COURT OF APPEALS
DECISION
DATED AND FILED

October 15, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2621-CR **Cir. Ct. No. 2010CT2264**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LEWIS ALLEN STOKES,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: CLARE L. FIORENZA, Judge. *Affirmed*.

¶1 BRENNAN, J.[1] Lewis Allen Stokes appeals from the judgment of conviction entered after he pled guilty to operating a motor vehicle while under the influence of an intoxicant as a third offense. Stokes complains that the police lacked probable cause to arrest him even though the arresting officer observed

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Stokes speeding and weaving through traffic, smelled a "strong odor of alcohol on Stokes's breath," described Stokes's speech as "slurred," and described Stokes's behavior as "argumentative and somewhat combative." We disagree with Stokes and conclude that the police had enough evidence to arrest Stokes for operating a motor vehicle while under the influence based upon the totality of the circumstances. As such, we affirm.

BACKGROUND

¶2 Following an incident on September 26, 2010, the State filed a criminal complaint charging Stokes with one count of operating a motor vehicle while under the influence of an intoxicant as a third offense and with operating a motor vehicle with a prohibited alcohol concentration as a third offense. In connection with that same event, Stokes received a notice of intent to revoke his operating privileges for refusing to submit to a blood alcohol test.

¶3 Stokes filed a request for a refusal hearing, which was conducted by the circuit court on February 23, 2011. Stokes's primary argument at the hearing was that police lacked probable cause for his arrest. City of Milwaukee Police Officer Patrick Fuhrman was the sole witness and he testified as follows.[2]

¶4 On September 26, 2010, Officer Fuhrman, a twelve-year employee of the Milwaukee Police Department was on duty in the City of Milwaukee. At approximately 11:00 p.m. he observed a vehicle traveling at a high rate of speed. Officer Fuhrman testified that as he pulled behind the vehicle it "appeared to be

[2] Stokes and the State agree that Officer Fuhrman accurately testified to the events of September 26, 2010. Stokes only appeals the circuit court's conclusion that Officer Fuhrman's testimony establishes probable cause for Stokes's arrest as a matter of law.

increasing its speed, and it was also weaving in and out of traffic, passing cars as it was traveling" without signaling. Officer Fuhrman followed the vehicle for approximately three blocks, and based upon his observations, conducted a traffic stop.

¶5 Officer Fuhrman identified the driver of the vehicle as Stokes. Stokes told Officer Fuhrman that the police had no right to take him out of the car, repeatedly claimed that he had done nothing wrong, and failed to produce his driver's license upon request. Stokes exhibited slurred speech, had "a strong odor of alcohol on his breath," and "was very argumentative." When Officer Fuhrman asked Stokes to exit the vehicle Stokes became increasingly argumentative and somewhat combative. Officer Fuhrman and two other officers on the scene were needed to take Stokes into custody. The other officers on the scene also detected a strong odor of alcohol emanating from Stokes's breath. Officer Fuhrman stated that he chose to forego standardized field sobriety tests "[b]ecause [Stokes] was being argumentative and combative on scene," and Officer Fuhrman did not think a field sobriety test "was … in our best interests for officer safety reasons."

¶6 After hearing Officer Fuhrman's testimony, the circuit court found that Officer Fuhrman had probable cause for the arrest. Despite losing his probable cause argument at his refusal hearing, after the refusal hearing, Stokes orally moved to exclude from his trial for the criminal charges in this case the evidence collected incident to his arrest. His motion to exclude was based on the same grounds, that is, that the evidence was illegally obtained after an improper arrest. The circuit court denied the motion based upon its conclusion at the refusal hearing. Stokes then pled guilty to one count of operating a motor vehicle while

under the influence of an intoxicant as a third offense. Stokes was sentenced and judgment was entered accordingly. Stokes appeals.[3]

DISCUSSION

¶7 On appeal, Stokes only complains that Officer Fuhrman did not have probable cause to justify Stokes's arrest. More specifically, Stokes contends that in the absence of field sobriety tests, the fact that he was speeding and weaving between cars, with an odor of alcohol on his breath and slurred speech, while exhibiting "argumentative and somewhat combative" behavior, is not enough to establish probable cause for an operating-a-motor-vehicle-while-intoxicated arrest. Because we conclude that, based upon the totality of the circumstances, Officer Fuhrman had probable cause to arrest Stokes, we affirm.

¶8 When reviewing a circuit court's denial of a suppression motion we "will uphold [the circuit] court's findings of fact unless they are against the great weight and clear preponderance of the evidence." ***State v. Richardson***, 156 Wis. 2d 128, 137, 456 N.W.2d 830 (1990). Whether the facts as found by the circuit court satisfy the standard of probable cause is a question of law that we review *de novo*. ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 316, 603 N.W.2d 541 (1999).

¶9 A police officer has probable cause to arrest for operating while intoxicated when the totality of the circumstances within that officer's knowledge

[3] In most instances, a defendant who pleads guilty waives all nonjurisdictional defects and defenses. *See* ***County of Racine v. Smith***, 122 Wis. 2d 431, 434, 362 N.W.2d 439 (Ct. App. 1984). However, WIS. STAT. § 971.31(10) makes an exception to this rule, which allows appellate review of an order denying a motion to suppress evidence, notwithstanding a guilty plea. ***Smith***, 122 Wis. 2d at 434-35.

at the time of the arrest would lead a reasonable police officer to believe that the defendant probably drove while intoxicated. *See* ***State v. Koch***, 175 Wis. 2d 684, 701, 499 N.W.2d 152 (1993). This is a practical test, based on "'considerations of everyday life on which reasonable and prudent [people], not legal technicians, act.'" ***State v. Drogsvold***, 104 Wis. 2d 247, 254, 311 N.W.2d 243 (Ct. App. 1981) (citation omitted).

¶10 Here, it is undisputed that Officer Fuhrman observed Stokes speeding and weaving in and out of traffic without signaling at 11:00 p.m. When Officer Fuhrman spoke with Stokes, Officer Fuhrman noted that Stokes's speech was slurred, he had a strong odor of alcohol on his breath, and he was argumentative and combative with the police. Other officers on the scene also detected a strong odor of alcohol emanating from Stokes's breath. A reasonable police officer observing all of these facts could logically conclude that Stokes was driving a motor vehicle under the influence of an intoxicant. These facts are sufficient to establish probable cause for arrest. *See* ***Koch***, 175 Wis. 2d at 701; *see also* ***Drogsvold***, 104 Wis. 2d at 254.

¶11 In so concluding, we reject Stokes's argument that more evidence is necessary to establish probable cause for operating under the influence. In support of his argument that more is necessary, Stokes relies on a number of cases in which more evidence was present to establish probable cause. *See* ***Washburn Cnty. v. Smith***, 2008 WI 23, 308 Wis. 2d 65, 746 N.W.2d 243; *see also* ***State v. Lange***, 2009 WI 49, 317 Wis. 2d 383, 766 N.W.2d 551. However, that does not mean that more was necessary here. We have consistently held that "[t]he question of probable cause must be assessed on a case-by-case basis." ***Lange***, 317 Wis. 2d 383, ¶20. Here, Officer Fuhrman observed Stokes speeding and weaving in and out of traffic without signaling. Upon stopping and speaking with Stokes,

Officer Fuhrman observed that Stokes's speech was slurred and he smelled of alcohol. Furthermore, Stokes exhibited poor judgment, deciding to be argumentative and combative with a police officer. A reasonable police officer in Officer Fuhrman's position could logically conclude based on the facts that Stokes was operating a motor vehicle under the influence of alcohol.

¶12 We also reject Stokes's argument that ***State v. Seibel***, 163 Wis. 2d 164, 471 N.W.2d 226 (1991), and ***State v. Swanson***, 164 Wis. 2d. 437, 475 N.W.2d 148 (1991), *abrogated by* ***State v. Sykes***, 2005 WI 48, 279 Wis. 2d 742, 695 N.W.2d 277, are determinative in this case and stand for the proposition that the evidence in this case was insufficient to establish probable cause without a positive field sobriety test. In ***Washburn County***, our supreme court explicitly stated that neither ***Seibel*** nor ***Swanson*** dealt with the issue we address here, that is, when a police officer has probable cause to arrest an individual for operating a motor vehicle while under the influence of an intoxicant. *See* ***Washburn Cnty.***, 308 Wis. 2d 65, ¶17. In fact, contrary to Stokes's assertion on appeal, the supreme court expressly stated that ***Swanson*** does "not announce a general rule requiring field sobriety tests in all cases as a prerequisite for establishing probable cause to arrest a driver for operating a motor vehicle while under the influence." *See* ***Washburn Cnty.***, 308 Wis. 2d 65, ¶33.

¶13 In sum, we conclude that Officer Fuhrman had enough evidence from which he could reasonably believe that Stokes was operating a motor vehicle under the influence of an intoxicant. The question when assessing probable cause is not what additional information the police did not have, but whether the information the police did have was enough to meet the low standard of proof necessary to justify an arrest. Here, the evidence was sufficient to justify the arrest. As such, we affirm the circuit court.

By the Court.—Judgment affirmed.

This opinion will not be published pursuant to WIS. STAT. RULE 809.23(1)(b)4.