

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**JUNE 23, 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. 98-3671-FT**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**DAVID L. GEYER,**

**DEFENDANT-APPELLANT.**

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APPEAL from orders of the circuit court for Racine County:  
DENNIS J. BARRY, Judge. *Affirmed.*

ANDERSON, J. David L. Geyer appeals from orders 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(9)(a), STATS., for unreasonably refusing to take an Intoxilyzer test. The sole issue on appeal is whether probable cause existed to arrest Geyer for driving while under the influence of an intoxicant. The answer is yes; therefore, the orders are affirmed.

At the refusal hearing, the following undisputed facts were established. While on patrol at approximately 8:55 p.m. on September 11, 1998, Officer Steve Sikora of the Racine County Sheriff's Department encountered a stalled motorcycle at a traffic light. Geyer, the motorcycle's operator, restarted the motorcycle and drove through the intersection. A truck driver then flagged down Sikora and told the officer that he thought the motorcycle's driver was drunk. Sikora proceeded to catch up with the motorcycle. As he followed the cycle, he observed it swerve from side to side in its lane.

Sikora attempted to pull the cycle over by using his emergency lights but Geyer only stopped after the siren was activated. Geyer got off his cycle and walked back to the squad car. Sikora observed Geyer stumble as he walked. The officer also smelled intoxicants emanating from Geyer and observed that Geyer's eyes were red and glazed. Sikora asked Geyer if he had been drinking and Geyer admitted that he had been drinking and at several places. When Sikora requested Geyer's driver's license, Geyer "opened his wallet and he passed up his driver's license and proceeded to show [Sikora] pictures of his family.... He dropped several cards a couple of times, bypassed his license again, and it took him approximately a minute and a half to two minutes to get his license out from ... behind the plastic in his wallet."

At the officer's request, Geyer agreed to submit to field sobriety tests. The first test was the alphabet test, and Geyer recited the alphabet "adequately." For the one-legged stand test, Geyer was instructed to stand on one leg to the count of twenty-one, but he lost his balance at the count of three and put his foot down to regain his balance. He started the test again and completed the test to the count of twenty-one. He performed all other aspects of the test "adequately."

The heel-to-toe test involved walking heel to toe on an imaginary line nine steps in one direction, turning and walking nine steps back. Geyer stumbled at first and while making the turn. He also failed to finish the return set of nine steps.

The finger-to-nose test requires the taker to close his or her eyes, tip his or her head back, and first place the right index finger on the tip of the nose and then the left index finger. Geyer missed the tip of his nose and touched his upper lip on two out of four attempts.

After administering the field sobriety tests, Sikora placed Geyer under arrest. Geyer was cooperative throughout his contact with Sikora.

Geyer contends that the evidence is insufficient for the trial court to conclude there was probable cause to arrest because the field sobriety tests indicated that he was not intoxicated. Geyer asserts that because he passed some of the tests, his performance was adequate enough to negate the arresting officer's conclusion that he was probably driving while intoxicated.

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. *See 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).

Geyer 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 upon his or her experiences with investigations also may be considered. *See State v. DeSmidt*, 155 Wis.2d 119, 134-35, 454 N.W.2d 780, 787 (1990).

An officer in Sikora's position, considering the totality of the circumstances, could reasonably conclude that Geyer had probably been driving while under the influence of an intoxicant. After receiving the truck driver's tip about a possible intoxicated motorcycle driver, Sikora observed Geyer swerving in his lane of traffic. Geyer then admitted to consuming alcohol that evening. Geyer stumbled when walking, smelled of alcohol, and his eyes appeared red and glassy. Geyer fumbled through his wallet when trying to find his license and struggled for an unusually long period of time to remove his license from its plastic holder.

The following evidence might indicate that the alcohol affected Geyer's capacity to drive safely: Geyer did not stand on one leg for twenty-one continuous seconds but put his foot down after three, then started over again and continued to twenty-one; he stumbled on the heel-to-toe test; he did not complete all nine steps on the heel-to-toe test; and he twice touched his hand to his upper lip rather than to the tip of his nose on the finger-to-nose test. After Geyer performed

the four field sobriety tests, Sikora concluded that in light of his experience and training that Geyer was under the influence of an intoxicant.

When reviewing the evidence on appeal, it must be remembered that the State 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 totality of the officer's observations and Geyer's failure of some of the field sobriety tests, the officer had probable cause to believe Geyer was driving a motor vehicle while under the influence of an intoxicant.

*By the Court.*—Orders affirmed.

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

