COURT OF APPEALS
DECISION
DATED AND FILED

December 16, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1830-CR **Cir. Ct. No. 02-CT-171**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SCOTT L. WUNDROW,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Chippewa County: THOMAS J. SAZAMA, Judge. *Affirmed*.

¶1 PETERSON, J.[1] Scott Wundrow appeals from a judgment of conviction for operating a motor vehicle with a prohibited alcohol concentration, third offense. He argues that there was insufficient probable cause to justify his arrest and therefore any evidence obtained as a result of the arrest was

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

inadmissible. We conclude there was probable cause to arrest Wundrow and affirm the judgment.

BACKGROUND

¶2 On May 28, 2002, Chippewa County Deputy Sheriff Melissa Zwiefelhofer was dispatched to the scene of an automobile accident. Upon her arrival, she observed a man, later identified as Wundrow, lying outside a truck that was involved in a one-vehicle rollover. An EMT was attending to him.

¶3 Zwiefelhofer testified that she assisted the EMT in rendering aid to Wundrow. At that time, Zwiefelhofer noticed an odor of intoxicants about Wundrow. She stated she did not ask Wundrow any questions at that time or administer field tests because he appeared to be injured. Zwiefelhofer did speak to Wundrow's brother, Shane, who apparently was a passenger in the truck. Shane stated that Wundrow was attempting to pass another vehicle when he hit the ditch and lost control of the vehicle.

¶4 Wundrow was transported by ambulance to a local hospital, while Zwiefelhofer followed. At the hospital, Zwiefelhofer was able to speak to Wundrow, who admitted that he had been drinking. Zwiefelhofer then arrested Wundrow, and he was subsequently charged with operating a motor vehicle while under the influence of an intoxicant, third offense, as well as operating with a prohibited alcohol concentration, third offense.

¶5 Wundrow filed a motion to suppress evidence, arguing there was insufficient probable cause for his arrest. The court denied the motion. Wundrow later changed his plea to no contest and was found guilty of the prohibited alcohol concentration charge. He now appeals.

DISCUSSION

¶6 When reviewing a trial court's ruling on a motion to suppress, we 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, Wundrow 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).

¶7 Wundrow contends we should ignore his admission at the hospital that he had been drinking. This is because, according to Wundrow, Zwiefelhofer had decided at the scene to arrest him. However, the time of Zwiefelhofer's decision is irrelevant. What matters is when she in fact did arrest him. In ***State v. Swanson***, 164 Wis. 2d 437, 446-47, 475 N.W.2d 148 (1991), the supreme 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." *See* ***id.*** Here, Zwiefelhofer never communicated any intent to arrest Wundrow until after Wundrow told her at the hospital that he had been drinking. Nor would a reasonable person in Wundrow's position believe he was under arrest before that

time. Zwiefelhofer was therefore able to take Wundrow's admission into account when determining whether there was probable cause to arrest him.

¶8 Wundrow contends that ***Swanson*** governs the outcome here. In ***Swanson***, the arresting officer observed erratic driving, Swanson was unable to produce his driver's license, and he had an odor of intoxicants. ***Id.*** at 442. However, the officers did not conduct field sobriety tests. ***Id.*** Based on the lack of field sobriety tests, the supreme court concluded there was insufficient probable cause. ***Id.*** at 453, n.6. Wundrow argues that if there was no probable cause in ***Swanson***, there cannot be probable cause here.

¶9 The State urges us to follow ***State v. Kasian***, 207 Wis. 2d 611, 558 N.W.2d 687 (Ct. App. 1996), which it argues has facts similar to the present case. In ***Kasian***, the officer came upon a one-vehicle accident and while speaking to Kasian noted an odor of intoxicants as well as slurred speech. ***Id.*** at 622. We concluded that field sobriety testing was not always necessary to establish probable cause. ***Id.*** (citing ***State v. Wille***, 185 Wis. 2d 673, 518 N.W.2d 325 (Ct. App. 1994)). We stated: "In some cases, the field sobriety tests may be necessary to establish probable cause; in other cases, they may not. This case, we conclude, falls into the latter category." ***Id.***

¶10 Wundrow argues that even under ***Kasian*** there was no probable cause here. Unlike in ***Kasian***, Zwiefelhofer never noted that Wundrow's speech was slurred. Further, while the officer in ***Kasian*** knew Kasian, Zwiefelhofer did not know Wundrow.

¶11 The factors discussed in ***Swanson*** and ***Kasian*** are not meant to be a definitive list of what must be present in all cases in order for probable cause to exist. Nor can we approve a laundry list of indicators that can be checked off until

a certain number equals probable cause. Rather, 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.

¶12 As in ***Kasian***, we conclude here that the lack of field testing does not preclude a finding of probable cause. Under the totality of the circumstances, it was reasonable for Zwiefelhofer to believe Wundrow was operating a motor vehicle while under the influence of an intoxicant. An automobile accident occurred while Wundrow was executing a fairly simple maneuver, passing another vehicle. In addition, Zwiefelhofer noted an odor of intoxicants and Wundrow admitted that he had been drinking. We think it is more than reasonable under these circumstances to conclude that Wundrow was probably operating while under the influence.

¶13 We note that Wundrow argues there could have been an innocent explanation for the accident, such as mechanical failure or bad road conditions. However, the mere fact that an innocent explanation for a driver's conduct may be advanced is not enough to defeat probable cause. ***State v. Schaefer***, 2003 WI App 164, ¶17, 668 N.W.2d 160.[2]

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[2] Wundrow also argues the court inappropriately stated it was a fact that Wundrow was driving drunk. The court stated, "We have the fact of the accident. We have the fact of the drunk driving." We note that the statement was erroneous because Wundrow's intoxication had not yet been established as a fact. However, we conclude that the record independently establishes probable cause, and therefore the error was harmless.

Wundrow further argues that the court inappropriately based its probable cause determination on "its concern of potential civil liability against Chippewa County as a result of the Circuit Court's decision on this issue." The relevant portion of the court's oral decision is as follows:

(continued)

By the Court.—Judgment affirmed.

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

> We have the defendant in pretty obvious pain and in need of medical attention. I don't think that is an appropriate situation for him to be reciting the alphabet, spell his name, walking a white line, touching his nose or any of that stuff. Perhaps if she intruded to that extent, she would have been sued for intervening and getting in the way of his medical treatment. Who knows? In other words, the county is damned if it does and damned if it doesn't in a situation such as this, so I choose to consider the testimony here today together with the [police] report.

The court then concludes there was probable cause. It is evident that the court was referring to Zwiefelhofer's decision not to question Wundrow at the scene when it referred to possible civil liability. It was not the basis of the court's probable cause determination. We therefore reject Wundrow's argument.