

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

July 30, 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, 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. 95-2236-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

State of Wisconsin,

Plaintiff-Respondent,

v.

Heidi Strom,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: DIANE S. SYKES, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Heidi L. Strom appeals from a judgment of conviction, following her no-contest plea, for causing injury by intoxicated use of a motor vehicle, contrary to § 940.25(1)(a), STATS. Strom argues that the trial court erred in denying her motion to suppress blood test evidence. We affirm.

City of Oak Creek Police Officer James Antisdell testified at the suppression hearing that on February 11, 1994, at approximately 11:40 p.m., he responded to a two-car accident. He stated that he observed two vehicles—a Ford Explorer laying on its left side partially in the southbound traffic lane and a Buick with extensive front-end damage completely blocking the northbound lane. Officer Antisdell first made contact with Strom, the driver of the Ford. Officer Antisdell stated that Strom was conscious, breathing, and did not appear to be in need of serious medical attention. She did, however, have a laceration above one of her eyes. Officer Antisdell stated that he detected “a strong odor” of alcohol from Strom's breath and her speech was somewhat slurred. Officer Antisdell also stated that Strom admitted that she had been drinking prior to the accident. He noted that she was able to answer most of his questions, but could not recall the accident. Officer Antisdell explained why he did not perform a field sobriety test:

I believe that I made a determination that based on speaking with the ... victim of the accident scene, I felt that the defendant in this case was operating while intoxicated.... At that time I didn't have the opportunity nor did I think it was relevant to ask the defendant to give me further evidence when I had made my determination that she was under arrest.

....

She was in the vehicle, seat-belted in the vehicle. She was somewhat uncomfortable. She wanted to be unbelted. I informed her that I'm not going to move you. You may have neck injuries. I'm not going to remove you. The Fire Department personnel got there. They rendered first aid, immobilized her somewhat. No, I didn't have the opportunity to render first aid—or render field sobriety test.

A blood sample drawn from Strom after she had been conveyed to a hospital revealed that she had a blood ethanol concentration of .156%.

Officer Antisdell also testified that he spoke with Cheryl Opine, the driver of the Buick, who had sustained numerous injuries. Officer Antisdell testified that Opine described the accident to him, stating that she had been driving southbound and Strom had been driving northbound. When Strom swerved into the southbound lane, she (Opine) swerved into the northbound lane in an attempt to avoid a collision, but Strom suddenly swerved into her. Officer Antisdell stated that Opine's description of the accident seemed accurate based on his observations of the scene.

The trial court denied Strom's suppress motion, stating:

I am satisfied that there was probable cause to arrest the defendant for OWI despite the fact that no field tests were performed. It's clear that there were exigent circumstances mitigating the performance of field tests, even verbal field tests, due to the fact that the defendant was immediately after the initial field interview at the scene conveyed to the hospital and then was receiving medical attention at the hospital, so the non-performance of the field test is not fatal to the finding of probable cause to arrest.

I'm satisfied that based on the defendant's slurred speech, the odor of alcohol and the manner in which the accident was caused that there was probable cause to place her under arrest ... and I'm further satisfied then that there was reasonable suspicion that her blood contained evidence of that crime, causing injury OWI, and that the blood test was therefore appropriate in this case and so ... the blood test will not be suppressed at this time for that reason.

A trial court's findings of fact will not be set aside on appeal unless they are clearly erroneous. Section 805.17(2), STATS. Whether probable cause to arrest exists based on the facts of a given case is a question of law which we review independently of the trial court. *State v. Truax*, 151 Wis.2d 354, 360, 444 N.W.2d 432, 435 (Ct. App. 1989).

“[A] blood sample may be drawn incident to a lawful arrest if the police reasonably suspect that the defendant's blood contains evidence of a crime.” *State v. Seibel*, 163 Wis.2d 164, 179, 471 N.W.2d 226, 233, *cert. denied*, 502 U.S. 986 (1991). Warrantless arrests are authorized by § 968.07(1)(d), STATS., when “[t]here are reasonable grounds to believe that the person is committing or has committed a crime.” What constitutes reasonable grounds—more commonly referred to as probable cause—has been described by our Supreme Court:

“Probable cause to arrest refers to that quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed a crime. It is not necessary that the evidence giving rise to such probable cause be sufficient to prove guilt beyond a reasonable doubt, nor must it be sufficient to prove that guilt is more probable than not. It is only necessary that the information lead a reasonable officer to believe that guilt is more than a possibility, and it is well established that the belief may be predicated in part upon hearsay information. The quantum of information which constitutes probable cause to arrest must be measured by the facts of the particular case.”

State v. Koch, 175 Wis.2d 684, 701, 499 N.W.2d 152, 161 (citation omitted), *cert. denied*, 510 U.S. 880 (1993). “Probable cause exists where the totality of the circumstances within the arresting officer's knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant probably committed a crime.” *Id.*

Strom argues that Officer Antidel lacked probable cause to arrest her and, therefore, the trial court erred in failing to suppress the blood alcohol test result.¹ Citing *State v. Seibel*, 163 Wis.2d 164, 471 N.W.2d 226 (1991), and

¹ Strom also argued that the six-month administrative suspension of her driver's license pursuant to § 343.305(7)-(8), STATS., is punishment in a separate proceeding such that any criminal prosecution arising from the same act would be a double jeopardy violation. Strom concedes in her reply brief, however, that *State v. McMaster*, ___ Wis.2d ___, 543 N.W.2d 499, 503 (Ct. App.

State v. Swanson, 164 Wis.2d 437, 475 N.W.2d 148 (1991), Strom also argues that: (1) “unexplained erratic driving coupled with the odor of intoxicants is not sufficient to constitute probable cause,” (2) “in the absence of field sobriety tests, police would ordinarily be viewed as lacking probable cause to arrest,” and (3) “a police officer has some duty to investigate possible innocent explanations for erratic driving and cannot simply draw an incriminating inference of ignorance.”

First, contrary to Strom's arguments, erratic driving and the odor of intoxicants were not the only indicia of intoxication. Officer Antisdell testified that Strom had slurred speech and admitted that she had been drinking.

Second, the absence of field sobriety tests is not automatically fatal to a probable cause determination particularly where, as here, exigent circumstances—Strom's injuries—were present. As we have explained: “The *Swanson* footnote² 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 while under the influence of an intoxicant.” *State v. Wille*, 185 Wis.2d 673, 684, 518 N.W.2d 325, 329 (Ct. App. 1994).

Officer Antisdell had numerous grounds to suspect that Strom was guilty of a crime even absent field sobriety tests. His decision to forgo those tests was not unreasonable given that Strom was injured and was being treated by medical professionals at the scene and at the hospital throughout the evening.

(..continued)

1995) (A “criminal prosecution for operating motor vehicle with a prohibited blood alcohol concentration subsequent to the administrative suspension of the driver's operating privileges does not constitute multiple punishment and therefore does not violate the Double Jeopardy Clause.”) (*review granted*, Mar. 12, 1996), conclusively refutes her argument.

² The relevant portions of the *Swanson* footnote read: “Unexplained erratic driving, the odor of alcohol, and the coincidental time of the incident form the basis for a reasonable suspicion but should not, in the absence of a field sobriety test, constitute probable cause to arrest someone for driving while under the influence of intoxicants.” *State v. Swanson*, 164 Wis.2d 437, 454 n.6, 475 N.W.2d 148, 155 n.6 (1991).

Finally, Strom cites the following language from *Swanson* in support of her argument:

Furthermore, the trial court record fails to indicate that the police officers investigated further any of the other alleged wrongdoings on the part of Swanson. The unexplained erratic driving could very well have been explained, for example, by a mechanical failure with the automobile. Without an investigation, the officers would be left with only suspicion.

Id. at 454 n.6, 475 N.W.2d at 155 n.6. Here, however, Officer Antisdell had much more evidence for concluding that Strom had been operating her vehicle while under the influence of an intoxicant. In addition to erratic driving, he relied on Strom's slurred speech, the smell of intoxicants, her admission that she had been drinking, her failure to recall the accident, and Opine's description of how the accident occurred. Under the totality of the circumstances, Officer Antisdell had probable cause to reasonably believe that Strom had committed a crime.

Once a lawful arrest based on probable cause has been made, a blood sample may be drawn if the police have a reasonable suspicion that the defendant's blood contains evidence of a crime. *Seibel*, 163 Wis.2d at 179, 471 N.W.2d at 233. The trial court correctly concluded that Officer Antisdell had a reasonable suspicion of finding such evidence based on the same facts and circumstances which supported probable cause to arrest Strom.

Because the trial court correctly concluded that Officer Antisdell had probable cause to believe that Strom was operating her vehicle while intoxicated and a reasonable suspicion that her blood would contain evidence of that crime, we affirm.

By the Court. – Judgment affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.