COURT OF APPEALS
DECISION
DATED AND RELEASED

June 5, 1996

No. 96-0297-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SHAWN C. PICOTTE,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Walworth County: ROBERT J. KENNEDY, Judge. *Affirmed*.

NETTESHEIM, J. Shawn C. Picotte appeals from a judgment of conviction for operating a motor vehicle while intoxicated (OWI). Picotte was convicted and sentenced as a repeat offender. On appeal, Picotte contends that he was arrested without probable cause. Thus, he further contends that the results of a blood alcohol test (BAC) should have been suppressed. We reject Picotte's arguments. We affirm the judgment of conviction.

The facts relevant to Picotte's arrest are not disputed. Officer Paul Schmidt of the Town of East Troy Police Department was patrolling on County Highway ES on April 4, 1995, at approximately 6:30 p.m. when he observed a red pickup truck with two occupants. The truck was traveling 68 miles per hour in a 55 miles per hour speed zone and passed another vehicle at a high rate of speed. Schmidt followed the truck and observed it make a quick turn into Jackson's Pointe Supper Club. Schmidt then briefly lost view of the truck. When he again sighted the truck, the two occupants were outside the vehicle.

One of the occupants, later identified as Picotte, was standing closer to the driver's side door of the truck. When Schmidt asked who was driving the truck, Picotte whispered that the other person was the driver. Later, the other person told Schmidt that Picotte was driving. Schmidt detected an order of intoxicants about Picotte. He also observed that Picotte's eyes were bloodshot, that his balance was suspect and that movements appeared deliberate. Picotte admitted to Schmidt that he had been drinking. Schmidt concluded that both Picotte and the other person were intoxicated. He arrested Picotte and eventually obtained a BAC test result.

Picotte filed a motion challenging the arrest and seeking to suppress evidence of the BAC result. The trial court rejected the motion, ruling that Schmidt had probable cause to arrest Picotte.

Picotte renews his probable cause challenge on appeal. He contends that Schmidt did not have sufficient information to reasonably suspect

that he was intoxicated.[1] Picotte relies on a footnote in the supreme court's opinion in ***State v. Swanson***, 164 Wis.2d 437, 475 N.W.2d 148 (1991), which we set out in the accompanying footnote.[2] We do not dispute that the language of the footnote in ***Swanson*** supports Picotte's argument in this case.

However, ***Swanson*** has been limited in its application. In ***State v. Wille***, 185 Wis.2d 673, 518 N.W.2d 325 (Ct. App. 1994), the court of appeals stated, "The ***Swanson*** footnote 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." ***Id***. at 684, 518 N.W.2d at 329. Thus, the absence of a field sobriety test in this case does not necessarily doom the arrest.

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[1] Despite the fact that both occupants told Schmidt that the other was operating the vehicle, Picotte does not make any argument that Schmidt did not have sufficient probable cause to believe that he had operated the vehicle. Rather, Picotte focuses on whether Schmidt had probable cause to believe that he was intoxicated.

[2] The supreme court stated:

> Unexplained erratic driving, the odor of alcohol, and the coincidental time of the incident [with bar closing] 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. A field sobriety test could be as simple as a finger-to-nose or walk-a-straight-line test. Without such a test, the police officers could not evaluate whether the suspect's physical capacities were sufficiently impaired by the consumption of intoxicants to warrant an arrest.

State v. Swanson, 164 Wis.2d 437, 454 n.6, 475 N.W.2d 148, 155 (1991).

We also observe that in ***Swanson***, the issue focused on whether the search of the defendant at the scene of the traffic stop was justified by attendant probable cause for the defendant's arrest. ***Id***. at 441, 518 N.W.2d at 150. The supreme court analyzed the issue from the perspective of the suspect—whether a reasonable person in the suspect's position would believe that the degree of restraint exercised by the police constituted formal arrest under the Fourth Amendment. ***Id.*** at 444, 518 N.W.2d at 151. In that context, the court concluded that a person who had merely been asked to submit to a field sobriety test would not, without more, reasonably conclude that a formal arrest had occurred. ***Id***. at 448, 518 N.W.2d at 153.

Here, there was no search of Picotte at the scene. Thus, the question is not whether Picotte reasonably understood that he was under arrest. Rather, the issue is whether a reasonable police officer in Schmidt's position would reasonably suspect that Picotte had probably committed an offense. *See* ***State v. Riddle***, 192 Wis.2d 470, 476, 531 N.W.2d 408, 410 (Ct. App. 1995). Viewed from that perspective, the arrest in this case was a routine and classic OWI arrest. Schmidt had observed the vehicle speeding. When the vehicle stopped, Schmidt observed the classic and usual symptoms of likely intoxication about Picotte (bloodshot eyes, questionable balance, deliberate movements and an odor of intoxicants). In addition, Picotte admitted that he had been drinking.

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***. The test is objective, not subjective. ***Id***. The facts within the officer's knowledge need not be sufficient to make the defendant's guilt more probable than not, but the defendant's guilt must be more than a mere possibility. ***Id***.

As we have already noted, the facts of this case present a classic and routine OWI arrest case. Picotte's condition as observed by Schmidt made Picotte's intoxication more than a mere possibility. Thus, the arrest was valid and the ensuing BAC test result was validly obtained. We affirm the judgment.

By the Court.—Judgment affirmed.

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