

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 8, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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.

No. 97-2398

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JEFFREY G. MEIXELSPERGER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Richland County:
KENT C. HOUCK, Judge. *Affirmed.*

DYKMAN, P.J.¹ Jeffrey G. Meixelsperger appeals from a judgment convicting him of operating a motor vehicle while intoxicated (OMVWI), third offense, contrary to § 346.63(1)(a), STATS. Meixelsperger argues that the trial court erred in denying his motion to suppress evidence because his arrest for

¹ This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

OMVWI was not based on probable cause. We conclude that the officer had probable cause to arrest Meixelsperger. Accordingly, we affirm.

BACKGROUND

Meixelsperger was arrested shortly after 12:00 a.m. on September 7, 1996, by Officer James Bindl. Meixelsperger was charged with OMVWI, third offense. He filed a motion to suppress evidence obtained as a result of his arrest, arguing that the arrest was not supported by probable cause.

At the suppression hearing, Officer Bindl testified that the police dispatcher informed him to watch for a truck driven by Meixelsperger. Bindl was informed of the truck's make and license plate number and that Meixelsperger's operating privileges were suspended. Bindl located and followed Meixelsperger's vehicle for approximately three miles. Bindl observed the vehicle being operated properly. Bindl then identified Meixelsperger as the driver of the vehicle with the assistance of another officer.

Bindl activated his emergency lights, and Meixelsperger stopped his vehicle and exited. Bindl observed Meixelsperger steady himself on the box of the truck with his left arm. Bindl asked Meixelsperger if he had a driver's license, to which Meixelsperger answered that he did not. Bindl noticed an odor of intoxicants coming from Meixelsperger's breath. Bindl asked Meixelsperger if he had been drinking, to which Meixelsperger answered affirmatively.

Bindl asked Meixelsperger to perform field sobriety tests. Meixelsperger was able to perform the alphabet test properly. He failed to perform the finger-to-nose test properly because he did not close his eyes. Bindl then asked Meixelsperger to perform a walk-and-turn test. Meixelsperger

informed Bindl that his left leg was handicapped. In performing the test, Meixelsperger walked with a two- to three-inch gap between his heel and toe, contrary to Bindl's instructions, and took nine steps back instead of six, also contrary to Bindl's instructions. Finally, Bindl asked Meixelsperger to perform the one-leg stand test, standing on whichever leg "he felt comfortable with." Meixelsperger, standing with his right leg on the ground, was able to perform the test to the count of four, and then said he could not do it any longer. Again Meixelsperger told Bindl that his left leg was handicapped. After witnessing Meixelsperger perform these tests, Bindl formed the opinion that Meixelsperger was intoxicated. Bindl had Meixelsperger perform a preliminary breath test, which registered 0.15%. Bindl placed Meixelsperger under arrest for OMVWI.

Meixelsperger also testified at the motion hearing. He testified that he did not recall Bindl asking him to close his eyes during the finger-to-nose test and that he thought Bindl told him to take nine steps back after the turn, not six, during the walk-and-turn test. Meixelsperger also stated that he told Bindl that his handicapped left leg would impair his ability to perform the tests. He testified that he drank four vodka and lemonade drinks prior to the arrest.

At the conclusion of the testimony, the trial court concluded that Bindl had probable cause to arrest Meixelsperger for OMVWI and denied the motion to suppress. Meixelsperger pleaded no contest to OMVWI pursuant to a plea agreement. Meixelsperger appeals.

DISCUSSION

Meixelsperger contends that Bindl did not have probable cause to arrest him for OMVWI. Whether a set of facts constitutes probable cause is a

question of law that we review *de novo*. See *State v. Babbitt*, 188 Wis.2d 349, 356, 525 N.W.2d 102, 104 (1994).

Probable cause to arrest for OMVWI exists when “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). That a reasonable officer could conclude, based on the information known to the arresting officer, that the “defendant probably committed” the offense is sufficient to establish probable cause. *State v. Koch*, 175 Wis.2d 684, 701, 499 N.W.2d 152, 161 (1993). We may consider the officer’s experience in determining whether his or her belief was reasonable. See *State v. DeSmidt*, 155 Wis.2d 119, 134-35, 454 N.W.2d 780, 787 (1990).

The set of facts relevant to whether Bindl had probable cause to arrest Meixelsperger for OMVWI is as follows: Bindl observed Meixelsperger steady himself on the box of his truck. Bindl noticed an odor of intoxicants coming from Meixelsperger’s breath. Meixelsperger admitted that he had been drinking. Finally, Meixelsperger had difficulty following directions and failed to satisfactorily perform three of the four field sobriety tests administered by Bindl. We conclude that under the totality of the circumstances, Officer Bindl had probable cause to arrest Meixelsperger for OMVWI.

Meixelsperger asserts that he safely drove his vehicle for miles and pulled his vehicle over safely when the officer activated his lights. But in *State v. Gaudesi*, 112 Wis.2d 213, 221, 332 N.W.2d 302, 305 (1983), the court stated:

We have expressly held that improper driving is not an element of [OMVWI]. Although erratic driving may be evidence that the defendant is under the influence of an intoxicant, the statute “does not require proof of an appreciable interference in the management of a motor vehicle.” The state need only prove that the defendant was driving a motor vehicle and was under the influence of an intoxicant at the time.

(Citations omitted.) Accordingly, Meixelsperger’s driving performance is not conclusive of whether he was guilty of OMVWI.

Meixelsperger also argues that his inadequate performance on the field sobriety tests was due to his handicap, and therefore the results of the field sobriety tests were not probative of his ability to drive. Our response to this argument is twofold. First, “probable cause” by definition deals with probabilities, not hard certainties. *See State v. Anderson*, 138 Wis.2d 451, 469, 406 N.W.2d 398, 406 (1987). Therefore, Officer Bindl did not need to be certain that Meixelsperger’s failure to maintain his balance was caused by his intoxication, not his handicap, before considering the lack of balance as indicative of intoxication.

Second, Meixelsperger’s handicap should not have affected every detail of his performance during the field sobriety tests. For example, Meixelsperger’s failure to close his eyes during the finger-to-nose test and failure to take the proper number of steps during the walk-and-turn test should not have been affected by his handicap.

Based on all of the facts, we conclude that Bindl had probable cause to arrest Meixelsperger for OMVWI. Therefore, we affirm.

By the Court.—Judgment affirmed.

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

