

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 17, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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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. 99-0043-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

CITY OF WATERTOWN,

PLAINTIFF-RESPONDENT,

v.

BRENT A. GENZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Jefferson County:
JACQUELINE R. ERWIN, Judge. *Affirmed.*

VERGERONT, J.¹ Brent Genz appeals a judgment of conviction for driving while under the influence of an intoxicant (OWI), contending that the officer did not have probable cause to arrest him. We agree with the trial court that there was probable cause for the arrest, and we therefore affirm.

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

At the hearing on Genz's motion to suppress evidence based on lack of probable cause, Officer Dayne Zastrow of the Watertown Police Department was the only witness. He had been employed as a police officer by the City for eight years, taken and passed the twenty-four-hour course in Standardized Field Sobriety Testing, received on-the-job training in detecting OWI offenses from a training officer, and had made over 100 arrests for OWI. Officer Zastrow testified that while on routine patrol late one evening he observed an oncoming vehicle driven by Genz make a left-hand turn onto Boughton Street in the City of Watertown. The turn was "too sharp," such that the vehicle continued at an angle into the oncoming lane of traffic, straddling the centerline portion of the road at the completion of the turn. There was no yellow line depicting the center of the street at that point. The vehicle continued fifty to sixty feet straddling the centerline portion of the road, then made a "slow meandering movement back into its own lane of traffic," and, as Officer Zastrow approached the vehicle "began a slow and meandering movement back and towards the centerline [portion] again,"² but his meandering was within Genz's lane.

Officer Zastrow made a U-turn to follow Genz's vehicle and activated the emergency lights of his squad car. After he did so, he observed that Genz's vehicle was left of the centerline by anywhere from eight to twelve inches and then made another slow and meandering motion back into its own lane of

² During the State's direct examination of Officer Zastrow, he stated that Genz's vehicle was "straddling the centerline" for fifty to sixty feet after the turn. On cross-examination, however, Officer Zastrow acknowledged that there is not a yellow line dividing the road until about 100 feet past the intersection, and clarified that by "centerline" he had meant the "centerline portion of the roadway."

traffic.³ After the activation of the emergency lights, Genz's vehicle traveled about 200 to 300 feet on the roadway, then pulled off and continued for 400 to 600 feet on the gravel, making "a very slow meandering stop."

Genz produced his driver's license for Officer Zastrow. During this interaction, Officer Zastrow could smell intoxicants, observed that Genz's eyes were bloodshot and glassy, and that his speech was labored and slurred. Genz said he had a few drinks at a park where he was playing volleyball. Genz did not have any difficulty getting out of his car.

Genz agreed to take the field sobriety tests. First, Officer Zastrow administered the Horizontal Gaze Nystagmus (HGN) test. He told Genz to keep his head still and follow a pen tip with his eyes. Officer Zastrow held the pen about twelve to fifteen inches from Genz's face at his eye level. Genz initially did not follow the instructions, instead moving his head. While the subject's eyes follow the moving point, the officer looks for three things for each eye, a total of six "clues": (1) whether the movement of the eye is choppy while tracking; (2) whether the pupil, when at maximum deviation (the corner of the socket), shows jerkiness; and (3) whether there is a distinct jerkiness prior to forty-five degrees. Genz's eyes both showed jerkiness on each point—all six "clues." In Officer Zastrow's opinion, Genz did not pass this test.

The second test was the walk-and-turn test. Officer Zastrow told Genz to stand in a heel-to-toe stance with the right foot in front of the left and

³ We understand this means that Officer Zastrow said Genz was across the line at this point, because the term "centerline" was not qualified to indicate the center portion of the road without a line, as it was at the intersection. However, whether Genz crossed a line or the center of the road does not affect our decision.

arms at his side, and explained and demonstrated the test to Genz. He told Genz to imagine a straight line and take nine steps, heel to toe, counting each step out loud and not stopping or stepping off the line; then turn 180 degrees leaving one foot on the ground and taking nine steps back to the starting point. Genz could not maintain a heel-to-toe stance while being instructed: he fell out of that stance at the beginning of the instructions and then just stood in a normal manner. While taking the nine steps each way, Genz needed to raise his arms to keep his balance, and several times he “missed heel-to-toe” and stepped off the imaginary line. Genz did take the correct number of steps and did turn as instructed.

The third test was the one-legged stand. Officer Zastrow explained to Genz that he was to raise one foot from the ground, hold it in a particular way, and count in a particular manner to thirty, all the while keeping his arms at his side and not hopping. Genz had a difficult time maintaining his balance. He put his foot down five times, needed to raise his arms, and was “very shaky.” In Officer Zastrow’s opinion, Genz did not pass either the walk-and-turn test or the one-legged-stand test. Officer Zastrow administered a preliminary breath test, obtained a reading of .12 and informed Genz that he was placing him under arrest for OWI.

The trial court found that there was probable cause to arrest without the PBT results, based on the officer’s observations of Zastrow’s driving, the odor of intoxicants, his admission of drinking, his bloodshot and glassy eyes, his slurred and labored speech, his failure of the HGN test and the deviations from the

requirements for successfully performing the other two tests.⁴ On appeal, Genz contends that the trial court erred in reaching this conclusion.

Whether the facts, which are not disputed, constitute probable cause presents a question of law, which we review de novo. *See County of Jefferson v. Renz*, 222 Wis.2d 424, 444, 588 N.W.2d 267, 277 (Ct. App. 1998), *review granted*, 222 Wis.2d 673, 589 N.W.2d 628 (1998). Because of our recent holding in *Renz* that, under § 343.303, STATS., an officer must have probable cause to arrest before administering a PBT test, *see id.* at 439, 588 N.W.2d at 275, the trial court properly first considered only those events occurring prior to the administration of the PBT test. Probable cause in this context exists when the facts and circumstances within the officer's knowledge would lead a reasonable officer to believe that the person has probably been driving while under the influence of an intoxicant. *Id.* at 439, 444, 588 N.W.2d at 275, 277. The evidence need not be sufficient to prove guilt beyond a reasonable doubt, nor sufficient to prove that guilt is more probable than not; it is necessary only that the information lead a reasonable officer to believe that guilt is more than a possibility. *Id.* at 439, 588 N.W.2d at 275.

We conclude that the facts and circumstances within Officer Zastrow's knowledge at the time he administered the PBT test were sufficient to lead a reasonable officer to believe that Genz was driving while under the influence of an intoxicant. Genz acknowledged he had been drinking, and the officer smelled intoxicants. Genz's glassy, bloodshot eyes and slurred, labored speech are evidence that the amount he drank had affected him physically. The

⁴ The trial court also concluded that, with the PBT results, there was probable cause to arrest.

“too sharp” turn he made, the driving over the centerline and the meandering within his lane indicate his driving was affected by the intoxicants. The officer’s observations of Genz’s loss of balance and shakiness during the heel-to-toe test and the one-legged-stand test are further indications that Genz’s ability to drive was impaired.

Genz points out that the officer never explained in his testimony the significance of eye jerkiness for the HGN test as it relates to the ability to drive safely. However, even if we disregard the officer’s testimony on that test, the other evidence is ample to support probable cause. We do not agree that additional testimony on the significance of the officer’s observations for the other two tests was necessary. “It is common knowledge that unsteadiness is one symptom of intoxication and may impair the capacity to drive safely,” *Renz* at 445, 588 N.W.2d at 277, and, based on common knowledge and experience, losing balance on the heel-to-toe test and one-legged-stand test as Genz did is an indication of unsteadiness. *See id.* at 446, 588 N.W.2d at 277. We also do not agree that this case is factually similar to *Renz* in which we found no probable cause. Evidence of poor driving, glassy and bloodshot eyes and slurred and labored speech were absent in *Renz*, and Genz demonstrated more signs of unsteadiness on the two tests than did Renz.

By the Court.—Judgment affirmed.

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

