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October 7, 2020

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

2019AP1882-CR State of Wisconsin v. Thomas T. Martin (L.C. #2018CF323)

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

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Thomas T. Martin appeals a judgment of conviction for operating a motor vehicle while intoxicated (OWI) sixth offense and challenges an order denying his motion to suppress. He contends that the officer lacked probable cause to arrest him. Based on 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 (2017-18).[1] We affirm.

At around 6:00 p.m. on July 15, 2018, a sunny day, Washington County Sheriff's Deputy Ryan Gullickson responded to a dispatch about a single-vehicle motorcycle accident on a county highway. Upon Gullickson's arrival at the scene, several first responders were tending to Martin who was lying in a ditch in the grass. While medical personnel tended to Martin, Gullickson investigated the area and determined it was a single-vehicle motorcycle accident, with the motorcycle lying next to Martin. Gullickson confirmed Martin's identity and that Martin was the only one on the motorcycle.

While Gullickson was investigating the crash, Washington County Sheriff's Deputy Alexander Herriges arrived. Herriges has been employed with the sheriff's department for ten years. He has attended advanced trainings on detecting impairment and administering standardized field sobriety tests, and he trains others on the same.

Herriges questioned the witness who observed the accident. The citizen witness informed Herriges that while she was driving, she was passed by the motorcycle going westbound on the county highway. The witness said she was traveling between fifty to fifty-five miles per hour in a fifty-five-mile-per-hour zone. When the motorcycle passed the witness, she estimated that Martin was going seventy miles per hour. The witness then saw the motorcycle crash with Martin thrown from the vehicle. Herriges was aware that the witness reported that Martin was not wearing a helmet and had been bleeding from his head.

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

Herriges ran the plate on the motorcycle and determined that it was registered to Martin and that Martin had five prior OWI convictions. With this information, Herriges believed that Martin would be subject to a .02% prohibited alcohol content (PAC) standard.[2]

While Gullickson stayed at the scene, Herriges followed Martin to the hospital. Herriges was not able to make contact with Martin until after the staff completed their initial triage of Martin. When Herriges was able to talk to Martin, Martin was in a cervical collar that partially covered his mouth. When Herriges asked what happened, Martin responded that he was walking on the county highway when someone hit him with a motorcycle. When Herriges tried to ask another question, Martin said he did not want to answer any more questions and wished to speak to his attorney.

While Herriges spoke with Martin, Herriges noticed that Martin's eyes were bloodshot, and Martin was slurring his words. Herriges was unable to perform any standard field sobriety tests on Martin because of his condition. Martin refused to provide a breath sample. Herriges placed Martin under arrest. A chemical test of his blood showed a .148% blood alcohol content.

Martin was charged with fifth or sixth offense OWI under WIS. STAT. § 346.63(1)(a) and a fifth or sixth offense PAC under § 346.63(1)(b). Martin moved to suppress the evidence on the ground that probable cause for his arrest was lacking. The court denied the motion. Martin pled guilty to the OWI and the State dismissed and read in the PAC charge. Martin appeals.

When reviewing a denial of a motion to suppress on probable cause grounds, we uphold the circuit court's factual findings unless they are clearly erroneous. ***State v. Blatterman***, 2015

[2] WISCONSIN STAT. § 340.01(46m)(c) defines "[p]rohibited alcohol concentration" as "an alcohol concentration of more than 0.02" for persons who have three or more "prior convictions, suspensions or revocations as counted under [WIS. STAT. §] 343.307(1)." There is no dispute that Martin was subject to the .02% PAC standard.

WI 46, ¶16, 362 Wis. 2d 138, 864 N.W.2d 26. We independently review the application of those facts to constitutional principles, as that is a question of law. ***Id.*** When the facts are not disputed, whether probable cause to arrest exists is a question of law this court determines independently of the circuit court but benefitting from its analysis. ***State v. Lange***, 2009 WI 49, ¶20, 317 Wis. 2d 383, 766 N.W.2d 551.

The Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution protects individuals against unreasonable seizures. It is not an unreasonable seizure when a law enforcement officer reasonably believes that the suspect probably committed or was committing a crime. ***State v. Secrist***, 224 Wis. 2d 201, 212, 589 N.W.2d 387 (1999); ***State v. Sykes***, 2005 WI 48, ¶14, 279 Wis. 2d 742, 695 N.W.2d 277 ("A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment …." (citation omitted)).

Applied to this case, 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 was operating a motor vehicle in violation of the applicable PAC. *See* ***Lange***, 317 Wis. 2d 383, ¶¶19-20 (addressing operating while under the influence of an intoxicant). "When a police officer is confronted with two reasonable competing inferences, one justifying arrest and the other not, the officer is entitled to rely on the reasonable inference justifying arrest." ***State v. Kutz***, 2003 WI App 205, ¶12, 267 Wis. 2d 531, 671 N.W.2d 660.

WISCONSIN STAT. § 346.63(1)(b) prohibits a person from driving a motor vehicle with a PAC. As noted above, the PAC for a person with three or more prior convictions is 0.02, which is the case for Martin. *See* WIS. STAT. § 340.01(46m)(c).

The following undisputed facts are clear from the record and support probable cause that Martin was operating a motor vehicle with a PAC of .02%. Martin was in a single-vehicle accident, crashing his motorcycle off the road on a sunny day. A citizen witness reported that Martin was driving in excess of the speed limit before the accident. Martin fabricated a story that he was struck by someone else driving a motorcycle while walking on the county highway. Martin's speech was slurred, and his eyes were bloodshot. The officer investigating Martin had ten years of experience, including receiving training on driving while under the influence, and training others. Martin was subject to the .02% restriction based on prior OWI convictions.

Martin argues that there was insufficient evidence to support probable cause because neither the police officers nor medical personnel detected an odor of intoxicants, Martin never admitted to drinking, and there were no containers at the scene. Martin's argument fails because the isolated facts he identifies ignore the totality of significant facts indicating that he was operating in excess of the prohibited blood alcohol content.

Probable cause must be determined on the *totality* of the circumstances. It is a "flexible, common-sense measure of the plausibility of particular conclusions about human behavior." ***Lange***, 317 Wis. 2d 383, ¶20 (citation omitted). The threshold for probable cause is not conclusive proof or even a preponderance of evidence. ***Id.***, ¶38. If guilt is more than a possibility, probable cause exists. ***County of Dane v. Sharpee***, 154 Wis. 2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990).

Both parties address ***Lange*** and we agree that it provides helpful guidance. Lange drove into a utility pole and, as here, field sobriety tests could not be performed because of injuries. ***Lange***, 317 Wis. 2d 383, ¶34. The supreme court held that five factors established probable cause for OWI: (1) defendant's dangerous driving to the point of being "wildly dangerous," (2) the experience of the law enforcement officer, (3) time of night the incident occurred, (4) prior OWI

convictions, (5) the nature of the accident where it impedes the law enforcement officers' opportunities for further investigation. ***Id.***, ¶¶23-34.

In ***Lange***, there were no odors, admissions of consumption, empty bottles or cans, or known visits to a bar. ***Id.***, ¶21. Nevertheless, our supreme court found probable cause, noting that, "[a]lthough evidence of intoxicant usage—such as odors, an admission, or containers—ordinarily exists in drunk driving cases and strengthens the existence of probable cause, such evidence is not required." ***Id.***, ¶37.

Such is the case here. Although Martin's driving was perhaps less "wild[]" than Lange's driving, Lange drove on the wrong side of the road at eighty miles per hour in a thirty-miles-per-hour zone, ***id.***, ¶24, Martin was involved in a single-vehicle accident shortly after reportedly speeding and although there was a sharp S curve, the weather conditions were normal. His report to the officer that he was hit by someone else with a motorcycle while he was walking on the county highway raises serious issues with his judgment as the story was clearly incredible. Although it was daytime, Martin's five prior OWIs alerted the officer that Martin had a history of driving while drinking and further suggested he may have been inclined to drink during the day. Again, his clearly fabricated story supported that reasonable inference.

Unlike in ***Lange***, the officer noted slurred speech and bloodshot eyes. Martin argues that the slurred speech could have been from the cervical collar and the bloodshot eyes from the injury. However, police are not obligated to rule out innocent explanations when confronted with ambiguous facts. ***State v. Nieves***, 2007 WI App 189, ¶14, 304 Wis. 2d 182, 738 N.W.2d 125.

As in ***Lange***, the investigating officer was able to make his determination based on his years of experience and training.

Most importantly, the officer knew that Martin was subject to the lower .02% PAC. Contrary to Martin's suggestion that an arrest can only be for OWI, WIS. STAT. § 346.63 addresses multiple violations for operating under the influence, one of which is operating with a PAC, subsec. (1)(b). *See* ***Blatterman***, 362 Wis. 2d 138, ¶38 (officer's knowledge of defendant's prior OWI convictions, together with information from dispatch and his own observations, established probable cause to arrest for a .02% PAC violation); ***State v. Howes***, 2017 WI 18, ¶34, 373 Wis. 2d 468, 893 N.W.2d 812 (probable cause supported arrest for driving with a PAC of .02%). As our supreme court has noted, the reduction from .08 to .02 PAC is "drastic[]," such that the "ordinary physical indications of intoxication are not typically present in a person with [a .02] blood alcohol content." ***State v. Goss***, 2011 WI 104, ¶¶23-27, 338 Wis. 2d 72, 806 N.W.2d 918 (knowledge of four prior OWIs lowering PAC to .02% and that very little consumed alcohol would meet that level, plus the odor of alcohol, was sufficient to support probable cause to request a preliminary breath test, which involves a lower quantum of proof than for probable cause to arrest). As such, the evidence required to establish probable cause for an arrest on a .02% PAC charge must necessarily be less than the evidence required to establish probable cause for an arrest on an OWI or .08% PAC charge.

All the facts add up to a reasonable belief that Martin's blood alcohol content was above .02%, in violation of WIS. STAT. § 346.63(1)(b). Probable cause supported Martin's arrest. The circuit court properly denied the motion to suppress.[3]

[3] The noncontrolling out-of-state cases involving accidents Martin cites are unpersuasive. In addition to the absence of the indicia of alcohol use present here, none of the cases involved a defendant with five prior OWIs.

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.

Sheila T. Reiff
Clerk of Court of Appeals