

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 27, 2004

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. 04-1348-CR
STATE OF WISCONSIN**

Cir. Ct. No. 02CT000203

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

KRIS A. WESTBERG,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County:
MICHAEL O. BOHREN, Judge. *Affirmed.*

¶1 ANDERSON, P.J.¹ We are obliged to revisit Kris A. Westberg's arrest on third offense drunk driving charges. In *State v. Westberg*, No. 02-2206-CR, unpublished slip op. (Wis. Ct. App. Feb. 12, 2003) (*Westberg I*),

¹ This is a one-judge appeal 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.

we held that there was reasonable suspicion to conduct an investigative traffic stop and reversed the circuit court's order suppressing evidence after it found just the opposite. Upon remand, Westberg brought a motion to suppress all evidence alleging that there was no probable cause to support his arrest. He is appealing the circuit court's denial of that motion. We determine that under the totality of the circumstances, the arresting officer's experience and knowledge at the time of Westberg's arrest would lead a reasonable police officer to believe that Westberg was operating a motor vehicle while under the influence of an intoxicant. Therefore, we affirm.

¶2 *Westberg I* was an appeal by the State of the circuit court's order suppressing evidence. We reversed the trial court's finding that Westberg's fishtailing on snow-covered streets did not constitute sufficient reasonable suspicion to support an investigative stop.

Both parties debate the circuit court's conclusion that Westberg's driving did not constitute a traffic violation. Reasonable suspicion does not require that the officer have grounds to issue a traffic citation in order to make a traffic stop nor does it require that the officer have grounds to believe that the weaving is caused by intoxication rather than drowsiness or some other more "innocent" cause before the stop.... "[W]hen a police officer observes lawful but suspicious conduct, if a reasonable inference of unlawful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, police officers have the right to temporarily detain the individual for the purpose of inquiry."

Id., ¶13 (citations omitted).² Because the procedural history of this case and the evidentiary history of the investigative stop are set forth in detail in *Westberg I*, we will skip directly to the challenge to the probable cause for arrest.

¶3 Following remand, the circuit court heard Westberg’s challenge to his arrest after the investigative stop. After reviewing the transcript prepared when Westberg questioned the investigative stop and hearing additional testimony from the arresting officer, the circuit court found that the officer’s testimony was credible. The court went on to consider the totality of the circumstances, especially Westberg’s display of consciousness of guilt, and concluded that there was probable cause to support Westberg’s arrest. Westberg appeals.

¶4 If the historical facts are undisputed, whether probable cause to arrest exists is a question of law. *State v. Drogsvold*, 104 Wis. 2d 247, 262, 311 N.W.2d 243 (Ct. App. 1981). When this court is presented with a question of law, the determination will be reviewed independently on appeal without deference to the conclusion of the circuit court. *Id.*

¶5 In determining whether probable cause exists, the court applies an objective standard, see *State v. Riddle*, 192 Wis. 2d 470, 476, 531 N.W.2d 408 (Ct. App. 1995), and is not bound by the officer’s subjective assessment or motivation. *State v. Kasian*, 207 Wis. 2d 611, 621, 558 N.W.2d 687 (Ct. App. 1996). The court is to consider the information available to the officer from the standpoint of one versed in law enforcement, taking the officer’s training and experience into account. *State v. Pozo*, 198 Wis. 2d 705, 711-13, 544 N.W.2d 228

² Citation to an unpublished case is permitted because it is the source of the law of the case. WIS. STAT. RULE 809.23(3).

(Ct. App. 1995). When a police officer is confronted with two reasonable competing inferences, one justifying arrest and the other not, the officer is entitled to rely on the reasonable inference justifying arrest. *State ex rel. McCaffrey v. Shanks*, 124 Wis. 2d 216, 236, 369 N.W.2d 743 (Ct. App. 1985).

¶6 The arresting officer was Mark Howard, with more than eight years of law enforcement experience when he arrested Westberg. Howard testified that on the midnight shift more than seventy-five percent of the citizens he encountered were intoxicated and he had arrested two hundred for drunk driving during his tenure with the department. Howard testified that as he first approached the vehicle, Westberg got out of the car and was conspicuously ignoring him. When Howard spoke to Westberg, he tried to avoid eye contact, he tried to avoid speaking to the officer, and when he did speak, it was with his head turned away from the officer. Howard testified that it was his experience that such behavior means the driver has been consuming intoxicants.

¶7 Howard stated that when Westberg was outside of his vehicle, Howard detected the faint odor of alcohol and noticed that Westberg's eyes were glassy and red. Howard ordered Westberg to get back into his vehicle and when he was in the confined area of the vehicle, Howard noticed a stronger odor of alcohol. Ultimately, Howard ordered Westberg to exit the vehicle and had him recite the alphabet; although Westberg's speech was slurred, he correctly recited the alphabet. In counting backwards from seventy-seven to sixty-five, Westberg's speech was still slurred and he stopped at sixty-seven.

¶8 Finally, Howard asked Westberg if he would perform physical field sobriety tests, and Westberg responded that he had hurt his knee or heel in a basketball game. Howard told him he would consider the injury if Westberg

performed the field sobriety test; Westberg responded he did not want to perform the test because it was cold and he wanted to go home. Howard specifically asked Westberg if he was refusing to participate in the field sobriety tests. Westberg did not answer, he just stared blankly at the officer. At length, Westberg made several more pleas to be able to go home. It was at this point Howard decided to arrest Westberg:

I told Mr. Westberg that based upon my observations of his driving, odor of intoxicants, glassy eyes, red eyes, slurred speech, performance on the verbal exercises, the totality of the circumstances, if he refused the physical exercises he would force me to arrest him for operating while intoxicated.

¶9 Westberg does not directly challenge Howard's testimony. He continues to contend that he was not driving erratically when he was stopped by Howard. This contention ignores our conclusion in *Westberg I* that his driving constituted reasonable suspicion to justify an investigative stop. Our decision in *Westberg I* is the law of the case; it is a "long-standing rule that a decision on a legal issue by an appellate court establishes the law of the case, which must be followed in all subsequent proceedings in the trial court or on later appeal." *Univest Corp. v. Gen. Split Corp.*, 148 Wis. 2d 29, 38, 435 N.W.2d 234 (1989). He also faults the officer for not transporting him to an indoor facility so that he could perform the field sobriety tests in a warm and comfortable environment. However, the officer testified that in his opinion the weather was not a factor and would not have prevented Westberg from performing the field sobriety tests.

¶10 We agree with the circuit court that Westberg's behavior in ignoring the officer and in refusing to submit to field sobriety tests is evidence of consciousness of guilt. See *State v. Bolstad*, 124 Wis. 2d 576, 583, 370 N.W.2d

257 (1985).³ We conclude that under the totality of the circumstances, Howard had probable cause to arrest Westberg.

By the Court.—Judgment affirmed.

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

³ In *State v. Bolstad*, 124 Wis. 2d 576, 370 N.W.2d 257 (1985), the supreme court was considering evidence of a refusal to submit to a chemical test under the implied consent law, whereas this case concerns field sobriety tests. That distinction does not call for a different conclusion.

