

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 13, 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. 98-3504-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

VINCENT J. LONGO,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sauk County:
VIRGINIA WOLFE, Judge. *Reversed and cause remanded with directions.*

DYKMAN, P.J.¹ Vincent J. Longo appeals from a judgment convicting him of operating a motor vehicle while under the influence of an intoxicant (second offense), contrary § 346.63(1)(a), STATS. The dispositive issue

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

is whether the arresting officer had probable cause to believe that Longo had committed or was committing a crime.² We conclude that he did not and reverse.

BACKGROUND

At around 9:30 p.m. on August 10, 1997, Officer Leif Gregerson, a member of the Wisconsin Dells Police Department, overheard a call from the Sauk County dispatcher to Lake Delton police officers that a car accident had occurred in Lake Delton. The Lake Delton officers radioed back that they were either busy or too far away from the scene. Officer Gregerson, who was close to the accident scene, responded to the call.

As he drove down the road toward the accident scene, Officer Gregerson noticed two individuals walking along the road toward him. He continued driving a couple hundred yards to where a crowd of people had gathered around an accident scene. As he approached the scene, a few of the bystanders pointed in the direction of two individuals that he observed walking away from the scene and heard a few of them say, “That’s them walking down the road.”

Officer Gregerson drove back to where he last saw the two individuals walking. He got out of his squad car and looked along the edge of the road. He eventually found them about forty to fifty yards off the road, sitting underneath a group of trees in the woods, and asked them who was the driver of the car involved in the accident. Longo responded that he was the driver. Officer Gregerson informed Longo that he should not have left the scene of the accident,

² Longo raises several issues on appeal. We, however, conclude that the probable cause issue surrounding Officer Gregerson’s arrest is dispositive; therefore, we will not consider the remaining issues.

and that he was under arrest. He then placed Longo in handcuffs and escorted him back out to the road.

After returning to the road with Longo and the other individual, Officer Gregerson was met by Officer Witthun of the Lake Delton Police Department. Officer Witthun talked briefly with Officer Gregerson and then took Officer Gregerson's handcuffs off Longo and replaced them with his own. Officer Witthun asked Longo and the other individual which one of them was the driver of the vehicle. Longo again said that he was the driver. Officer Gregerson apparently never told Officer Witthun why he placed Longo in handcuffs, or that he had arrested him. Up to this point, neither officer had read Longo his *Miranda* rights.³

As Officer Witthun put Longo in the back of his squad car and transported him back to the scene of the accident, he noticed that Longo's eyes were glassy and a little bloodshot, and that his breath smelled slightly of alcohol. After arriving back at the scene of the accident, Officer Witthun approached his lieutenant, who was at the scene, and asked him what he should do. His lieutenant told him to conduct field sobriety tests, which he did. Longo performed poorly on some of these tests and was placed under arrest for operating a motor vehicle while under the influence of an intoxicant.

Prior to trial, Longo's attorney moved to dismiss the criminal complaint and moved to suppress evidence because he was unlawfully arrested. Two evidentiary hearings were held. Officer Witthun testified at the first hearing

³ See *Miranda v. Arizona*, 384 U.S. 436 (1966).

and Officer Gregerson testified at the second.⁴ The court denied Longo's motions. Longo was eventually convicted of driving while under the influence of an intoxicant, and now appeals.

STANDARD OF REVIEW

Longo contends that the trial court erred in denying his motion to suppress for lack of probable cause to make an arrest. When we review a motion to suppress evidence, we will uphold the circuit court's findings of fact unless they are clearly erroneous. *See State v. Eckert*, 203 Wis.2d 497, 518, 553 N.W.2d 539, 547 (Ct. App. 1996). However, whether a search or seizure passes constitutional muster is a question of law that we review de novo. *See id.* (quoting *State v. King*, 175 Wis.2d 146, 150, 499 N.W.2d 190, 191 (Ct. App. 1993)).

DISCUSSION

Probable cause is the *sine qua non* of a lawful arrest.⁵ *See State v. Mitchell*, 167 Wis.2d 672, 681, 482 N.W.2d 364, 367 (1992). Probable cause is a common sense test that looks to the totality of the circumstances facing the officer at the time of the arrest to determine whether the officer could have reasonably

⁴ It was at these hearings that Longo's attorney objected to Officer Gregerson's arrest, stating that at the time of the arrest he lacked probable cause that Longo had committed any crime.

⁵ The fact that Officer Gregerson placed Longo under arrest does not appear to be in dispute. An individual is under arrest in a constitutional sense when a reasonable person in the defendant's position would have considered himself or herself to be "in custody," given the degree of restraint under the circumstances. *See State v. Swanson*, 164 Wis.2d 437, 446-47, 475 N.W.2d 148, 152 (1991). The circumstances of the situation, including what has been communicated by the police officers, either by their words or actions, shall be controlling under this objective standard. *See id.* at 447, 475 N.W.2d at 152. Officer Gregerson testified at the evidentiary hearing that he handcuffed Longo, *placed him under arrest* and escorted him back toward the road. We therefore need not consider the issue any further.

believed the defendant committed or was committing a crime. *See County of Dane v. Sharpee*, 154 Wis.2d 515, 518, 453 N.W.2d 508, 510 (Ct. App. 1990). While the evidence must be more than a reasonable suspicion that the defendant committed an offense, the evidence need not reach the level of proof beyond a reasonable doubt or even that guilt is more likely than not. *See Mitchell*, 167 Wis.2d at 681-82, 482 N.W.2d at 367-68. “Probable cause is to be judged by the factual and practical considerations of everyday life on which reasonable and prudent persons, not legal technicians, act.” *State v. Traux*, 151 Wis.2d 354, 360, 444 N.W.2d 432, 435 (Ct. App. 1989). Whether probable cause exists depends on the facts of each case. When the facts are undisputed, as they are in this case, the question of whether probable cause exists is a question of law. *See id.*

Officer Gregerson testified that after Longo admitted to being the driver of the car, he arrested him for leaving the scene of the accident. Officer Gregerson did not articulate the specific statute or ordinance that he believed Longo had violated by leaving the scene. The State, however, asserts that Officer Gregerson arrested Longo for violating § 346.70(1), STATS., which reads in pertinent part:

The operator of a vehicle involved in an accident resulting in injury to or death of any person, any damage to state or other government-owned property, except a state or other government-owned vehicle, to an apparent extent of \$200 or more or total damage to property owned by any one person or to a state or other government-owned vehicle to an apparent extent of \$1,000 or more shall immediately by the quickest means of communication give notice of such accident to the police department, the sheriff's department or the traffic department of the county or municipality in which the accident occurred or to a state traffic patrol officer.

Based on Officer Gregerson's testimony, we conclude that he did not have probable cause to make the arrest. Officer Gregerson stated that he responded to a call from the dispatcher regarding a car accident in Lake Delton. When he arrived near the scene, he observed two people walking away from the scene of the accident. Upon arriving at the scene, a group of people who had gathered around the car pointed in the direction of where he had just seen the two individuals walking and said that they were in the car. And when Officer Gregerson finally found Longo and asked him if he was the driver of the car, Longo told him that he was. Officer Gregerson, however, never testified that he observed any damage to the car or anything or anyone around the car, and he never offered an opinion as to the extent of the damage to the car.

The State argues that "[t]he Officer could reasonably believe, given the current cost of auto repair, that the 'apparent extent' of the damage to an immobilized car was in excess of \$1,000." There is no evidence in the record to support such an assertion. We are not willing to accept that any accident to any car of any age or condition will cost in excess of \$1,000 to repair. A driver is not required to give notice of accidents where the apparent extent of the damage is not in excess of \$1,000. Section 346.70(1), STATS. We therefore conclude that the facts Officer Gregerson testified to at trial are insufficient to constitute probable cause that Longo violated § 346.70(1). Accordingly, we reverse and remand with instructions to suppress all evidence obtained as a result of Longo's unlawful arrest.

By the Court.—Judgment reversed and cause remanded with directions.

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

