COURT OF APPEALS
DECISION
DATED AND FILED

October 27, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1986 **Cir. Ct. No. 2009TR2919**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TAMMI MARIE ZELLMER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Wood County: JAMES M. MASON, Judge. *Affirmed.*

¶1 BLANCHARD, J.[1] Tammi Marie Zellmer appeals a circuit court order finding her guilty of operating a motor vehicle with a prohibited blood

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

alcohol concentration, in violation of WIS. STAT. § 346.63(1)(b). Zellmer argues that the circuit court erred in denying her suppression motion. She asserts that the arresting officer illegally obtained a preliminary breath test (PBT) result from her and that, without the PBT evidence, there was no probable cause to arrest. This court concludes that there was probable cause to arrest Zellmer even without reference to the PBT evidence. Accordingly, the judgment is affirmed.

BACKGROUND

¶2 The sole witness at the suppression hearing was the Wisconsin State Patrol trooper who stopped, assessed, and arrested Zellmer. He testified in substance as follows. At approximately 2:50 a.m. on August 23, 2009, he stopped a vehicle for speeding. According to the trooper's radar, the vehicle was travelling forty-five miles per hour in a thirty-five mile-per-hour zone. However, the driver did not exhibit any other driving behaviors that the trooper associated with impaired driving.

¶3 The trooper made contact with the driver, identified as Zellmer. While speaking with Zellmer from outside Zellmer's vehicle, the trooper detected a strong odor of intoxicants on Zellmer's breath as she spoke to him. The trooper also noticed that Zellmer's eyes were glassy and bloodshot. He asked Zellmer if she had anything to drink that evening and she replied that she had a couple of beers and a mixed drink.

¶4 Zellmer complied with the trooper's request to exit her vehicle to perform field sobriety tests. On the horizontal gaze nystagmus (HGN) test, Zellmer displayed six of six possible clues of intoxication, or three clues for each eye. On the walk-and-turn test, Zellmer started the test early, stopped the test after the first nine steps, and stepped off the line. On the one-leg-stand test, Zellmer

hopped up and down, swayed or leaned, and dropped her foot twice. Zellmer registered a 0.144 on the PBT.

¶5 Although Zellmer did not testify, she offered a video tape documenting the field sobriety tests. The circuit court reviewed pertinent portions of the tape and made factual findings based in part on its review of the video.

¶6 The circuit court found, based on additional testimony of the trooper, that the trooper gave Zellmer a directive that he "needed her to take a PBT," and that, following this directive, Zellmer either consented or acquiesced to the PBT. The court concluded that the PBT evidence could be considered in the probable cause analysis and denied Zellmer's motion to suppress. Zellmer subsequently entered a no-contest plea.

DISCUSSION

¶7 In reviewing a motion to suppress, this court upholds the circuit court's findings of fact unless they are clearly erroneous. ***State v. Phillips***, 2009 WI App 179, ¶6, 322 Wis. 2d 576, 778 N.W.2d 157, *review denied*, 2010 WI 53, 326 Wis. 2d 35, 783 N.W.2d 872. Whether the facts as found meet the probable cause standard is a question of law the court reviews de novo. ***Id.***

¶8 Zellmer argues that the trooper illegally obtained the PBT result without her consent and that, without the PBT evidence, probable cause to arrest her was lacking. She argues that, under the PBT statute, WIS. STAT. § 343.303, and constitutional principles, a PBT is a search requiring consent. She argues that the supreme court in ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 603 N.W.2d 541 (1999), already decided the issue, albeit indirectly, when the court interpreted § 343.303 as follows: "For non-commercial drivers, the officer may *request* a

PBT [if the proper standard is met]. If the driver *consents* to the PBT, the result can assist the officer in determining whether there is probable cause for the arrest. § 343.303." ***Renz***, 231 Wis. 2d at 311 (emphasis added). Zellmer asserts that here the trooper gave a directive, and her acquiescence to that directive is not consent.

¶9 The State disagrees with these arguments of Zellmer in several respects, and also argues in the alternative that, even without the PBT evidence, the facts of Zellmer's case are sufficient to constitute probable cause under ***County of Dane v. Sharpee***, 154 Wis. 2d 515, 453 N.W.2d 508 (Ct. App. 1990). This court agrees with the State's alternative argument, and does not address the consent-to-PBT issue.

¶10 On appeal, Zellmer fails to reply to the State's argument based on ***Sharpee***, which is a failure that could be treated as a concession. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (court of appeals may take the failure to refute a proposition in a reply brief as a concession). Nevertheless, in part because Zellmer does make the explicit argument that the trooper lacked probable cause to arrest if the PBT result is ignored, this court proceeds to analyze the facts of this case in light of ***Sharpee***. In doing so, the court concludes that the trooper had probable cause to arrest Zellmer without the PBT evidence.

¶11 The test for probable cause is a common-sense one based on the totality of circumstances. ***Sharpee***, 154 Wis. 2d at 518. This court has summarized it as follows:

> Probable cause to arrest exists where the officer, at the time of the arrest, has knowledge of facts and circumstances sufficient to warrant a person of reasonable prudence to believe that the arrestee is committing, or has committed, an offense. As the very name implies, it is a

> test based on probabilities; and, as a result, the facts faced by the officer "need only be sufficient to lead a reasonable officer to believe that guilt is more than a possibility." It is also a commonsense test. The probabilities with which it deals are not technical: "[T]hey are the factual and practical considerations of everyday life on which reasonable and prudent men [and women], not legal technicians, act."

Id. (citations omitted).

¶12 The officer in ***Sharpee*** stopped a suspect for failure to display license plates. ***Id.*** at 517. The stop here was for speeding, a driving behavior that, while not necessarily associated with intoxicated driving, is more likely to be associated with intoxicated driving than a failure to display license plates.

¶13 The stop in ***Sharpee*** occurred during the "early morning hours." ***Id.*** The same is true here. In fact, the 2:50 a.m. stop time in this case is particularly suspicious given its proximity to "bar time." *See* ***State v. Post***, 2007 WI 60, ¶36, 301 Wis. 2d 1, 733 N.W.2d 634 (suggesting that a stop at "bar time" may heighten suspicion of impaired driving).

¶14 The officer in ***Sharpee*** noticed a strong odor of intoxicants. ***Sharpee***, 154 Wis. 2d at 517. Here, the same is true. The trooper testified that he could smell "a strong odor" on Zellmer's breath, even while speaking with her from outside her vehicle.

¶15 In ***Sharpee***, the suspect's speech was slurred. ***Id.*** That is a difference with this case, where there was no such testimony.

¶16 In ***Sharpee***, the suspect's eyes were bloodshot and he had a "blank stare." ***Id.*** Here, the trooper described Zellmer's eyes as glassy and bloodshot.

¶17 The suspect in ***Sharpee*** admitted to having "two or three" drinks. ***Id.*** Zellmer admitted to having two beers and a mixed drink.

¶18 The suspect in ***Sharpee*** "failed" the "horizontal gaze" test. ***Id.*** Here, the trooper testified that Zellmer displayed all six of six clues of intoxication on the test.[2]

¶19 The suspect in ***Sharpee*** showed unsteady balance and was swaying from front to back. ***Id.*** Zellmer concedes that she exhibited at least two clues of intoxication on the walk-and-turn test and two clues on the one-leg-stand test.[3] Specifically, in performing the walk-and-turn test, she started the test early and stepped off the line on her way back, and in the one-leg-stand test, she hopped up and down and dropped her foot twice.

¶20 In ***Sharpee***, the suspect could not accurately recite the alphabet and slurred letters together. ***Id.*** Here, there is no evidence as to Zellmer's ability to recite the alphabet.

¶21 In sum, the facts in ***Sharpee*** are similar to those here, with a few factual differences cutting in favor of Zellmer (no slurred speech; no swaying from front to back; no failure to recite the alphabet accurately) and a few others cutting against her (speeding; relatively specific testimony about the strong odor of

[2] Zellmer acknowledges that the trooper had reasonable suspicion that she was operating a vehicle while intoxicated, which is the quantum of proof necessary to justify administration of field sobriety tests. *See* ***State v. Colstad***, 2003 WI App 25, ¶19, 260 Wis. 2d 406, 659 N.W.2d 394.

[3] The suspect in ***County of Dane v. Sharpee***, 154 Wis. 2d 515, 453 N.W.2d 508 (Ct. App. 1990), was unable to perform other field sobriety tests because of a disability. ***Id.*** at 517 n.1.

intoxicants on her breath; two clues of intoxication on the walk-and-turn test and two clues of intoxication on the one-leg-stand test). On balance, this court is satisfied that, in light of the totality of circumstances as compared to those in ***Sharpee***, there was probable cause to arrest Zellmer, even without the PBT evidence.

¶22 Zellmer argues that at least three of the six HGN test clues should have been discounted in the probable cause analysis. She asserts that the test was invalid, at least as to her right eye, because she was positioned such that her right eye "may" have been exposed to the squad car's flashing red and blue lights. This is not persuasive.

¶23 There is no dispute that during the HGN test a suspect should be facing away from flashing lights. However, the trooper testified that, consistent with his training, he intentionally positioned Zellmer so that the rotating emergency lights would not flash in her eyes at any point during the HGN test. On this issue, the circuit court made several fact findings adverse to Zellmer regarding her positioning in relation to the squad lights and the low likelihood that her positioning would have undermined the validity of the HGN test. Those findings include that "by and large the defendant's back was turned at those lights." Based on this court's review of the officer's testimony and the portion of the video tape the court viewed documenting the field sobriety tests, the court's findings of fact in this regard are not clearly erroneous.[4] The video does not reveal much of value in itself, but it does not serve to undermine the court's findings.

[4] Moreover, as already stated, the trooper testified that Zellmer showed all six possible clues during the HGN test. Assuming without deciding that as many as three of those clues were (continued)

¶24 Zellmer also argues that the circuit court erroneously relied on the additional clue of stopping during the walk-and-turn test. She argues that the evidence shows that she stopped only because the officer interrupted her. Zellmer further argues that the court erroneously relied on the additional clue of swaying back and forth in the one-leg-stand test. She argues that the evidence shows she was merely leaning, and that leaning is not a recognized clue. Even assuming without deciding that Zellmer is correct on these points, these small differences would not change this court's conclusion that there was probable cause. That is, even without the additional clue on each test, the totality of circumstances was sufficient under the common-sense standard.

CONCLUSION

¶25 For the reasons stated above, the circuit court correctly denied Zellmer's motion to suppress and this court affirms the order.

By the Court. Order affirmed.

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

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due to visual distraction (the three clues from her right eye that Zellmer asserts are suspect), the facts here would still, as a whole, resemble the facts of ***Sharpee***.