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June 14, 2017

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You are hereby notified that the Court has entered the following opinion and order:

2016AP1697-CR

State of Wisconsin v. Anthony S. Holbrook (L.C. # 2015CF347)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

Anthony S. Holbrook appeals from a judgment convicting him of operating a motor vehicle with a restricted controlled substance in his blood, fourth offense within five years, and with a minor child in the vehicle. He contends that the circuit court should have granted his motion to suppress evidence because police lacked probable cause to arrest him. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for

summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).¹ We affirm the judgment of the circuit court.

On November 15, 2014, police officer Michael Kirby stopped Holbrook's truck for going forty-four miles per hour in a twenty-five-mile-per-hour zone. When he approached the vehicle, he detected an odor of incense, which he knew from experience is often used to mask odors such as marijuana. He then saw Holbrook and observed that his pupils were small.

Kirby asked Holbrook for proof of insurance, and Holbrook responded by looking through papers from his glove box. While doing so, he took his foot off of the brake, and his truck began rolling backwards. Holbrook did not notice that his truck was moving until its tires struck the curb and came to a stop. Knowing that slow reaction speed is a sign of impairment, Kirby decided to call in another officer to assist in the investigation.

After Kirby's call for backup, Holbrook asked for a speeding ticket and preliminary breath test so that he could leave. Kirby found these requests unusual. He also found Holbrook's behavior with respect to the truck's passenger—Holbrook's twelve-year-old daughter—unusual. When Kirby attempted to speak to her, Holbrook locked the truck and refused to roll down her window. Kirby described Holbrook's speech to him as slurred. Holbrook indicated that this was due to a syndrome called "wet brain."

Police Officer Duane Ott soon arrived at the scene. He observed Holbrook's small pupils and slurred speech, which, in his experience, often indicate "some type of drug impairment." He

¹ All references to the Wisconsin Statutes are to the 2015-16 version.

then administered standard field sobriety tests on which Holbrook performed poorly. Ott and Kirby subsequently placed Holbrook under arrest and transported him to a medical center for a blood draw. A test showed that Holbrook had tetrahydrocannabinol in his blood.

Holbrook moved to suppress all evidence gathered in the case, arguing that probable cause did not support his arrest. Following a hearing on the matter, the circuit court denied the motion. Eventually, Holbrook pled to and was convicted of operating a motor vehicle with a restricted controlled substance in his blood, fourth offense within five years, and with a minor child in the vehicle. This appeal follows.

On appeal, Holbrook contends that the circuit court should have granted his motion to suppress evidence because police lacked probable cause to arrest him. He seeks reversal of his conviction as well as the suppression ruling.

When reviewing a circuit court's decision on a motion to suppress evidence, we apply the clearly erroneous standard to the court's findings of fact. *State v. Guard*, 2012 WI App 8, ¶14, 338 Wis. 2d 385, 808 N.W.2d 718. However, we review the court's application of constitutional principles to those facts de novo. *Id.*

In general, if police lack probable cause to arrest a suspect, the fruits of the arrest must be suppressed. *See New York v. Harris*, 495 U.S. 14, 18-19 (1990). "Probable cause to arrest is the quantum of evidence within the arresting officer's knowledge at the time of the arrest which would lead a reasonable police officer to believe that the defendant probably committed or was committing a crime." *State v. Secrist*, 224 Wis. 2d 201, 212, 589 N.W.2d 387 (1999). "There must be more than a possibility or suspicion that the defendant committed an offense, but the

evidence need not reach the level of proof beyond a reasonable doubt or even that guilt is more likely than not.” *Id.*

Here, we are satisfied that police had probable cause to arrest Holbrook for operating a motor vehicle while under the influence. As noted by the State, Holbrook exhibited numerous signs of impairment including excessive speeding, small pupil size, slow reaction speed, slurred speech, and poor performance on the standard field sobriety tests. Moreover, other facts were suspicious and suggested that Holbrook may have recently used a controlled substance. These included the odor of incense and his unusual requests and behavior. Accordingly, we conclude that the circuit court properly denied Holbrook’s motion to suppress.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published and may not be cited except as provided under WIS. STAT. RULE 809.23(3).

Diane M. Fremgen
Clerk of Court of Appeals