COURT OF APPEALS
DECISION
DATED AND RELEASED

April 17, 1997

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. 96-2731

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TONIA L. MUNZ,

Defendant-Appellant.

APPEAL from an order of the circuit court for Dane County: P. CHARLES JONES, Judge. *Affirmed.*

DYKMAN, P.J. This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS. Tonia L. Munz appeals from an order revoking her operating privileges for one year because she refused to submit to a chemical blood alcohol test as required by § 343.305, STATS. Munz argues that the police officer who arrested her did not have probable cause to do so because the officer never administered field sobriety tests. Therefore, she argues, she did not violate the implied consent law by refusing to submit to testing. We reject Munz's argument and affirm.

BACKGROUND

On February 25, 1996 at approximately 1:37 a.m., a pedestrian flagged down Officer Meredyth Thompson of the Madison Police Department and notified her that an accident had just occurred at the corner of Park Street and West Dayton Street. Thompson went to the location, where a car had crashed into a guard rail that separates the sidewalk from the street. Thompson checked the condition of the two occupants of the vehicle. Both of their faces were cut and scratched, and Thompson smelled a very strong odor of intoxicants on Munz's breath. Munz was the driver of the vehicle. Both Munz and her passenger were conscious but semi-coherent, and neither could answer questions at that time. Thompson believed they were unable to respond because the crash had just occurred. Thompson called the fire rescue unit, which arrived quickly and transported Munz and her passenger to the hospital.

After the rescue unit arrived, Thompson was contacted by Bobby Peck, a bystander who had witnessed the accident. Peck stated that at the time of the accident, he was in the left-hand lane of Park Street heading southbound. The left-hand lane was marked as the appropriate lane of travel for southbound traffic and for vehicles turning left. Peck then witnessed Munz's vehicle pass him in the right-hand lane, which was marked for right turns only. Peck saw Munz's brake lights come on and then witnessed the vehicle impact with the guard rail. Peck thought that Munz was attempting to cut around the southbound traffic and continue southbound on Park Street.

Thompson visited Munz at the hospital emergency room. Munz appeared somewhat dazed, but was more coherent than before and was able to answer the questions of emergency room personnel. Thompson noticed that Munz's eyes were somewhat bloodshot and again noticed a very strong odor of intoxicants on her breath. Munz's speech was very slow and slurred. Thompson asked Munz for her name and

address, and Munz complied. When Thompson asked another question, Munz became very hostile and abusive and screamed profanities at the officer. Thompson informed Munz that she was under arrest for operating a motor vehicle while under the influence of an intoxicant and issued a traffic citation.

Thompson did not perform field sobriety tests on Munz prior to arresting her. Thompson declined to administer the tests because the emergency room was extremely crowded and there was no available space to conduct the battery of field sobriety tests that her department administers. She also did not perform the tests because Munz was still being treated by emergency room personnel and she did not want to interfere with the treatment.

After notifying Munz that she was under arrest, Thompson read her the informing the accused form and asked her if she would submit to a chemical test of her blood. Munz originally consented, but then refused. Thompson issued a notice of intent to revoke operating privileges, and Munz demanded a refusal hearing. At the hearing, the court concluded that Munz's arrest was supported by probable cause and revoked her operating privileges for one year. Munz appeals.

DISCUSSION

Munz argues that she properly refused to submit to chemical blood alcohol testing because her arrest was not supported by probable cause. Whether undisputed facts constitute probable cause is a question of law we review *de novo*. ***State v. Drogsvold***, 104 Wis.2d 247, 262, 311 N.W.2d 243, 250 (Ct. App. 1981).

In ***State v. Babbitt***, 188 Wis.2d 349, 356-57, 525 N.W.2d 102, 104 (Ct. App. 1994), we set forth the test for determining probable cause in a refusal hearing:

> In determining whether probable cause exists, we must look to the totality of the circumstances to determine

> whether 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 while under the influence of an intoxicant." Probable cause to arrest does not require "proof beyond a reasonable doubt or even that guilt is more likely than not." It is sufficient that a reasonable officer would conclude, based upon the information in the officer's possession, that the "defendant probably committed [the offense]."

(Citations omitted; alterations in original.) "The State's burden of persuasion at a refusal hearing is substantially less than at a suppression hearing." ***State v. Wille***, 185 Wis.2d 673, 681, 518 N.W.2d 325, 328 (Ct. App. 1994). In presenting evidence at a refusal hearing to establish probable cause, the State only needs to show that the officer's account is plausible. ***Id.***

Viewing the totality of the circumstances, we conclude that the facts known by Officer Thompson at the time of arrest would lead a reasonable police officer to believe that Munz was probably operating a motor vehicle while under the influence of an intoxicant. Thompson was informed of the accident at 1:37 a.m., which is near the time that the bars close in Wisconsin. The witness informed Thompson that Munz was attempting to pass traffic in a right-turn only lane when she crashed into the barrier. Thompson notice that Munz's eyes were somewhat bloodshot, that her breath emitted a very strong odor of intoxicants and that her speech was very slow and slurred. And Munz became very hostile, abusive and screamed profanities after Thompson asked her a question. Based on this information, Thompson could reasonably conclude that Munz was probably driving while under the influence of an intoxicant.

Munz argues that Thompson's failure to perform field sobriety tests deprived her of the information necessary to establish probable cause. Munz cites ***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), to support her argument. We believe that ***Seibel*** and ***Swanson*** are distinguishable.

In ***Seibel***, the issue was not whether the facts supported probable cause to arrest for drunk driving, but "whether the police reasonably suspected that the defendant's blood contained evidence of the crime." ***Seibel***, 163 Wis.2d at 166, 471 N.W.2d at 227. The court concluded that Seibel's erratic driving that caused a serious accident, the strong odor of intoxicants emanating from his companions, the police chief's belief that Seibel emitted an odor of intoxicants and Seibel's belligerent conduct at the hospital provided a sufficient basis for the police to reasonably suspect that Seibel was driving while intoxicated. ***Id.*** At 181-83, 471 N.W.2d at 234-35. The court did not address whether the facts supported probable cause, and therefore the discussion in ***Seibel*** is irrelevant to this case.

Under the facts present in ***Swanson***, the supreme court concluded that "[u]nexplained erratic driving, the odor of alcohol, and the coincidental time of the incident 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." ***Swanson,*** 164 Wis.2d at 454 n.6, 475 N.W.2d at 155. But this does not mean that under all circumstances an officer must first perform field sobriety tests before determining that probable cause exists to arrest for operating a motor vehicle while intoxicated. ***State v. Wille***, 185 Wis.2d 673, 684, 518 N.W.2d 325, 329 (Ct. App. 1994). In this case, the officer knew more facts on which to base a conclusion of intoxication than the officer in ***Swanson***. In addition to the ***Swanson*** factors, Officer Thompson noticed that Munz's eyes were bloodshot, her speech was slow and slurred, and that Munz became hostile and abusive when asked questions. These additional indicia of intoxication make this case distinguishable from ***Swanson***.

Munz also argues that this case is distinguishable from ***Wille***, in which we concluded that field sobriety tests were not necessary to establish probable cause. Munz notes that in ***Wille*** the defendant provided a statement that evinced consciousness of guilt,

while she did not. But Munz did not need to utter an incriminating statement to establish probable cause in the absence of field sobriety tests. In ***State v. Babbitt***, 188 Wis.2d 349, 525 N.W.2d 102 (Ct. App. 1994), the facts were sufficient to support a probable cause determination in the absence of both field sobriety tests and an admission of guilt. There, the odor of alcohol emanating from the defendant's vehicle and the defendant's erratic driving, glassy and bloodshot eyes, slow and deliberate walk, and uncooperative attitude provided the facts necessary to establish that the defendant was probably driving while under the influence of alcohol. ***Id.*** at 357, 525 N.W.2d at 104. These facts are more similar to the facts at hand than the facts of ***Seibel***, ***Swanson*** or ***Wille***.

Munz argues that her unwillingness to answer the officer's questions may not be used against her in our probable cause determination because she did not have an obligation to cooperate with the officer. She cites ***Florida v. Royer***, 460 U.S. 491 (1983), to support her argument. Of relevance here, however, is not her unwillingness to answer questions, but the hostile and abusive behavior she exhibited at the time. Belligerence is often associated with intoxication. *See, e.g.*, ***Seibel***, 163 Wis.2d at 182, 471 N.W.2d at 234. Therefore, Munz's demeanor is relevant to our probable cause determination.

Finally, Munz argues that Officer Thompson's testimony as to the nature of her driving before the accident is inadmissible hearsay because Thompson testified based on information she had received from a witness. But the fact that this information may be hearsay does not militate against its relevance to the officer's beliefs at the time of arrest. In deciding whether probable cause to arrest exists, "[a]n officer's belief may be partially predicated on hearsay information …." ***Wille***, 185 Wis.2d at 683, 518 N.W.2d at 329. Our task is to determine whether "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 while under the influence of an intoxicant." ***State v. Nordness***, 128 Wis.2d 15, 35, 381 N.W.2d 300, 308

(1986). The nature of Munz's driving was within Officer Thompson's knowledge at the time of arrest, and therefore is germane to whether a reasonable police officer would believe that Munz was driving while under the influence of alcohol.

By the Court.—Order affirmed.

Not recommended for publication in the official reports. *See* Rule 809.23(1)(b)(4), STATS.