COURT OF APPEALS
DECISION
DATED AND FILED

October 29, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1550-CR **Cir. Ct. No. 01CT000124**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LARRY J. KAIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Fond du Lac County: RICHARD J. NUSS, Judge. *Affirmed*.

¶1 NETTESHEIM, J.[1] Larry J. Kain appeals from a judgment of conviction for operating a motor vehicle while intoxicated (OWI) pursuant to WIS. STAT. § 346.63(1)(a) as a third-time offender. Kain pled no contest to the charge

[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.

following the trial court's denial of his motion to suppress. On appeal, Kain argues that the arresting officer did not have probable cause to arrest him. We disagree and affirm the conviction.

¶2 The controlling facts are undisputed. On February 26, 2001, at approximately 1:30 p.m., Officer William Olig of the City of Fond du Lac Police Department arrived at the scene of a three-car accident. Olig's investigation revealed that a vehicle driven by Kain had "side-swiped" two other vehicles, which were parked along the curb of the street on which Kain had been traveling. Olig detected the odor of alcohol on Kain's breath and noticed that Kain's eyes were glassy and bloodshot. In response to Olig's inquiry, Kain denied that he had been drinking. Instead, he stated that he had worked all night and just finished work at 7:00 a.m. that morning.

¶3 Kain then agreed to perform some field sobriety tests. During the finger-to-nose test, which required Kain to tilt his head back, close his eyes, and touch the tip of his nose, Kain would open his eyes every two or three seconds, prompting Olig to remind him to keep his eyes closed. With his right hand, Kain touched his upper lip; with his left hand, Kain had to search for the lower part of his nose.

¶4 Next, during a seven-step heel-to-toe test, Kain almost fell to the ground and said, "I fucked up again." Kain then told Olig that he knew the entire procedure because he had previously been twice arrested for OWI. Olig then arrested Kain for OWI.

¶5 Probable cause is that quantum of evidence that would lead a reasonable police officer to believe that the defendant probably committed a crime. ***Ball v. State***, 57 Wis. 2d 653, 659, 205 N.W.2d 353 (1973). Probable

cause is a fluid concept, turning on the assessment of probabilities in a particular factual contest. ***State v. Ehnert***, 160 Wis. 2d 464, 469, 466 N.W.2d 237 (Ct. App. 1991). In assessing whether probable cause exists we examine the totality of the circumstances. ***Id***. The probable cause standard is a practical, nontechnical one invoking the practical considerations of everyday life on which reasonable and prudent persons, not legal technicians, act. ***Id***. Probable cause has been equated to "a fair probability." ***State v. Lee***, 157 Wis. 2d 126, 131, 458 N.W.2d 562 (Ct. App. 1990). Since the facts in this case are undisputed, we decide the question of probable cause independently. ***Id***.

¶6 Kain contends that the facts known to and observed by Olig did not constitute probable cause for his arrest. In support, he cites to the following passage from ***State v. Swanson***, 164 Wis. 2d 437, 475 N.W.2d 148 (1991).

> 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…. Without such a test, the police officers could not evaluate whether the suspect's physical capacities were sufficiently impaired by the consumption of intoxicants to warrant an arrest.

Id. at 454, n.6. We find Kain's reliance on ***Swanson*** somewhat strange since, in this case, Olig did administer field sobriety tests in compliance with ***Swanson***.[2]

[2] We also note that the ***Swanson*** language upon which Kain relies has since been qualified. It "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).

Regardless, Kain goes on to argue that the results of those tests, coupled with the other facts surrounding his arrest, did not satisfy the probable cause requirement.

¶7 As to the finger-to-nose test, Kain argues that this is not a standardized test recognized by the National Highway Traffic Safety Administration (NHTSA). Kain argues that under a standardized test, the officer would look for, and could testify to, "specific and articulable clues," which would allow the officer (and any reviewing court) to meaningfully assess the suspect's performance of the test. Without such standardization, Kain contends that the opening and closing of his eyes, the touching of his upper lip instead of his nose with one hand, and his searching for his nose with his other hand are of no consequence. Even without such standardization, Kain argues that his failings on the test, measured against the things he did correctly, mitigate against probable cause.[3]

¶8 However, Wisconsin law has never proclaimed that a field sobriety test must be a standardized test recognized by the NHTSA. As a result, the trial court properly assessed Kain's performance of the finger-to-nose test under the conventional and well-established principles of probable cause. In other words, the court assessed whether Kain's performance of the test, combined with any other indicators of likely intoxication, would lead a reasonable police officer to believe that Kain was intoxicated. *See* ***Ball***, 57 Wis. 2d at 659. Under that procedure, Kain's failings on the test were relevant factors on the question of probable cause.

[3] For instance, Kain notes that he stood in the correct instructional stance, that he tilted his head back, that he put his arms out to the sides, and that he had no difficulty in maintaining his balance.

¶9 We thus turn to the other facts of the case. Olig's investigation of the accident revealed that Kain had "side-swiped" two vehicles parked alongside the curb of the street on which Kain had been traveling. When he first made contact with Kain, Olig detected the odor of alcohol on Kain's breath and observed that Kain's eyes were bloodshot and glassy. Kain explained that he had just completed his work shift at 7:00 a.m., yet the time of his conversation with Olig was 1:30 p.m. Finally, Kain nearly fell to the ground while performing the heel-to-toe test.

¶10 All of these facts supported a reasonable probability that Kain was intoxicated. The circumstances of the accident reasonably suggested that Kain had failed to properly maintain control of his vehicle. His near fall to the ground during the heel-to-toe test reasonably suggested an intoxicated condition. The time discrepancy in his explanation suggested either a confused mind or a guilty mind by offering a feeble and dishonest attempt to explain away the accident and his condition.

¶11 We hold that the totality of these factors would lead a reasonable officer to believe that Kain was intoxicated. As such, Olig had probable cause to arrest Kain.

¶12 Kain points to factors that augur against probable cause: he made no admission that he had been drinking; he exhibited no balancing problems other than when he nearly fell during the heel-to-toe test; and he did not slur his speech. We disagree that these facts trumped those in support of probable cause. Even if we were to allow that the factors cited by Kain created an equally reasonable inference against probable cause, a police officer is entitled to rely on the

reasonable inference justifying the arrest. *Cf*. ***State v. Tompkins***, 144 Wis. 2d 116, 125, 423 N.W.2d 823 (1988).

¶13 We uphold the trial court's denial of Kain's motion to suppress. We affirm the judgment of conviction.

By the Court.—Judgment affirmed.

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