COURT OF APPEALS DECISION DATED AND RELEASED

February 29, 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. 95-2706

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

COUNTY OF DANE,

Plaintiff-Respondent,

v.

SHARON R. CHAMBERLAIN,

Defendant-Appellant.

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

VERGERONT, J.[1] Sharon Chamberlain appeals from a judgment convicting her of operating a motor vehicle while under the influence of an intoxicant and operating a motor vehicle the wrong way on a divided highway, contrary to § 69.01 DANE COUNTY ORDINANCES. On appeal she contends that: (1) her detention was unlawful because the field sobriety tests administered by the detaining officer were not shown to be related to the reasons for which she was detained, and (2) there was no probable cause to arrest because the tests

[1] This appeal is decided by one judge pursuant to § 752.31(2), STATS.

administered were not shown to be probative. We conclude neither argument has merit and we therefore affirm.

At the hearing on Chamberlain's motion to suppress, Dale Anderson was the only witness, and he was not cross-examined by Chamberlain's counsel. Anderson is a deputy sheriff employed by the Dane County sheriff's office and has been for seven years. He has attended the police academy and a twenty-four hour course, the Standardized Field Sobriety School, which provides training in performing tests to identify persons who are under the influence of intoxicants. He has also attended a one-week field sobriety instructor course at the Wisconsin State Patrol Academy, and, as a result, is a certified field sobriety instructor, one of two for the Dane County sheriff's department.

At 9:48 p.m. on Saturday, September 24, 1994, Anderson was called to an accident on State Highway 113 at County Highway M. Two cars had collided head-on in the north-bound passing lane of the divided highway. The car driven by Chamberlain was going the wrong way. Chamberlain told Anderson that she had just left the Mariner's Restaurant and was going into Madison and did not know how she got in the lane she was in. Anderson could smell an odor of intoxicants from Chamberlain. Anderson observed damage to the car that would prevent its operation or safe operation, specifically, the front fender of the car was pushed into the wheel, preventing the wheel from turning. When Anderson told Chamberlain she would need a wrecker to remove her car, she asked why she could not drive it home. Anderson told Chamberlain that since he could smell intoxicants, he was going to perform field sobriety tests.

Anderson performed a number of standardized field sobriety tests on Chamberlain, which he had experience in giving and had provided instruction on. He first performed the horizontal gaze nystagmus test, which determines whether eye movement is jerky when the eyes are following an object. He had been trained to perform this test. He asked Chamberlain if the light rain bothered her and she said no. Anderson determined Chamberlain was not wearing contacts. He had her perform the test in a way to keep the light rain from affecting her eyes, as he had been trained. He described how he administered the test. Out of a possible six "clues" showing jerky eye movement, Chamberlain's performance of the test showed five clues.

The second test was the walk-and-turn test, which Anderson demonstrated and explained to Chamberlain. Part of this test involves testing for divided attention, a psycho-physical task that requires the person being tested to perform physical and mental tasks at the same time, such as watching the instructions, comprehending the instructions, processing information and doing physically what has been shown. This simulates the tasks involved in driving a car safely. Chamberlain was unable, on the walk-and-turn test, to remain in the position she was asked to remain in while watching Anderson demonstrate the test. There were a total of four other instances in performing the test in which she did not do as instructed, resulting in five clues. Based on Anderson's training, "the criteria for that test is two clues."

Based on his experience in administering these tests in the past, Anderson is able to begin to form an opinion as to the state of sobriety of the person taking the tests.

The third test was the one-leg stand test, which also has a divided attention component. In his testimony, Anderson described the test, his instructions and his demonstration. This test involves lifting one foot approximately six inches off the ground and counting from 1,001 to 1,030 with arms down at the person's sides. Chamberlain lifted her left foot from the ground for approximately two seconds, did not count, and then said she could not do that test even if she were sober. She then said she would try again, raised her left foot, immediately began hopping, and put her foot down, saying, "No, I guess I can't." Anderson considered that she was unable to complete this test.

Anderson then explained the finger dexterity test to Chamberlain and asked her to perform it. Chamberlain looked at her hand and moved her thumb. She was unable to take her thumb and touch her fingers in the order Anderson instructed her. She attempted to perform the test for about thirty seconds.

Based on the fact that Chamberlain was driving the wrong way on the highway and struck another vehicle, the odor of intoxicants on her, her performance on the tests, and the manner in which she conducted herself when

Anderson spoke to her, Anderson formed the opinion that Chamberlain was impaired by intoxicants, and he placed her under arrest.

The trial court concluded that the odor of intoxicants, coupled with the circumstances of the accident, were grounds for a reasonable suspicion that Chamberlain had been driving under the influence of intoxicants sufficient to conduct further inquiry; and that, after each step of inquiry, there was sufficient confirmation to continue, leading to probable cause for arrest.

In reviewing a trial court's denial of a motion to suppress evidence, we must uphold the court's findings of fact unless they are against the great weight and clear preponderance of the evidence. *See* ***State v. Whitrock***, 161 Wis.2d 960, 973, 468 N.W.2d 696, 701 (1991). However, whether a search and seizure meets constitutional standards is a question of law, which we review de novo. ***State v. Richardson***, 156 Wis.2d 128, 137-38, 456 N.W.2d 830, 833 (1990).

To execute a valid investigatory stop consistent with the Fourth Amendment prohibition against unreasonable searches and seizures, a law enforcement officer must reasonably suspect, in light of his or her experience, that some kind of criminal activity has taken or is taking place. ***Richardson***, 156 Wis.2d at 139, 456 N.W.2d at 834. An investigatory stop is permissible when the person's conduct may constitute only a civil forfeiture. ***State v. Krier***, 165 Wis.2d 673, 678, 478 N.W.2d 63, 65-66 (Ct. App. 1991). Upon stopping the individual, the officer may make reasonable inquiries to dispel or confirm the suspicions that justified the stop. ***Terry v. Ohio***, 392 U.S. 1, 22 (1968).

In assessing whether there exists reasonable suspicion for a particular stop, we must consider all the specific and articulable facts, taken together with the rational inferences from those facts. ***State v. Dunn***, 158 Wis.2d 138, 146, 462 N.W.2d 538, 541 (Ct. App. 1990). The question of what constitutes reasonable suspicion is a common sense test: under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience. ***State v. Jackson***, 147 Wis.2d 824, 834, 434 N.W.2d 386, 390 (1989).

Whether undisputed facts constitute probable cause is a question of law that we review de novo. ***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. ***Id.*** The inquiry is whether the arresting officer's knowledge at the time of 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.***

Chamberlain's argument is somewhat obscure. Both the challenge to the detention and to the arrest appear to be premised on the assumption that without scientific testimony on the validity of the field sobriety tests as an indicator of impaired ability to drive, the field sobriety tests are outside the scope of a lawful detention and the results observed by the officer may not be a basis for probable cause to arrest for driving while under the influence. Chamberlain cites no authority for this position and ignores what Anderson's testimony *does* establish.

Anderson had training and experience in administering the field sobriety tests and observing the results. He was familiar with how people look and act when they are under the influence of intoxicants. Although Anderson did not testify to the scientific basis for the tests, he did carefully explain what he told Chamberlain to do, what he showed her, and what Chamberlain said or did in response. Anderson's training and experience qualified him to testify to her behavior and the conclusions he drew from her behavior. Chamberlain did not object to Anderson's testimony concerning the tests he administered or the results he observed.

We conclude, as did the trial court, that the circumstances of the accident, the strong odor of alcohol on Chamberlain, and her inability to explain how she got on the wrong side of a divided highway constituted a reasonable suspicion of driving under the influence and justified further inquiry. We reject Chamberlain's argument that administering the field sobriety tests transformed the lawful detention into an unlawful one solely because Anderson did not establish the scientific validity of the tests. Asking Chamberlain to perform certain actions so that he could observe her ability to perform physical tasks and to understand and follow instructions and demonstrations is a proper continuation of the inquiry.

At the completion of the field sobriety tests, Anderson did have probable cause to believe that Chamberlain had been driving while intoxicated. It was reasonable for him to infer that Chamberlain's inability to follow his instructions and to stand, walk and move her fingers, as he directed and demonstrated, was due to intoxication. Under these circumstances, scientific testimony on the validity of the tests was not necessary to establish probable cause.

By the Court.—Judgment affirmed.

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