COURT OF APPEALS
DECISION
DATED AND RELEASED

August 22, 1995

No. 95-0916-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DANIEL JOSEPH CHAULKLIN,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed.*

FINE, J. Daniel Joseph Chaulklin appeals from the judgment convicting him of operating a motor vehicle under the influence of an intoxicant. *See* §§ 346.63(1)(a) & 346.65(2), STATS. The dispositive issue on this appeal is whether there was probable cause to arrest him for drunk driving.[1] We affirm.

[1] Chaulklin pled no contest. He may, nevertheless, contest the trial court's determination that there was probable cause for his arrest. *See* § 971.31(10), STATS.

I.

Chaulklin was arrested by Scott Beaver, a police officer employed by the city of Milwaukee. Beaver and his partner were sent by a police dispatcher to the scene of a two-car accident that was caused, at least in part, by Chaulklin driving through a stop sign without first stopping. The officers arrived two to three minutes after the accident.

Beaver testified that when he interviewed Chaulklin at the accident scene, Chaulklin told him that he had had a couple of beers.[2] According to Beaver, Chaulklin "had a strong odor of an alcoholic beverage about him," Chaulklin was "belligerent," and Chaulklin's "speech was slurred, and he had glassy, bloodshot eyes." Although Beaver believed that Chaulklin had been driving under the influence of an intoxicant, he did not have Chaulklin do any field-sobriety tests because, according to Beaver's testimony, Chaulklin told the officers that he had hurt his legs in the accident and Beaver

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[2] Without a citation to the record that supports the representation, Chaulklin's brief on this appeal contends that his admission to having drunk a couple of beers was made *after* his arrest. The record, however, is to the contrary, as the following colloquy between the prosecutor and Beaver attests:

QYou stated earlier that the defendant told you that he had a couple of beers; is that correct?

ACorrect.

QWhen did he tell you that, before or after he had been placed under arrest?

AThat was before, while we were on the street.

Chaulklin did not testify at the suppression hearing, and we have been unable to find any support for the representation in Chaulklin's brief that the admission was made after the arrest. Further, Chaulklin's reply brief compounds counsel's lack of candor in his main brief by representing that the trial court found that Chaulklin's admission about drinking the beers "was obtained after his arrest." This, too, is not correct. We admonish counsel, Mark Lukoff, to comply with SCR 20:3.3 in all of his future submissions to this court. Sadly, this is not the first time that counsel has been admonished about his responsibilities of candor towards judicial tribunals. ***Burrus v. Young***, 808 F.2d 578, 587–588 & 588 n.3 (7th Cir. 1986) (Coffey, J., concurring); ***Framer v. Prast***, 721 F.2d 602, 606 (7th Cir. 1983).

and his partner "felt that it wouldn't be fair to him to have him perform the tests." Neither Beaver nor his partner asked Chaulklin to do field-sobriety tests that did not require walking—recitation of the alphabet or placement of his finger on the tip of his nose.

The trial court found that the officers had probable cause to arrest Chaulklin for operating a motor vehicle under the influence of an intoxicant.

II.

The material facts here are not disputed in the record. In concluding that Beaver had probable cause to arrest Chaulklin for drunk driving, the trial court found that Chaulklin drove through a stop sign, had the "strong odor of alcoholic beverages," had slurred speech, glassy, bloodshot eyes, was belligerent, and that there was "an indication" that he had been drinking beer before the accident.

> Whether undisputed facts constitute probable cause is a question of law that we review without deference to the trial court. *State v. Drogsvold*, 104 Wis.2d 247, 262, 311 N.W.2d 243, 250 (Ct. App. 1981). 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. Nordness*, 128 Wis.2d 15, 35, 381 N.W.2d 300, 308 (1986). Probable cause to arrest does not require "proof beyond a reasonable doubt or even that guilt is more likely than not." *State v. Welsh*, 108 Wis.2d 319, 329, 321 N.W.2d 245, 251 (1982). It is sufficient that a reasonable officer would conclude, based upon the information in the officer's possession, that the "defendant probably committed [the offense]." *State v. Koch*, 175 Wis.2d 684, 701, 499 N.W.2d 152, 161 (1993).

State v. Babbitt, 188 Wis.2d 349, 356–357, 525 N.W.2d 102, 104 (Ct. App. 1994). Chaulklin contends, however, that ***State v. Seibel***, 163 Wis.2d 164, 471 N.W.2d 226 (1991), and ***State v. Swanson***, 164 Wis.2d 437, 475 N.W.2d 148 (1991), have modified for drunk driving cases this common-sense approach to what constitutes probable cause for an arrest. Specifically, Chaulklin argues that ***Swanson*** requires that a field-sobriety test be given as a prerequisite to a finding of probable cause. We disagree.

Seibel concerned whether, following the defendant's arrest for homicide by the negligent use of a motor vehicle as the result of a fatal accident triggered when the defendant's motorcycle sideswiped a car, ***Seibel***, 163 Wis.2d at 167, 471 N.W.2d at 228, the police had reasonable suspicion to believe that his blood "contained evidence" of that crime, ***id.***, 163 Wis.2d at 180, 471 N.W.2d at 233. The case held that evidence of erratic driving, "strong odor of intoxicants" emanating from the defendant's traveling companions, an officer's belief that he smelled "an intoxicant on the defendant," and the defendant's belligerence at the hospital to which he had been taken after the accident, was sufficient to permit taking a sample of the defendant's blood. ***Id.***, 163 Wis.2d at 181–183, 471 N.W.2d at 234. Further, although *dictum* in ***Swanson*** opines that a defendant's "unexplained erratic driving," the "odor of intoxicants" coming from the defendant as he spoke, and the fact that the erratic driving took place shortly after bar-closing time would not, in the absence of a field-sobriety test, constitute probable cause to believe that the defendant was driving under the influence of an intoxicant, ***Swanson***, 164 Wis.2d at 453–454 n.6, 475 N.W.2d at 155 n.6, it misreads ***Seibel***, 163 Wis.2d at 183, 471 N.W.2d at 235, to hold that "similar factors" to those presented in ***Swanson*** constituted "reasonable suspicion but not probable cause." ***Seibel*** did not so hold. Moreover, even ***Swanson***'s *dictum* does not support Chaulklin's position here, where the totality of the evidence together with factors not present in ***Swanson*** add up to probable cause even in the absence of a field-sobriety test. *See* ***Babbitt***, 188 Wis.2d at 357, 525 N.W.2d at 104 (erratic driving, odor of alcoholic beverage, glassy and bloodshot eyes, slow and deliberate walk, lack of cooperation constituted probable cause to arrest defendant for drunk driving) (alternate holding); ***State v. Wille***, 185 Wis.2d 673, 684, 518 N.W.2d 325, 329 (Ct. App. 1994) ("The *Swanson* footnote does not mean that under all circumstances the officer must first perform a field sobriety test, before deciding whether to arrest for operating a motor vehicle under the influence of an intoxicant.").

By the Court.—Judgment affirmed.[3]

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

[3] We do not discuss the State's alternate argument that Chaulklin is precluded by the result of the hearing on his refusal to submit to blood-alcohol tests from litigating whether there was probable cause for his arrest. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).