facts might support the inference that Kvalo was not intoxicated, his intoxication did not need to be shown beyond a reasonable doubt. To establish probable cause, the evidence only needs to show that guilt is more than a possibility or a suspicion. *Mitchell*, 167 Wis. 2d at 681-82. Given the facts, it is probable that Kvalo was intoxicated.

¶11 Under the totality of the circumstances, we conclude that a reasonable police officer would believe that Kvalo was probably operating a motor

vehicle while intoxicated. Therefore Pamerter had probable cause to arrest Kvalo and the trial court properly denied the 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.

