

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 27, 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. 99-0217-CR

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK A. GEORGE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for St. Croix County:
CONRAD A. RICHARDS, Judge. *Affirmed.*

CANE, C.J. Mark A. George appeals a judgment of conviction for operating a motor vehicle with a prohibited alcohol concentration, second offense, contrary to § 346.63(1)(b), STATS. The sole question for review here is whether trooper Danielson had probable cause to arrest George at the scene of the accident. Did the strong odor of alcohol on George within a close proximity, coupled with a serious accident on a night when road conditions were hazardous and other

vehicles also got stuck, constitute probable cause to arrest for OWI? Because this court is satisfied that the arresting officer had sufficient probable cause to arrest George, the conviction is affirmed.

George was involved in a serious one-car accident during the early morning hours of March 1, 1998. Road conditions at the time of the accident were snow covered and slippery in spots, according to police reports. Other cars had been reported being stuck in the median or ditches throughout the evening. Two state patrolmen, troopers Kirk Danielson and Bruce Wozniak, responded to a report of a vehicle on its side in the median. When the troopers arrived, George had already been secured to a backboard by medical personnel, suffering from a collapsed lung and other internal injuries.

The testimony of troopers Danielson and Wozniak indicate George was cooperative, but “incoherent,” as he seemed to be in a great deal of pain, although he did acknowledge an understanding of who the troopers were when they identified themselves. Both troopers confirmed an odor of alcohol on George, characterized by Danielson as “strong,” detectable within six inches of George’s face. At that time, Danielson informed George that he was being placed under arrest for operating a motor vehicle while intoxicated, based on both the smell of alcohol and the crash. At the hospital, Danielson attempted to read George the Informing the Accused form. However, the doctor informed Danielson that George would not be coherent due to the amount of medication George had been given. Danielson then ordered a blood test to determine George’s blood alcohol content, which ultimately registered .142.

Whether undisputed facts constitute probable cause is a question of law that is reviewed without deference to the trial court. *State v. Babbitt*, 188

Wis.2d 349, 356, 525 N.W.2d 102, 104 (Ct. App. 1994); *see also State v. Drogsvold*, 104 Wis.2d 247, 256, 311 N.W.2d 243, 247 (Ct. App. 1981). Probable cause "means facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." *Henes v. Morrissey*, 194 Wis.2d 338, 351, 533 N.W.2d 802, 807 (1995) (quoting *Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979)); *see also* § 968.07(1)(d), STATS. The test for probable cause is one "based on probabilities; and, as a result, the facts faced by the officer 'need only be sufficient to lead a reasonable officer to believe that guilt is more than a possibility.'" *County of Dane v. Sharpee*, 154 Wis.2d 515, 518, 453 N.W.2d 508, 510 (Ct. App. 1990) (quoting *Village of Elkhart Lake v. Borzyskowski*, 123 Wis.2d 185, 189, 366 N.W.2d 506, 508 (Ct. App. 1985)). Further "[t]he quantum of information which constitutes probable cause to arrest must be measured by the facts of the particular case." *State v. Wilks*, 117 Wis.2d 495, 502, 345 N.W.2d 498, 501 (Ct. App. 1984). We must look to "the totality of the circumstances within the arresting officer's knowledge at the time of the arrest." *State v. Koch*, 175 Wis.2d 684, 701, 499 N.W.2d 152, 161 (1993).

"Unexplained erratic driving which causes a serious accident is an indicia of the influence of alcohol." *State v. Seibel*, 163 Wis.2d 164, 181, 471 N.W.2d 226, 234 (1991). George argues that the road conditions alone were enough to explain the accident, and there must then be more evidence to establish probable cause. Further, George claims that the odor of alcohol was insufficient to establish probable cause, even when coupled with the accident, because (1) it is not illegal for an adult to consume alcohol, and (2) the odor was only detectable within six inches of George's face. George argues that the odor of alcohol when

six inches away does not establish probable cause absent field sobriety tests. He contends that if the information available creates only a reasonable suspicion, then the officers must investigate further. These arguments fail, however, because of George's physical condition at the accident scene and the resultant inability of Danielson to administer field sobriety tests, and thus an inability to investigate any further. Had George been physically capable of attempting the field sobriety tests, Danielson undoubtedly would have been required to administer them. However, Danielson's failure to administer the tests is not fatal to the existence of probable cause because of George's physical incapacity at the time of the arrest.

Although the road conditions were likely a factor in the accident, the standard for probable cause is whether all of the facts and circumstances available could lead a reasonable officer to believe that guilt is more than a possibility. Despite the fact that there were a number of other weather-related accidents, Danielson and Wozniak considered all of the facts available to them: other accidents that evening had been relatively minor; the road conditions, while poor, were "not the worst I've seen," according to Wozniak; and the strong odor of intoxicants detectable only when six inches from George's face is not out of the ordinary, as Wozniak stated that it is more difficult to detect the odor of alcohol during the winter because of the wind, cold and other factors. Danielson's observations of George and the accident scene, combined with his evaluation of the driving conditions that evening and his extensive experience in the field, formed more than just a bare suspicion of guilt.

Probable cause hinges on the question of whether the facts and circumstances would allow a reasonable officer to believe that guilt is more than a possibility. Probable cause cannot be determined by a checklist of requirements. Probable cause involves an officer's evaluation of the entire situation at hand, and

a determination based upon that evaluation of the probability that an offense was committed. *See Babbitt*, 188 Wis.2d at 356-57, 525 N.W.2d at 104. Looking at the totality of the circumstances, this court believes that a reasonable officer in Danielson's position could have reasonably concluded that George committed an OWI offense. Accordingly, George's arrest was lawful, and therefore the conviction is affirmed.

By the Court.—Judgment affirmed.

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

