

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

May 4, 1999

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. 98-3247-FT**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**VILLAGE OF BONDUEL,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JAMES R. WIND,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Shawano County:  
THOMAS G. GROVER, Judge. *Affirmed.*

CANE, C.J. James Wind appeals from an order finding that probable cause existed to arrest him for driving while under the influence of an intoxicant, contrary to § 346.63(1)(a), STATS., and revoking his license under § 343.305(10), STATS., for unreasonably refusing to take an Intoxilyzer test.<sup>1</sup> The sole issue on appeal is whether probable cause existed to arrest Wind for driving

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<sup>1</sup> This is an expedited appeal under RULE 809.17, STATS.

while under the influence of an intoxicant. The answer is yes; therefore, the order is affirmed.

At the refusal hearing the following undisputed facts were established. While on routine patrol at approximately 10:30 p.m., officer Wade Wudtke of the Village of Bonduel Police Department received a dispatch informing him that there was a possible intoxicated driver heading eastbound on Highway 29 and driving through the Village. The dispatcher indicated that the person placing the 911 call about the possible intoxicated driver identified the vehicle as a green van with a license plate "C" and then "HAWK." After a few minutes, Wudtke noticed the van heading eastbound on Highway 29 through the Village. As Wudtke followed the van, he observed it drift on to the parking lane of the road and then pull back on to the main lane of travel. Wudtke observed the van do this three times over a period of one to two minutes before he stopped the van. After identifying the driver as James Wind, the officer had him perform three field sobriety tests; a "horizontal gaze and nystagmus" test, a "walk and turn and the nine step" test, and the "one-leg stand" test. After Wind failed these tests, Wudtke placed him under arrest and transported him to the Shawano County Sheriff's Department where Wind refused the Intoxilyzer test.

Wind contends that the evidence is insufficient for the trial court to conclude there was probable cause to arrest because the arresting officer: (1) testified only to his conclusion that Wind was under the influence of an intoxicant based upon the results of the field sobriety tests, without describing those results; and (2) did not describe his experience in OWI investigations.

Whether undisputed facts constitute probable cause is a question of law that this court reviews without deference to the trial court. *See State v.*

*Drogsvold*, 104 Wis.2d 247, 262, 311 N.W.2d 243, 250 (Ct. App. 1981). In determining whether probable cause exists, a court 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." *State v. Nordness*, 128 Wis.2d 15, 35, 381 N.W.2d 300, 308 (1986). Probable cause to arrest does not require proof beyond a reasonable doubt or even that guilt is more likely than not. *State v. Ford*, 211 Wis.2d 741, 749, 565 N.W.2d 286, 290 (Ct. App. 1997). 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]." *State v. Koch*, 175 Wis.2d 684, 701, 499 N.W.2d 152, 161 (1993).

Wind concedes that at a refusal hearing, the State need only show that the officer's account is plausible and that the court will not weigh the evidence for and against probable cause or determine the credibility of the witnesses. *See Nordness*, 128 Wis.2d at 36, 381 N.W.2d at 308. In determining whether probable cause exists, the conclusions of an officer based on his experiences with investigations may be considered. *State v. DeSmidt*, 155 Wis.2d 119, 134-35, 454 N.W.2d 780, 787 (1990).

After receiving the dispatcher's call about a possible intoxicated driver heading eastbound in a green van on Highway 29 in the Village, the arresting officer observed Wudtke driving the van erratically by weaving off and on the main lane of traffic three times. The officer explained that he had Wind perform three field sobriety tests and, based on the results of these three tests, concluded that in light of his experience and training, Wind was under the influence of an intoxicant. Although the officer described each of these field sobriety tests to the court, he was not asked how Wind had failed these tests. Nor

was the officer asked to explain his training and experience. Even though that additional information might have been helpful, it was not fatal. From the limited testimony, the trial court reasonably concluded that Wind obviously failed each of these tests.

When reviewing the evidence on appeal, it must be remembered that the Village needed to show only that the officer's account was reasonable, and at a refusal hearing the trial court does not weigh the evidence for and against probable cause or determine the arresting officer's credibility. *See Nordness*, 128 Wis.2d at 36, 381 N.W.2d at 308. This court is satisfied that based on the officer's observations of Wind's erratic driving behavior and failure of the three field sobriety tests, the officer had probable cause to believe Wind had been driving a motor vehicle while under the influence of an intoxicant.

*By the Court.*—Order affirmed.

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

