COURT OF APPEALS
DECISION
DATED AND FILED

January 14, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-2248-CR **Cir. Ct. No. 02-CT-557**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SARA L. LOHRY,

DEFENDANT-APPELLANT.

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

¶1 BROWN, J.[1] This is an appeal from a judgment convicting Sara L. Lohry of operating a motor vehicle while intoxicated, fourth offense, and an underlying order denying her motion to suppress evidence. Her claim on appeal is premised upon a phrase used over fifty years ago by the United States Supreme

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

Court in ***Brinegar v. United States***, 338 U.S. 160, 175-76 (1949), where the Court explained that probable cause includes information obtained by a police officer which is "reasonably trustworthy." Based on this phrase, Lohry argues that since probable cause to arrest her for OWI was based in part on field sobriety tests, and since the officer conducting the tests was not certified to conduct them, and since two of the tests she ostensibly failed are not approved for use by the National Highway Traffic Safety Administration, and since administration of such tests were subject to the officer's purely subjective indicators of what it takes to "pass" or "fail" a test, these tests were not reasonably trustworthy and, without them therefore, the officer had no probable cause to arrest her. We hold there was such probable cause and affirm.

¶2 This court reviews a probable cause determination de novo. *See* ***State v. Babbitt***, 188 Wis. 2d 349, 356, 525 N.W.2d 102 (Ct. App. 1994). In OWI cases, probable cause will be found "where the totality of the circumstances within the arresting officer's knowledge at the time of the arrest would lead a reasonable police officer to believe … the defendant was operating a motor vehicle while under the influence of an intoxicant." ***State v. Nordness***, 128 Wis. 2d 15, 35, 381 N.W.2d 300 (1986). This is a commonsense test, based on probabilities. *See* ***County of Dane v. Sharpee***, 154 Wis. 2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990). The facts need only be sufficient to lead a reasonable police officer to believe that guilt is more than a possibility. ***Id***. Probable cause is neither a technical nor a legalistic concept; rather, it is a "flexible, common-sense measure of plausibility of particular conclusions about human behavior." ***State v. Petrone***, 161 Wis. 2d 530, 547-48, 468 N.W.2d 676, *cert. denied*, 502 U.S. 925 (1991).

¶3 The facts are as follows. A city of Fond du Lac police officer saw a vehicle stopped at a flashing yellow light. The vehicle stayed in that stopped

position for about five seconds. This is what caught the officer's attention, as there was no other traffic that would have caused the vehicle to stop and remain stopped. The officer stated that there is no rule mandating vehicles to stop at flashing yellow lights; rather, they are to merely slow down.

¶4 Next, the officer saw the vehicle proceed through the intersection at a high rate of speed. The officer followed and paced the vehicle. He estimated the vehicle speed to be between thirty-eight and forty miles per hour in a twenty-five mile-per-hour speed zone. Two blocks later, the vehicle stopped at a stoplight in the left-turn lane. The officer pulled in behind the vehicle. When the left-turn arrow came on, the vehicle pulled away from the intersection, turned left, squealed its tires and traveled westbound at a high rate of speed. The officer followed.

¶5 Next, the officer observed the vehicle come up behind another westbound vehicle and begin to tailgate that vehicle. At that point, the officer had "seen enough" and initiated a traffic stop. The officer initiated contact with the driver, who was later identified as Lohry. While conversing with Lohry and obtaining her identification, the officer "could smell the odor of an alcoholic beverage on her breath, her speech was slurred, and upon looking into her eyes … noticed that they were red and glossy." The officer asked if she had been drinking, and she confirmed that she had "a couple of beers at a local tavern…." Based on the officer's experience of over eight years, the officer arrived at the conviction that what he had observed were indications of driving under the influence. The officer asked her to exit the vehicle and informed her that he was going to conduct some field sobriety tests. The officer explained to Lohry that he would give her the instructions for each test and if she had any questions regarding his instructions, she could ask and he would explain further.

¶6 The first test he had her perform was the alphabet test, which she successfully completed. The second test was the standing leg lift test. After receiving instructions to lift her right leg off the ground for a period of thirty seconds, Lohry attempted to lift her right leg off the ground, as instructed, and "immediately lost her balance." She attempted again and got to number nineteen but now had her arms out to the side to balance rather than keeping them at her side, as instructed. She was also bending over at the waist and leaning over to her right while trying to hold her balance. She then lost her balance a second time. She tried once more and got to thirty but again was having problems keeping her arms at her side and keeping from bending forward at the waist. Based on these observations, the officer concluded that she had failed the test.

¶7 The next test was the heel-to-toe test. Lohry was instructed to stand in one position with her right foot in front of her left foot, touching her right heel to her left toe. She was told to stand in that position while the officer completed giving his instructions. The officer observed her to lose her balance and her right foot shuttled out to the side. The officer observed her try to resume the requested position four or five times, all without success. The officer then instructed her to keep her arms at her side, walk in a straight line and keep touching heel-to-toe as she walked for nine steps forward, pivot around and take nine steps back, counting out loud each step. The officer observed that she had difficulty maintaining her balance and was again using her arms out to her side to help her maintain balance and, still, she could not walk a straight line. The officer concluded that she had failed the test.

¶8 Next, she was instructed how to perform a standing head tilt test, also known as the Romberg Test. The instructions called for her to stand in one position with her arms at her side, close her eyes, tilt back her head, have her feet

and toes touching each other and count for what she feels is thirty seconds. But on attempting the test, Lohry kept opening her eyes, tried to put her head down, and swayed back and forth. The test lasted seventeen seconds. The officer concluded that Lohry was having difficulty maintaining her balance and had failed it.

¶9 The final test was the fingertip-to-nose dexterity test. She was instructed to stand in one position, feet together, close her eyes, tilt her head back, and then with the index finger of either hand, touch the fingertip to her nose. She turned the finger around so that the nail portion of the index finger touched her nose. After the officer explained the problem to her, she attempted it again with the left finger, but touched the nose with the back portion of her fingernail. She was instructed again and did the same thing touching her nose with the back of her right, then left, fingernail. Finally, she was again instructed to use the right hand, and she missed the nose altogether. In the officer's opinion, Lohry failed the test. She was placed under arrest for operating while intoxicated. A blood test was obtained at a local hospital and the test result was .172.

¶10 Lohry was eventually charged with OWI-Fourth Offense. She brought a motion to suppress the evidence, alleging a lack of probable cause. A motion hearing took place and the trial court denied the motion. Lohry then pled no contest and commenced this appeal.

¶11 Lohry's contention that the officer based his arrest decision on information which was not "reasonably trustworthy" is founded upon what only can be described as inaccurate statements of the law. First, she argues that the observations of the officer while she was driving and the officer's observations as to her lack of balance during the taking of the field sobriety tests "are rarely sufficient by themselves and in the majority of cases require corroboration by

making the suspect perform field sobriety tests." With this foundation in place, Lohry is then able to launch her attack on the officer's lack of certification to conduct these tests, the accuracy of these tests and the arbitrary way in which the officer scored these tests. Her theory is that, absent the tests, there are insufficient facts to show probable cause. The problem is, her statement of the law is not the law.

¶12 Field sobriety tests are not required as a condition precedent to finding probable cause to arrest. ***State v. Wille***, 185 Wis. 2d 673, 684-85, 518 N.W.2d 325 (Ct. App. 1994). ***Wille*** limited ***State v. Swanson***, 164 Wis. 2d 437, 475 N.W.2d 148 (1991), to its facts.[2] It is true that in some cases the 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). Thus, it is not the law that field sobriety tests are a condition precedent to probable cause. And it is certainly not true that other facts are "rarely sufficient" by themselves to justify a finding of probable cause. A canvass of Westlaw or Lexis shows otherwise. Instead, the question of probable cause is assessed on a case-by-case basis. ***Id.***

¶13 And here, with our review being de novo, we are satisfied that, even without the field sobriety tests, the officer had probable cause to arrest Lohry for

[2] In ***Swanson***, the supreme court wrote a footnote suggesting that the officers in that case "arguably" lacked probable cause to arrest but did have reasonable suspicion to stop Swanson. *See* ***State v. Swanson***, 164 Wis. 2d 437, 453-54 n. 6, 475 N.W.2d 148 (1991). The court noted "unexplained" erratic driving, an odor of intoxicants emanating from Swanson as he spoke, and the fact that the incident occurred at approximately the same time as the bars closed, as indicia of criminal conduct. ***Id.*** The court also related in its factual recitation that the officers did not have time to conduct field sobriety testing because of a call to go to a domestic disturbance. ***Id***. at 442. Based on the facts and the footnote, later OWI defendants argued that ***Swanson*** stood for the proposition that field sobriety tests were a condition precedent to probable cause. This theory was rejected in ***State v. Wille***, 185 Wis. 2d 673, 685-85, 518 N.W.2d 325 (Ct. App. 1994).

operating her vehicle while intoxicated. The officer saw four indicators that Lohry was either confused while driving or was driving erratically or both. She stopped at a yellow light, she peeled out in turning left, she sped and she followed another vehicle too closely. After the stop, the officer noted alcohol on her breath, a slur in her diction and glassy eyes. Additionally, she admitted to having been drinking. Taken together, there was more than enough for probable cause even without the field sobriety tests. In comparison with the facts in ***Kasian***, where the officer did not personally observe erratic driving of the defendant, but saw the aftermath of the accident, noted alcohol on Kasian's breath and his slurred speech, *see* ***Kasian***, 207 Wis. 2d at 622, there are more indicia here. The officer actually observed the erratic driving. Likewise, ***Wille*** involved a fact situation similar to Kasian's except that Wille told the officer he had to "quit doing this." ***Wille***, 185 Wis. 2d at 684. The facts here are stronger than in ***Wille*** as well. We conclude that the officer had probable cause to arrest even before he conducted the field sobriety tests.

¶14 But that's not all. Even if we were to factor in the field sobriety tests, we could do so with no problem. First, Lohry cites no authority for the proposition that the officer's lack of certification is somehow fatal to the authenticity of the test results. Moreover, we do not even know from her brief whether she is arguing that the lack of certification goes to the admissibility of the test results or whether it affects the weight of the testimony as a matter of law. She does not say. We could easily dispose of this argument by noting that appellate courts need not address issues where the proponent of the legal theory cites no authority for the argument. ***State v. Lindell***, 2000 WI App 180, ¶23 n.8, 238 Wis. 2d 422, 617 N.W.2d 500 (arguments unsupported by references to legal authority will not be considered). Even if we do not use ***Lindell*** to answer the

issue, the fact is that the officer merely related what he observed Lohry do. Whether the officer was certified or not, Lohry had trouble maintaining her balance and the officer related that to the trial court. Certainly, the trial court could take these observations into consideration.

¶15 Second, Lohry cites no authority for the proposition that field sobriety tests not approved for use by the National Highway Safety Commission are somehow not valid in a Wisconsin court.

¶16 Third, Lohry asserts that field sobriety tests are too subjective in nature because the officer has no standards with which to compare his or her observations with some general consensus about what must be seen in order to convince the reasonable officer that the person taking the tests is intoxicated. Again, there is no authority cited for this proposition. But more to the point, these tests are not a rocket science nor are they the product of subjective variables arbitrarily inserted by the testing authority. They are what they are—observations of how a person does when performing certain uniform assigned tasks. We reject Lohry's arguments and affirm.

By the Court.—Judgment and order affirmed.

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