COURT OF APPEALS
DECISION
DATED AND FILED

January 20, 2000

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

No. 99-1039-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DONALD A. LESAVAGE,

RECONSIDERATION of the decision filed December 9, 1999. *Confirmed.*

¶1 DYKMAN, P.J. Donald A. Lesavage has filed a motion to reconsider our decision of December 9, 1999. WISCONSIN STAT. RULE 809.24 (1997-98)[1] provides that "[a] motion for reconsideration is not permitted." Nonetheless, we will reconsider our opinion on our own motion. *See* RULE 809.24.

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

¶2 Lesavage's motion addresses two issues. He asserts that the trial court erred by failing to dismiss the case when the district attorney was unprepared to proceed at the hearing on Lesavage's motion to suppress evidence. He also asserts that, for a variety of reasons, the officer who arrested him did not have reason to do so. We confirm our decision of December 9, 1999.

¶3 We explained in our previous opinion that Lesavage had not been unfairly prejudiced by the trial court's decision to grant the State's request for a continuance. Lesavage asserts that it cost him an additional $1,000 in legal fees for his attorney to attend the adjourned motion hearing. This is unfortunate, but all continuances raise the cost of litigation and continuances are a part of our legal landscape. Substantial attorney fees are not unique to Lesavage. It is a fact of litigation that continuances are sometimes requested and sometimes granted. It is another fact that legal representation is expensive and out of the reach of many people. Yet, it is within a trial court's discretion to grant a motion for a continuance. *See* ***State v. Anastas***, 107 Wis. 2d 270, 272, 320 N.W.2d 15 (Ct. App. 1982). The fact that Lesavage had to pay an additional $1,000 because the district attorney was unable to proceed is not unique to him, and is not a reason to overturn his conviction.

¶4 Lesavage suggests a number of reasons why the trial court should not have believed the district attorney. He believes that the subpoena the district attorney claimed to have sent to the sheriff was not in the court record. But unserved subpoenas are not necessarily part of the record. If the sheriff had not yet served the subpoena, it would still have been in the hands of the sheriff. And the issue of the subpoena is a red herring. The trial judge was entitled to believe the district attorney. This is a matter of credibility and the trial judge is the ultimate arbiter of credibility. *See* ***State v. Marty***, 137 Wis. 2d 352, 359, 404

N.W.2d 120 (Ct. App. 1987), *overruled on other grounds by* ***State v. Sanchez***, 201 Wis. 2d 219, 548 N.W.2d 69 (1996). This means that an appellate court will not interfere with a trial judge's credibility determination, and we will not do so here.

¶5 Second, it is incorrect that Lesavage would have saved $1,000 had the trial court dismissed the action against him. Had the trial court done so, the district attorney would merely have reissued the complaint. If Lesavage then wanted to again make a motion to suppress, his attorney would have been required to attend court to make that motion. Either way, his attorney would have been present two times, and would have billed Lesavage for both appearances. We conclude that the adjournment and resulting legal fees are not a reason to grant relief to Lesavage.

¶6 Next, Lesavage again argues that the deputy sheriff who arrested him could not accurately determine that there was probable cause to arrest because Lesavage's actions could have been due to accident trauma and not the ingestion of alcohol. We repeat the conclusions of our December 9, 1999 opinion. However, we also note that at the motion to suppress, Lesavage relied upon our opinion in ***County of Jefferson v. Renz***, 222 Wis. 2d 424, 588 N.W.2d 267 (Ct. App. 1998), for its discussion of the issue of probable cause in driving while intoxicated cases. Since then, the supreme court has reversed ***Renz***. ***County of Jefferson v. Renz***, No. 97-3512 (Wis. Dec. 22, 1999). The supreme court decided that the purposes of the OWI laws:

> [are] best served if an officer can request a PBT [preliminary breath test] while investigating whether a driver has violated the OWI laws, before probable cause for arrest has been established. As stated above, the petitioner's interpretation maximizes highway safety, because it makes the PBT an effective tool for law enforcement officers investigating possible OWI violations.

> It also encourages vigorous prosecution of OWI violations, because it allows PBT results to be used to show the existence of probable cause for an arrest.

Id. at ¶46.

¶7 We repeat that the test for probable cause is a low standard. As we explained, it could have been more likely than not that Lesavage was not guilty of OWI, and yet probable cause for his arrest would still exist. *See* ***State v. Mitchell***, 167 Wis. 2d 672, 681-82, 482 N.W.2d 364 (1992). Even the concurring opinion in ***Renz*** concludes that a more demanding definition of probable cause "is not very demanding at all." ***Renz***, No. 97-3512, slip op. at ¶56 (Abrahamson, C.J., concurring). Thus, it could have been more likely than not that Lesavage's behavior at the scene of his accident was caused by trauma and post-accident alcohol ingestion, and the officer still would have had probable cause to arrest him.

¶8 We also repeat that whether a set of facts constitutes probable cause 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). This means that we examine the transcript of the motion to suppress hearing without considering the trial court's observations about that hearing. Lesavage did not testify at his hearing, so the deputy sheriff's testimony is undisputed. This testimony shows a one-car accident, which can be an indication of alcohol involvement, a "stronger odor of intoxicants" when Lesavage was sitting in the deputy's car, an inability to recite the alphabet, another indication of intoxication, a failed HGN test, another indication of intoxication, slurred speech, also an indication of intoxication, and a preliminary breath test result of .12. Wisconsin's legal limit is .10. *See* WIS. STAT. § 340.01(46m).

¶9 This is not a close case. It is possible that despite Lesavage's assertion that he had consumed no alcohol that evening, he found alcohol after the accident in the back seat of the officer's squad car or somewhere else. It is possible that, despite no evidence of record that he wore glasses, he wore glasses or contacts and that this invalidated the HGN test. It is possible that the deputy sheriff would have discovered Lesavage's pupils were unequal in size had she checked, demonstrating a possible head injury rather than intoxication. It is possible that his inability to recite the alphabet was caused by trauma and not alcohol, that the odor of alcohol about him was imaginary, and that his accident was caused by a deer and not intoxication. Viewing the evidence as Lesavage would have us view it, we could even conclude that it was more likely than not that Lesavage was *not* driving while intoxicated, and still there would be probable cause for his arrest. We need not go that far however, and we do not.

¶10 The concept of probable cause envisions that persons who are ultimately found not guilty of OWI can be validly arrested for that crime. Lesavage might have been one of those persons but for his no contest plea upon which he was found guilty. The deputy sheriff had a slight burden indeed before she was entitled to conclude that there was probable cause to believe Lesavage had been operating a motor vehicle while intoxicated. That burden was more than met by the evidence produced at Lesavage's motion hearing.

¶11 Lesavage will undoubtedly disagree with this analysis, and again conclude that his arguments were not address or improperly addressed. We go no further except to note that, as the supreme court has concluded, "[a]n appellate court is not a performing bear, required to dance to each and every tune played on an appeal." ***State v. Waste Management of Wis., Inc.***, 81 Wis.2d 555, 564, 261 N.W.2d 147 (1978).

By the Court.—Upon reconsideration, the decision filed in this case on December 9, 1999, is confirmed.