COURT OF APPEALS
DECISION
DATED AND FILED

March 16, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 99-0920-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHAD A. HANSEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Richland County: EDWARD E. LEINEWEBER, Judge. *Reversed and cause remanded with directions.*

¶1 DYKMAN, P.J.[1] Chad Hansen appeals from a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant (OMVWI). He asserts that the officer who arrested him had insufficient evidence

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1997-98).

to do so. We agree, and therefore reverse and remand, with instructions to grant Hansen's motion to suppress evidence of his blood test.

¶2 At about midnight on January 10, 1998, Deputy Rick Wickland of the Richland County Sheriff's Department was dispatched to a one car roll-over accident. He soon arrived at the scene of the accident and observed tracks suggesting that Hansen's vehicle had drifted to the right, Hansen had overcorrected and his vehicle had ended up rolling over in the median of the four-lane divided highway. He saw that Hansen was unconscious and smelled a strong odor of intoxicants about him. Wickland was assisted by a Sergeant Ewing of the Richland County Sheriff's Department who testified that he observed beer cans near the accident scene, though the cans could not be identified as definitely coming from Hansen's vehicle.

¶3 After Hansen was taken to the hospital, Wickland placed him under arrest for OMVWI. Hansen was still unconscious and could not respond. A lab technician drew blood from Hansen for an evidentiary test of his alcohol concentration. Hansen filed a motion to suppress the blood alcohol test results. The Richland County Circuit Court denied Hansen's motion, Hansen pleaded no contest to OMVWI, and the court adjudged him guilty. Hansen appeals.

ANALYSIS

¶4 The question of whether Deputy Wickland had probable cause to arrest Hansen is a question of law that we review de novo. *See* ***State v. Babbitt,*** 188 Wis. 2d 349, 356, 525 N.W.2d 102 (Ct. App. 1994). Probable cause to arrest is based on the totality of the circumstances facing a police officer at the time. *See* ***id.*** The standard is whether the specific facts of the particular case would have led a reasonable officer to conclude that the defendant had probably violated the law.

See ***State v. Wille***, 185 Wis. 2d 673, 682, 518 N.W.2d 325 (Ct. App. 1994). The standard for probable cause is low. The conclusion must be based on more than a suspicion that the defendant committed a crime, but the evidence need not even reach the level that guilt is more likely than not. *See* ***State v. Mitchell***, 167 Wis. 2d 672, 681-82, 482 N.W.2d 364 (1992).

¶5 The case law has not clearly outlined the minimum evidence necessary to establish probable cause to arrest for OMVWI. In ***State v. Seibel***, the supreme court held that several factors were sufficient to give the police reasonable suspicion that Seibel's driving was impaired by alcohol. ***State v. Seibel***, 163 Wis. 2d 164, 183-84, 471 N.W.2d 226 (1991). However, ***Seibel*** did not need to consider what factors would constitute probable cause for arrest, and therefore did not do so.

¶6 ***Wille*** holds that an odor of intoxicants, a rear-end accident with a parked car and Wille's statement that he had "to quit doing this" gave an officer probable cause to arrest Wille for operating a motor vehicle while intoxicated. ***Wille***, 185 Wis. 2d at 683-84.

¶7 In ***State v. Swanson,*** 164 Wis. 2d 437, 442, 475 N.W.2d 148 (1991), the supreme court considered the following facts: at approximately 2:00 a.m. on December 31, 1989, officers observed a vehicle drive onto the sidewalk in front of a tavern, nearly hitting at least one pedestrian; the officers investigated, and noticed an odor of intoxicants on Swanson's breath; Swanson had no difficulty standing and did not have slurred or impaired speech. Swanson then escaped, *see* ***id.*** at 443, and the court concluded that it was not necessary to address whether the officers had probable cause to arrest Swanson for OMVWI, *see* ***id.*** at 453. But in

a footnote, the last sentence of which is consistently cited in nearly all OMVWI appeals, the court said:

> Clearly, the officers here did possess a reasonable suspicion that Swanson had committed a criminal act, either operating under the influence or reckless endangerment, but arguably lacked probable cause to arrest Swanson at the time of the search. The first indicia of criminal conduct included Swanson's unexplained erratic driving. The second indicia included the odor of intoxicants emanating from Swanson as he spoke. The third indicia included the approximate time of the incident, which occurred at about the time that bars close in the state of Wisconsin. Taken together, these indicia form a basis for a reasonable suspicion that Swanson was driving while intoxicated. *See* ***State v. Seibel***, 163 Wis. 2d 164, 183, 471 N.W.2d 226 (1991), where we held that similar factors add up to a reasonable suspicion but not probable cause.

Swanson, 164 Wis. 2d at 453 n.6.

¶8 The difficulty caused by ***Swanson*** is that, contrary to the last sentence of footnote six, the supreme court in ***Seibel***, 163 Wis. 2d at 183, did not hold that the facts in that case added up to reasonable suspicion but not probable cause. All that the court said was: "While none of these indicia alone would give rise to a reasonable suspicion that the defendant's driving was impaired by alcohol, taken together they gave the police reason to suspect that the defendant's driving was impaired by alcohol."

¶9 Still, the supreme court held in ***Swanson*** that the ***Seibel*** factors do not add up to probable cause to arrest for OMVWI. The factors identified in ***Seibel*** were: (1) unexplained erratic driving that caused an accident; (2) a strong odor of intoxicants emanating from Seibel's traveling companions when Seibel and his companions had been traveling together between taverns; (3) a police

chief's belief that he smelled an intoxicant on Seibel; and (4) Seibel's belligerent conduct and lack of contact with reality when he was at a hospital. ***Id.*** at 181-82.

¶10 Usually, a defendant under suspicion of OMVWI will show indications of intoxication or fail field sobriety tests. Thus, in ***Wille***, the defendant's erratic driving, odor of intoxicants and statement that he had to "quit doing this" resulted in probable cause to arrest. ***Wille***, 185 Wis. 2d at 683. Here, Hansen exhibited two of those factors: erratic driving and odor of intoxicants. It is uncertain whether ***Wille*** would have been decided as it was had Wille not made his inculpatory statement at the hospital. Nor does ***State v. Kasian***, 207 Wis. 2d 611, 558 N.W.2d 687 (Ct. App. 1996), present the minimal facts with which we are faced here. In ***Kasian***, the defendant was involved in a one-car accident, had a strong odor of intoxicants about him, and exhibited slurred speech. ***Id.*** at 622. We concluded that this evidence gave the police probable cause to arrest Kasian. *See* ***id.*** Because he was unconscious, Hansen exhibited no slurred speech.

¶11 The State seeks to substitute the discovered beer cans, the time of day and the officer's expertise for other factors missing here, but present in ***Kasian*** and ***Wille***. We agree with the trial court that the presence of beer cans in the median adds little to a probable cause analysis. First, there is no direct connection between the beer cans and Hansen. But more importantly, the beer cans are only corroborative of the inference that Hansen consumed alcohol, a factor already shown by the odor of intoxicants emanating from him. In other words, we think the State has shown that Hansen probably consumed some amount of an alcoholic beverage. The same is true of the time of day. A late Saturday evening accident suggests alcohol consumption, but that fact is again shown by the odor of intoxicants around Hansen. And though the officer's experience helped him conclude how the accident probably happened, experience will not substitute for

evidence showing that Hansen probably consumed alcohol to a degree that rendered him incapable of safely driving.

¶12 Were we writing on a clean slate, we might reach a different conclusion. But the most relevant explanation of probable cause in OMVWI cases are the four ***Seibel*** factors, which the supreme court said in ***Swanson*** were insufficient to constitute probable cause: (1) unexplained erratic driving; (2) a strong odor of intoxicants on travelling companions; (3) an odor of intoxicants on the defendant; and (4) belligerence and lack of contact with reality. Two of these factors were present in Hansen's arrest: a strong odor of intoxicants and erratic driving. Even assuming the slight evidence provided by the beer cans would be the equivalent of the evidence of Seibel's bar hopping, which it is not, and the officer's experience would be the equivalent of Seibel's belligerence and lack of contact with reality, which it is not, we are still left with ***Swanson's*** conclusion that the four ***Seibel*** factors are insufficient to support probable cause to arrest for OMVWI. We recognize that this is not what ***Seibel*** held, but we also recognize that this is what ***Swanson*** said that ***Seibel*** held. We are bound by supreme court decisions, *see* ***State v. Lossman***, 118 Wis. 2d 526, 533, 348 N.W.2d 159 (1984), and if there is a conflict between two supreme court opinions, we follow that court's practice of following the most recent opinion, *see* ***Spacesaver Corp. v. DOR***, 140 Wis. 2d 498, 502, 410 N.W.2d 646 (Ct. App. 1987). ***Swanson*** was decided after ***Seibel***.

¶13 The State recognizes the problem created by the "***Swanson*** footnote." In effect, the State asks us to ignore or consider the footnote overruled by subsequent court of appeals cases. The State contends:

> The ***Swanson*** case itself has been criticized, first in the case of ***State v. Wille***, *supra.,* and then again in the case

> of ***State v. Kasian***, 207 Wis. 2d 611, 558 N.W.2d 687 (1996). Specifically, the "***Swanson*** footnote" upon which the defendant relies has been criticized. Both the ***Wille*** and ***Kasian*** cases have corrected the ***Swanson*** footnote's broad assertions concerning what is or is not sufficient for probable cause.... The "***Swanson*** footnote" is really just that: a footnote. It had nothing to do with the actual decision in the case and was gratuitous dicta. It held nothing.

¶14 What the state is really arguing is that the court of appeals has either overruled the "***Swanson*** footnote" or that alleged court of appeals criticism of the footnote has diminished its effect. We do not believe that this is possible. While there might be a conflict between ***Swanson***, ***Wille*** and ***Kasian***, where a supreme court opinion conflicts with a court of appeals opinion or opinions, we are to follow the supreme court opinion. *See* ***Madison Reprographics, Inc. v. Cook's Reprographics, Inc.***, 203 Wis. 2d 226, 238, 552 N.W.2d 440 (Ct. App. 1996). We are left, however, with the State's assertion that footnote six of ***Swanson*** is dicta.

¶15 Even if a court's statement is not decisive to the primary issue presented, the statement may not be dictum. If a statement is plainly germane to a primary issue, it is not dictum. *See* ***State v. Kruse***, 101 Wis. 2d 387, 392, 305 N.W.2d 85 (1981). Also:

> It is deemed the doctrine of the cases is that when a court of last resort intentionally takes up, discusses, and decides a question germane to, though not necessarily decisive of, the controversy, such decision is not a *dictum* but is a judicial act of the court which it will thereafter recognize as a binding decision.

Id. (quoting ***Chase v. American Cartage Co.***, 176 Wis. 235, 238, 186 N.W. 598 (1922)). The supreme court has noted that court of appeals deference in identifying supreme court statements as dicta is gratifying, and also cautions that in the supreme court's "superintending and administrative capacity, some

pronouncements that are technically obiter dictum are nevertheless administrative or supervisory directions that are intended for the guidance of the court system and are to be followed." ***State v. Koput***, 142 Wis. 2d 370, 386 n.12, 418 N.W.2d 804 (1988). Thus, if the last sentence of footnote six in ***Swanson*** was either germane to the ***Swanson*** controversy or an instruction to trial and intermediate appellate courts, we must follow it. And, given that deference is gratifying, we conclude that we should only label a supreme court statement "dicta" if it is clearly that. It is far from clear that the ***Swanson*** footnote was a purely gratuitous statement or not germane to the opinion or was not made in the supervisory function of the supreme court. We decline the State's request to label it "gratuitous dicta."

¶16 We conclude that although this is a close case, the information that Hansen's arresting officer obtained prior to arresting Hansen for OMVWI was insufficient to support a finding that there was probable cause to believe Hansen was guilty of OMVWI. We therefore reverse Hansen's judgment of conviction, and remand with instructions to grant Hansen's motion to suppress the evidence obtained as a result of the evidentiary test of his blood.

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

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4 (1997-98).