COURT OF APPEALS
DECISION
DATED AND FILED

September 30, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-1439 **Cir. Ct. No. 03TR000284**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID V. PUGH, SR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Vernon County: MICHAEL J. ROSBOROUGH, Judge. *Affirmed.*

¶1 VERGERONT, J.[1] David Pugh appeals a judgment of conviction for operating a motor vehicle while intoxicated in violation of WIS. STAT. § 346.63(1)(a). He contends the trial court erred in denying his motion to suppress evidence based on lack of probable cause to arrest. We affirm.

[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 unless otherwise noted.

¶2 The arresting officer, Wisconsin State Trooper Gary Helgerson, was the only witness at the hearing on the motion. He testified as follows. On March 2, 2003, at 1:20 a.m. he was on duty in Readstown, Wisconsin, parked in a parking lot at the intersection of Highways 14 and 131. He saw a vehicle approaching the intersection on Highway 131. The vehicle did not come to a complete stop at the stop sign; it then made a right turn onto Highway 14. The officer pulled out of the parking lot behind the vehicle and saw it cross the centerline of the roadway. At that point, the officer turned on his emergency red and blue flashing headlights. The vehicle did nothing in response but continued westbound. As the vehicle approached the intersection of Highways 14 and 61, it was in the left lane of the two west bounds lanes. The officer observed that the left blinker light was on, and then saw the vehicle move over in the left lane to the dotted line between the left driving lane and the right passing lane. At that point, the officer turned on his emergency siren. The vehicle made a left turn onto Highway 61/131 and the officer followed it. The vehicle went past a driveway into the Kickapoo Inn and then pulled over on the gravel shoulder.

¶3 The officer went up to the vehicle and spoke to the driver, who was later identified as Pugh. The officer noticed that the vehicle and the driver smelled of intoxicants and that Pugh's eyes were red. The officer asked Pugh if he had been drinking. Pugh initially said he had consumed three or four drinks, and then at another point said he had consumed four or five drinks, in Readstown. The officer asked Pugh to step out of the car, which he did. Pugh's speech was "good."

¶4 The officer then administered three field sobriety tests—the Horizontal Gaze Nystagmus (HGN), the walk-and-turn, and the one-legged stand. These tests, in the officer's opinion, yielded a number of clues of intoxication.

After these tests were completed, the officer asked Pugh to give a breath sample for a preliminary breath test (PBT). Pugh did blow into the mouth piece of the tester, but did not give an adequate sample, which, the officer explained, meant Pugh did not blow hard enough. The officer gave Pugh the opportunity to do that three or four times and each time Pugh failed to give an adequate sample. Pugh said after the second time he was trying to give an adequate sample. After these unsuccessful attempts to obtain an adequate sample, the officer placed Pugh under arrest.

¶5 Based on the officer's testimony, which the court accepted as credible, the circuit court concluded the officer had probable cause to arrest Pugh for driving while under the influence of an intoxicant. It therefore denied the motion.

¶6 Pugh argues on appeal, as he did in the trial court, that the results of the walk-and-turn test and the one-legged-stand test are not probative of his ability to drive because of his weight: the citation notes that his weight is 300 pounds and his height is 6′3″. Pugh relies on instructions for these tests that contain cautions that being overweight, or being fifty pounds or more overweight, may, or do, compromise the validity of these tests. He also argues that without the results of these two tests, the three clues the officer observed for the HGN do not indicate intoxication. We need not address these arguments, because we are satisfied that, even without the results of these three tests, the officer had probable cause to arrest Pugh for driving while "[u]nder the influence of an intoxicant … to a degree which renders [one] incapable of safely driving." WIS. STAT. § 343.63(1)(a).

¶7 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, 525 N.W.2d 102 (Ct. App. 1994). Probable cause is neither a technical nor a legalistic concept; rather, it is a "flexible, common-sense measure of the plausibility of particular conclusions about human behavior." ***State v. Petrone***, 161 Wis. 2d 530, 547-48, 468 N.W.2d 676 (1991), *cert. denied*, 502 U.S. 925 (1991). While the circumstances within the arresting officer's knowledge need not be sufficient to make the defendant's guilt more probable than not, the defendant's guilt must be more than a mere possibility for the arrest to be constitutional. ***State v. Paszek***, 50 Wis. 2d 619, 625, 184 N.W.2d 836 (1971). Whether undisputed facts show probable cause to arrest is a question of law, which we review de novo. ***Babbitt***, 188 Wis. 2d at 356.

¶8 The observations the officer made of the vehicle are sufficient to lead a reasonable officer to believe that the driver was not capable of driving safely: the incomplete stop, crossing the centerline, moving to the right of the left-hand lane to make a left turn, and not responding to the officer's flashing lights. The observations the officer made and the information Pugh provided after the stop were sufficient to lead a reasonable officer to believe that Pugh had consumed alcohol to a degree that made him incapable of driving safely: his red eyes, the odor of intoxicants from the vehicle and his person, and his acknowledgement that he had consumed "four to five drinks." More particularly, Pugh's initial admission that he had consumed three or four drinks and his later admission that he had consumed four or five drinks gives rise to a reasonable inference that Pugh understated the amount he had to drink even when he said "four or five."

¶9 We conclude that the officer had the requisite probable cause to arrest even before attempting to take a breath sample for the PBT—which requires

a showing that is less than probable cause to arrest. ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 316, 603 N.W.2d 541 (1999) (concluding that WIS. STAT. § 343.303 authorizes a PBT based on a quantum of proof that is greater than the reasonable suspicion necessary to justify an investigative stop, but less than the level of proof required to establish probable cause of arrest"). We also conclude that a reasonable officer could infer from the inadequacy of the breath samples Pugh produced that Pugh knew he had consumed enough to drink to impair his ability to drive safely and did not want to provide evidence of that. *See* ***Babbitt***, 188 Wis. 2d at 358-60, 363 (driver's refusal to submit to a field sobriety test may be used as evidence of probable cause; like the refusal to submit to an intoxilyzer test, the reasonable inference from refusal is consciousness of guilt).

¶10 Thus, at the time the officer placed Pugh under arrest, the officer had reasonable grounds to believe that Pugh was operating a motor vehicle while intoxicated in violation of WIS. STAT. § 346.63(1)(a). The trial court therefore properly denied his motion to suppress evidence.

By the Court.—Judgment affirmed.

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