COURT OF APPEALS
DECISION
DATED AND RELEASED

January 4, 1996

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. 95-1650-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KENNETH E. HANSON,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Dane County: STUART A. SCHWARTZ, Judge. *Affirmed.*

DYKMAN, J. This is a single-judge appeal decided pursuant to § 752.31(2)(c), STATS. Kenneth E. Hanson appeals from a judgment convicting him of operating a motor vehicle while intoxicated, contrary to § 346.63(1)(a), STATS. He asserts that the police did not have probable cause to arrest him and, therefore, the trial court erred by denying his motion to suppress the results of an intoxilyzer test showing his blood alcohol content to be .11. We conclude that the police had probable cause to arrest Hanson thereby permitting the intoxilyzer test to be used as evidence against him. We, therefore, affirm.

BACKGROUND

On September 24, 1993, Hanson was driving a truck on Highway 18/151 in the Town of Fitchburg. He stopped at a weigh station to have his truck weighed and because the truck was overweight, he was asked to park it and show the inspectors his papers and log book. Three inspectors noted a strong odor of intoxicants on Hanson. Two of them administered preliminary breath tests on him, the results of which were .16 and .15. The inspectors took Hanson to the Fitchburg Police Department where they administered an intoxilyzer test. The result was .11. The police issued him two citations for violating § 346.63(1)(a) and (b), STATS.[1]

We have taken these facts from two police reports which the parties stipulated would form the record before the trial court. The parties refer to other citations which are not of record. RULE 809.19(1)(d) & (e), STATS., require parties to cite the record to support facts and arguments. ***State v. Lass***, 194 Wis.2d 592, 605, 535 N.W.2d 904, 909 (Ct. App. 1995). We will not consider arguments that are not supported by the record. ***Id.*** at 605-06, 535 N.W.2d at 909. A party wishing to rely upon matters not in the record must move this court to supplement the record. *See* RULE 809.14(1), STATS. Hanson has failed to do this. We, therefore, consider only the two citations we have mentioned.

DISCUSSION

Section 343.303, STATS., requires that a law enforcement officer have probable cause to believe that a person has been driving while intoxicated before requesting the driver to take a preliminary breath test. However, if the driver is operating a commercial vehicle while on duty and an officer detects any presence of alcohol on the driver, the officer may request a preliminary breath test. ***Id.*** This is because no one may drive a commercial motor vehicle while having a measured alcohol concentration above 0.0. Section 346.63(7)(a)1, STATS.

Hanson argues that his arrest for operating while intoxicated under § 346.63(1), STATS., was without probable cause because the arrest could not have been for violating § 346.63(7). That is so, he asserts, because there is no

[1] These citations may both assert the same statutory violation.

statutory provision for blood alcohol testing after an arrest for violating § 346.63(7). But Hanson only assumes that the officers arrested him in order to determine whether they could also cite him for a violation of § 346.63(1), STATS. The only reason the police arrested Hanson and brought him to the Fitchburg Police Department was to administer an intoxilyzer test. There is no record of a citation or an arrest for violating § 346.63(7). There are two citations of record, one for violating § 346.63(1)(a) and one for violating § 346.63(1)(b). The criminal complaint includes two counts for violations of these same two paragraphs. The trial court dealt with these two charges only. It said: "I will accept [Hanson's] plea at this time. I will dismiss Count No. 2 of the criminal complaint under 93-CT-1898. I will adjudge the defendant guilty on Count 1." Because the citations, the complaint, the judge's comments and the judgment of conviction do not show that Hanson was arrested for a violation of § 346.63(7), we will not consider that charge further. But even if we were to do so, the result would be the same.

The police smelled intoxicants on Hanson while he was at the weigh station. The odor of intoxicants coupled with the fact that Hanson was operating a commercial motor vehicle gave the police the right, under § 343.303, STATS., to request a preliminary breath test. They did so, and Hanson took two tests, the results of which were .15 and .16. These tests, plus the strong odor of intoxicants, gave the police probable cause to arrest Hanson for a violation of § 346.63(1)(b), STATS.

Hanson cites ***County of Dane v. Sharpee***, 154 Wis.2d 515, 519-20, 453 N.W.2d 508, 510-11 (Ct. App. 1990), as holding that a preliminary breath test may not be the sole determinant of probable cause in an operating while intoxicated case. But that is not what ***Sharpee*** holds. In ***Sharpee***, a defendant charged with operating while intoxicated argued that a preliminary breath test which showed a blood alcohol concentration of .01 negated a finding of probable cause to arrest. ***Id.*** at 518, 453 N.W.2d at 510. We disagreed, and noted that a preliminary breath test was only one of several facts which the arresting officer could consider. ***Id.*** at 820, 510 N.W.2d at 511. In that context, we noted: "The preliminary breath test is one of several elements going into the existence of probable cause to arrest—it is part of the `totality of circumstances' upon which the officer's determination of probable cause must rest. It is not the sole determinant." ***Id.*** (footnote omitted).

This quote from ***Sharpee*** cannot be taken out of the context of the facts of that case. Probable cause is a common sense, shorthand way of noting the relationship between cause and effect. It is an inquiry into likelihood. The very case upon which Hanson relies describes probable cause:

> 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." Finally, courts will look to the totality of the facts and circumstances faced by the officer at the time of the arrest to determine whether he or she reasonably believed that the defendant had committed an offense.

Id. at 518, 453 N.W.2d at 510 (citations and quoted sources omitted).

Based on these considerations, we concluded that despite a low preliminary breath test, the officer had probable cause to arrest the defendant for operating a motor vehicle while intoxicated. The preliminary breath test which suggested sobriety was outweighed by other indicia of intoxication. A common sense view of the ***Sharpee*** scene would be that through error or failure, the preliminary breath test was dramatically inaccurate, or that Sharpee was under the influence of something other than alcohol.

But that is the exception. Preliminary breath tests usually reflect, with fair but not perfect accuracy, the blood alcohol concentration in a person's blood. As ***Sharpee*** reveals, preliminary breath tests can sometimes be substantially inaccurate. But a preliminary breath test is sufficient for probable cause. By its very nature, probable cause deals with probabilities. Probability is a coarse sieve, leaving room for error. Not all persons arrested on probable cause will be convicted at trial.

In ***Sharpee***, the police officer who stopped the defendant's automobile noticed a strong odor of intoxicants, slurred speech, bloodshot eyes and a blank stare. ***Id.*** at 517, 453 N.W.2d at 509. Despite a preliminary breath test indicating sobriety, the defendant was properly arrested for operating while intoxicated. ***Id.*** at 518-19, 453 N.W.2d at 510.

Here, the facts are reversed. No field sobriety tests were done. The only information the officers had was a strong odor of intoxicants, leading to a common sense belief that Hanson had recently consumed alcohol. The officers obtained two preliminary breath tests which carry a presumption of rough accuracy. The tests read .15 and .16 respectively.[2] From this, the officers concluded that it was probable that Hanson was operating his motor vehicle while intoxicated. We sustain this conclusion as reasonable.

Hanson asserts that there was no evidence establishing the reliability of the preliminary breath tests, no showing that the persons who administered the tests were qualified to do so, nor any evidence that the preliminary breath testing units were tested in accordance with administrative regulations. This assertion reflects Hanson's misunderstanding of the concept of probable cause. It is possible that the preliminary breath tests were unreliable, that the persons who administered them were unqualified and that the units were untested. But it is not probable that this was so. It is probable that the legislature would not authorize the use of preliminary breath tests if the results of those tests were inherently unreliable and haphazard. It is probable that if preliminary breath tests were wholly inaccurate, this fact would have been discovered by now. It is probable that the persons who administered the tests have been trained and are qualified to do so. A common sense knowledge of law enforcement procedures buttresses this probability. Finally, because common sense and experience tells us that administrative regulations are usually (though not always) followed, we conclude that it is probable that the units were properly tested. All that is necessary is that guilt is more than a possibility. ***Id.*** at 518, 453 N.W.2d at 510.

Hanson also argues that ***State v. Swanson***, 164 Wis.2d 437, 453-54 n.6, 475 N.W.2d 148, 155 (1991), and ***State v. Seibel***, 163 Wis.2d 164, 471 N.W.2d

[2] We need not decide whether probable cause would have existed had Hanson's preliminary breath tests been .10 and .11.

226, *cert. denied*, 502 U.S. 986 (1991), hold that something more than the odor of intoxicants is necessary for probable cause to arrest for operating while intoxicated. He asserts that a preliminary breath test does nothing more than explain the odor of intoxicants. But those cases involved other indicia of intoxication, not preliminary breath tests. Thus, they do not support Hanson's argument.

Finally, Hanson contends that if we affirm the procedure used by the police in this case, the police will be administering tests to all commercial operators without probable cause. But, under § 343.303, STATS., police can administer preliminary breath tests to all commercial operators where the police detect any presence of alcohol, a controlled substance or other drug, or a combination thereof. Though Hanson decries this result, the legislature has authorized this procedure and Hanson has not contested that statute's validity. Accordingly, we affirm.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports. *See* RULE 809.23(1)(b)4, STATS.