COURT OF APPEALS
DECISION
DATED AND FILED

August 26, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-0277

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

COUNTY OF GREEN,

PLAINTIFF-RESPONDENT,

V.

SHERRIE L. ZUBER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Green County: JAMES R. BEER, Judge. *Affirmed.*

VERGERONT, J.[1] Sherrie Zuber appeals a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant, contrary to GREEN COUNTY ORDINANCE § 8-1-1, which adopts § 346.63(1)(a), STATS. She contends the trial court erred in denying her motion to dismiss on the ground that

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

her arrest was unlawful. She contended before the trial court, as she does on appeal, that the arresting officer did not have probable cause to believe she was driving while under the influence of an intoxicant at the time he administered a preliminary breath test (PBT). We conclude the officer did have probable cause and therefore affirm.

BACKGROUND

The relevant testimony at the hearing on the motion to suppress was that of Deputy William Sangermano of the Green County Sheriff's Department. At approximately at 4:00 p.m. on April 11, 1998, he was dispatched to a motor vehicle accident on Marty Road, south of State Highway 39 in Green County. Arriving at the scene, he observed several fire and EMS vehicles. He also observed two trees that appeared to have been struck by the vehicle and he saw that the vehicle was severely damaged in the front end and the rear end. It appeared to him that the front of the vehicle hit one tree, bounced off that tree and hit the second tree with the rear of the vehicle. Another officer from the New Glarus Police Department was at the scene of the accident and pointed out to Deputy Sangermano that there was a beer can inside the vehicle. The can was open, had about two ounces of liquid in it and was cold to the touch. It was located on the passenger side of the floorboard.

The EMS personnel informed Deputy Sangermano that the driver of the vehicle was the only person in the vehicle at the time of the accident. The driver, Zuber, was in the back of the ambulance when Deputy Sangermano approached her. She was strapped to a back board, had a neck brace on and a collar around her neck. After she identified herself verbally and with an Illinois state driver's license, he asked her to tell him what had happened. She stated she

was driving the vehicle, but could not remember what happened, which way she was travelling or anything like that. While he was speaking to her he could detect a strong odor of intoxicants coming off her breath and her person. Zuber also told the deputy that she had had three beers prior to the accident, and that she had gotten into an argument with her husband just before the accident and was upset. Zuber's height as indicated on the citation was five foot three inches and her weight was 140 pounds. The deputy asked her to submit to a preliminary breath test and she did.

Deputy Sangermano testified that there were skid marks on the road, just prior to a curve. The car went sideways and all four tires left skid marks. The longest skid mark was approximately 180 feet long and approximately 2.7 feet from the left side of the road, indicating that the vehicle was left of the center of the road. He interpreted this as indicating that the person was losing control during the curve, but he acknowledged that the skid marks could indicate that someone was attempting to slow down and negotiate the curve. He also acknowledged that a person who is not familiar with a certain roadway may not handle it as well as a someone who is and that it was possible that the beer can had been sitting in the back seat and was jostled into the front seat as a result of the accident and spilled on Zuber.

The car was brand new. Deputy Sangermano did not check the breaks or otherwise try to determine if there was something mechanically wrong with the car, except to see whether something appeared obvious to him, and nothing did. The weather was warm, and it had not rained that day. The road surface was dry. The road was narrow and curved. There were no potholes or anything similar in the roadway.

Later at the hospital another deputy issued Zuber three citations, one for operating too fast for conditions, another for operating left of center, and another for operating a motor vehicle while under the influence of an intoxicant.

The trial court determined there was probable cause to believe that Zuber was driving while under the influence of an intoxicant prior to the administration of the PBT. The court concluded that there was a believable or plausible account that she had been driving while under the influence of an intoxicant given her weight, her size, her admission that she drank three beers, the accident on a curve and the 180 feet of skid marks. The court stated that in deciding whether probable cause existed, it was not to weigh the evidence but rather determine whether "there is sufficient inferences to find that there's probable cause that the defendant here committed a violation."

DISCUSSION

On appeal, Zuber argues the trial court erred in three ways: (1) it applied the wrong burden of persuasion when it concluded the officer's account need only be plausible and the court is not to weigh the evidence for and against probable cause; (2) it used a chart not in evidence to ascertain Zuber's blood alcohol concentration (BAC); and (3) it erroneously concluded there was probable cause to arrest prior to the administration of the PBT.

Whether the facts, which are not disputed here, 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 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.

With respect to the correct burden of persuasion, the State concedes that at a hearing on this type of motion, the trial court is to weigh the evidence and choose between conflicting versions of the facts, unlike at a refusal hearing, where the court need only determine whether the officer's account is plausible. *See* ***State v. Wille***, 185 Wis.2d 673, 681-82, 518 N.W.2d 325, 328-29 (Ct. App. 1994). However, the State contends that it is not clear that the trial court did the former, rather than the latter. We agree it is not clear, but that means the trial court may have incorrectly viewed its role as determining whether the officer's account was plausible rather than weighing the evidence both for and against probable cause. We conclude, however, that this error by the trial court, if it did occur, does not entitle Zuber to a reversal. The only relevant testimony was that of Deputy Sangermano, and there was no inconsistencies or contradictions in his testimony requiring resolution by the trial court. Therefore, the facts are undisputed and the question is whether those facts meet the standard for probable cause. Because this is a question of law and our review is de novo, *see* ***Renz***, 222 Wis.2d at 444, 588 N.W.2d at 277, our analysis is unaffected by any misunderstanding the trial court may have had on the State's burden of persuasion.

Zuber's second point concerns comments the trial court made with respect to Zuber's height and weight at the close of the direct examination of Deputy Sangermano. The court stated that it noted the defendant was five foot three and weighed 140 pounds and had admitted she had three beers.[2] The trial court asked the prosecutor, "What blood alcohol test by statute or by the cases does that come up with, counselor?" The prosecutor answered that he had not calculated that. The court referred to a chart in a case, the name of which the court could not remember, which, it believed, indicated that a person 140 pounds having three beers was going to be over .05 BAC; that percentage, the court stated, "is the base limit for probable cause for an arrest." The court added it was not sure of this, and suggested that the prosecutor might want to look it up. However, the prosecutor did not follow that suggestion, explaining to the court that the testimony already presented by the officer on direct examination, in his view, established probable cause. Zuber's counsel contended that even if Zuber had a .05 BAC, that measure did not give any kind of indication of intoxication. The court agreed there was no presumption of intoxication from .05 to .1 BAC, but expressed the view that that range was sufficient to indicate probable cause. At that point, defense counsel proceeded to cross-examine the officer, after which both counsel presented argument to the court. Neither the officer's cross-examination nor counsels' arguments referred again to Zuber's BAC or to the court's comments on it.

Zuber contends the court was relying on a chart not in evidence when it took her weight, size and admission of three beers into account in

[2] The citation states Zuber's height and weight, and presumably that is the record the court was referring to.

concluding there was probable cause. The State responds that the trial court's reference to Zuber's BAC as over .05 was proper because the court may take judicial notice of matters which have verifiable certainty, and in ***State v. Hinz***, 121 Wis.2d 282, 289, 360 N.W.2d 56, 60 (Ct. App. 1984), the court held that the blood alcohol chart prepared by the Department of Transportation (DOT) meets the standard of verifiable certainty. According to the chart, which is set out fully in ***Hinz***, a 140-pound person's blood alcohol would be .08 after consuming three drinks. ***Id.*** at 284 n.2, 360 N.W.2d at 58.

We do not decide whether the trial court could properly take into account Zuber's BAC according to the DOT chart, because we are persuaded that, without any evidence of her BAC, the facts and circumstances within Deputy Sangermano's knowledge before administering the PBT were sufficient to lead a reasonable officer to believe that Zuber was probably driving while under the influence of an intoxicant. Zuber acknowledged that she had three beers. The cold can of open beer in the car still containing two ounces would lead a reasonable officer to believe that she had probably been drinking while driving, in other words, that at least one of those three beers were very recently consumed. The strong odor of alcohol also indicates that Zuber had been drinking. Moreover, Deputy Sangermano was able to observe Zuber's size, and a reasonable officer would believe that three beers would probably have an effect on a person of that size. The circumstances of the accident, which the officer observed, would lead a reasonable officer to believe the consumption of alcohol had probably affected Zuber's ability to drive. The degree of damage to the car and the trees, the skid marks, and the lack of anything in the road, weather conditions, or time of day to indicate there were other causes of the accident, would lead a reasonable officer to believe that Zuber had been driving in an uncontrolled manner. A reasonable

officer would therefore believe that it was more than a possibility that the consumption of intoxicants had affected Zuber's ability to drive safely.[3]

We do not agree with Zuber that the facts in this case are similar to those in ***Renz***, in which we found there was not probable cause. In ***Renz***, the driver was stopped because of a muffler; the officer did not observe anything about Renz's driving that was unusual or erratic. We concluded that the odor of intoxicants, Renz's statement that he had three beers earlier in the evening, and his performance on the field sobriety tests were not sufficient to establish probable cause. *See* ***Renz***, 222 Wis.2d at 444-46, 588 N.W.2d at 277-78. The significant factual difference between ***Renz*** and this case is that there is evidence here indicating that the consumption of alcohol had affected Zuber's ability to drive safely.

We also do not agree with Zuber that ***State v. Swanson***, 164 Wis.2d 437, 453 n.6, 475 N.W.2d 148, 155 (1991), controls the outcome of this case and requires reversal of the trial court. Zuber refers to this statement in ***Swanson***:

> Unexplained erratic driving, the odor of alcohol, and the coincidental time of the incident form the basis for a reasonable suspicion but should not, in the absence of a field sobriety test, constitute probable cause to arrest someone for driving while under the influence of intoxicants. A field sobriety test could be as simple as a finger-to-nose or walk-a-straight-line test. Without such a test, the police officers could not evaluate whether the suspect's physical capabilities were sufficiently impaired by the consumption of intoxicants to warrant an arrest.

[3] Section 346.63(1), STATS., prohibits driving "[u]nder the influence of an intoxicant … to a degree which renders [one] incapable of safely driving…."

Id. Although we later held in ***Wille*** that ***Swanson*** does not mean that under all circumstances the officer must perform field sobriety tests, *see* ***Wille***, 185 Wis.2d at 684, 518 N.W.2d at 329, Zuber points out that in ***Wille,*** the defendant stated "I've got to quit doing this," after an accident and after the officer had observed the odor of intoxicants. ***Id.*** Zuber emphasizes that such a statement, which we considered in ***Wille*** to be evidence of conscientiousness of guilt, is lacking here.

Just as ***Swanson*** does not establish a rule that field sobriety tests are always required in order to have probable cause, so, too, ***Wille*** does not establish a rule that in the absence of field sobriety tests there must be evidence of consciousness of guilt. Whether probable cause exists is assessed on a case-by-case basis. In this case, there was not simply erratic driving, but an accident, skid marks, a severely damaged vehicle and conditions that did not offer any cause for the accident other than the driver's lack of ability to drive safely. Also, Zuber admitted to drinking three beers and there was evidence of very recent consumption. We conclude it was not necessary for Deputy Sangermano to perform field sobriety tests, and without them, based on all the circumstances within his knowledge, it was more than a possibility that Zuber's drinking had impaired her ability to drive safely.

By the Court.—Judgment affirmed.

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