COURT OF APPEALS DECISION DATED AND RELEASED

August 2, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. **95-0872-FT**

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

COUNTY OF WINNEBAGO,

Plaintiff-Respondent,

v.

RALPH WACHTVEITL,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Winnebago County: WILLIAM H. CARVER, Judge. *Affirmed.*

NETTESHEIM, J. Ralph Wachtveitl appeals from a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant pursuant to § 346.63(1), STATS. On appeal, Wachtveitl contends: (1) the State failed to establish that the arresting officer had probable cause to arrest Wachtveitl; and (2) the trial court improperly limited Wachtveitl's constitutional right to call a witness on his behalf. We reject both of Wachtveitl's arguments and affirm the judgment of conviction.

BACKGROUND

The evidence adduced at a hearing on Wachtveitl's motion to dismiss for lack of probable cause established the relevant facts. During the early evening of October 19, 1994, two occupants of an ambulance radioed a report to the police authorities that they were following a vehicle which was being operated in an extremely erratic manner, including crossing the center line at least six times, crossing the fog line on the right side of the road and erratic speeds varying from forty-five miles per hour to seventy miles per hour.

Sergeant William Tedlie of the Winnebago County Sheriff's Department responded to the report, located the suspect vehicle and took up pursuit. During this pursuit, Tedlie observed the vehicle cross the center line once and then swerve back into the right lane. Based on the information he obtained from the ambulance personnel and on his own observation of the vehicle, Tedlie stopped the vehicle and asked the driver whether he was tired or had been drinking. The driver responded affirmatively to both questions. Tedlie requested identification from the driver, who fumbled in an effort to produce his driver's license. The driver proved to be Wachtveitl.

Tedlie then asked Wachtveitl to exit the vehicle, at which time Tedlie detected the odor of alcohol on Wachtveitl's breath and an unsteadiness in his walk. Wachtveitl then admitted again to having had a few drinks. Wachtveitl was unable to perform any of the field sobriety tests requested by Tedlie. Tedlie arrested Wachtveitl for operating a motor vehicle while under the influence of intoxicants.

Officer Richard Smith then arrived on the scene. Tedlie turned Wachtveitl's custody over to Smith who then transported Wachtveitl to the sheriff's department for further processing.

At the hearing on motion to dismiss, Wachtveitl produced Smith as a witness. Smith testified that he arrived at the scene at 7:06 p.m. and that Wachtveitl was already in restraints and under arrest at that time.

The trial court ruled that probable cause supported Wachtveitl's arrest. Even discounting the field sobriety tests and Tedlie's other observations of Wachtveitl, the court held that the report of the ambulance personnel, coupled with Wachtveitl's admission to Tedlie that he had been drinking, constituted probable cause for the arrest.

The parties then stipulated that the evidence presented at the probable cause hearing would constitute the proofs at trial. Based upon this stipulated evidence, the trial court adjudged Wachtveitl guilty. Wachtveitl appeals the court's denial of his motion to dismiss based upon his claim that Tedlie did not have probable cause to arrest him. He also claims that the court improperly barred Smith from testifying.

DISCUSSION

The facts relative to the question of probable cause are not disputed. Whether undisputed facts constitute probable cause to arrest is a question of law which we review without deference to the trial court. ***State v. Babbitt***, 188 Wis.2d 349, 356, 525 N.W.2d 102, 104 (Ct. App. 1994). In determining whether probable cause exists, we 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. ***Id***. Probable cause does not require proof beyond a reasonable doubt or even that guilt is more likely than not. ***Id***. at 357, 525 N.W.2d at 104.

We agree with the trial court's holding that the erratic and dangerous driving reported to Tedlie, coupled with Tedlie's own observations of Wachtveitl's erratic driving and Wachtveitl's admission that he had been drinking, provided Tedlie with reasonable grounds to suspect that Wachtveitl was intoxicated. Probable cause does not bar suspicion; rather, it bars "bare suspicion." ***State v. Drogsvold***, 104 Wis.2d 247, 254, 311 N.W.2d 243, 247 (Ct. App. 1981). Here, Tedlie's suspicion was well grounded in reported and observed fact.

Wachtveitl argues, however, that this case is governed by ***State v. Swanson,*** 164 Wis.2d 437, 475 N.W.2d 148 (1991). We disagree. The issue in ***Swanson*** was whether the defendant reasonably understood that he was in custody such that he could be charged with escape. *See* ***id***. at 444, 475 N.W.2d at 151. That is a different inquiry than whether the police have probable cause to arrest.

Moreover, contrary to Wachtveitl's representation, the ***Swanson*** court did not say that the police lacked probable cause to arrest Swanson under the facts of that case. Rather, in a footnote constituting dicta, the court said that while the police had a reasonable suspicion that the defendant had committed a

criminal act, they "*arguably* lacked probable cause to arrest Swanson at the time of the search." ***Id***. at 453 n.6, 475 N.W.2d at 155. ***Swanson*** does not control this case.

Next, Wachtveitl contends that the trial court improperly precluded Smith from testifying in his behalf at the suppression hearing. We disagree. The transcript of the suppression hearing reveals that the court initially sustained the State's objection to Wachtveitl's inquiry of Smith as to what time Smith arrived on the scene. However, after some discussion between the court and Wachtveitl's attorney, Smith was permitted to answer the question and to further establish that Wachtveitl was already handcuffed and under arrest when he arrived. Thus, the evidence which Wachtveitl contends the court precluded was actually received.

In any event, as we have already held, Smith's testimony was not relevant to the question of probable cause since Tedlie already had probable cause to arrest Wachtveitl before Smith arrived on the scene.

By the Court.—Judgment affirmed.

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