COURT OF APPEALS
DECISION
DATED AND FILED

October 21, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-1306-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL E. CREVISTON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Sauk County: JAMES EVENSON, Judge. *Affirmed.*

¶1 EICH, J.[1] Daniel E. Creviston appeals from an order denying his motion to suppress evidence obtained as a result of what he claims was his unlawful arrest for possessing open intoxicants, which, in turn, led to his arrest and conviction for driving while intoxicated. He argues that because the arrest for

[1] This appeal is decided by a single judge pursuant to §752.31(2)(f), STATS.

open intoxicants was not based on probable cause, it—and, as a result, his subsequent arrest for DWI—was unlawful. We are satisfied that probable cause existed for both arrests, and we therefore affirm the order.

¶2 When reviewing the denial of a suppression motion, we defer to the trial court's factual findings, and will uphold them unless they are clearly erroneous. ***State v. Dull***, 211 Wis.2d 652, 655, 565 N.W.2d 575, 577 (Ct. App. 1997). However, whether those facts satisfy the constitutional standard is a question of law, which we review de novo. ***State v. Richardson***, 156 Wis.2d 128, 137-38, 456 N.W.2d 830, 833-34 (1990).

¶3 Probable cause to arrest is a question frequently before us. In ***State v. Pozo***, 198 Wis.2d 705, 544 N.W.2d 228 (Ct. App. 1995), we said that the concept of probable cause

> … is neither a technical nor a legalistic concept; rather, it is a "flexible, common-sense measure of the plausibility of particular conclusions about human behavior"—conclusions that need not be unequivocally correct or even more likely correct than not. It is enough if they are sufficiently probable that reasonable people—not legal technicians—would be justified in acting on them in the practical affairs of everyday life.

Id. at 711, 544 N.W.2d at 231(citations and quoted sources omitted).

¶4 Probable cause to arrest exists where the officer, at the time of the arrest, has knowledge of facts and circumstances sufficient to warrant a person of reasonable prudence to believe that the person arrested is committing, or has committed, an offense. As we have said—and as the very name implies—it is a test based on probabilities; and, as a result, the facts faced by the officer need only be sufficient to lead him or her to believe that guilt is more than a possibility. It is also a commonsense test. "The probabilities with which it deals are not technical:

They are the factual and practical considerations of everyday life on which reasonable and prudent men and women, not legal technicians, act." ***Dane County v. Sharpee***, 154 Wis.2d 515, 518, 453 N.W.2d 508, 510 (Ct. App. 1990). The 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), and in making that measurement, we look to the totality of the circumstances within the officer's knowledge and at the place and time of the arrest. ***State v. Koch***, 175 Wis.2d 684, 701, 499 N.W.2d 152, 161 (1993). Finally, it is well recognized that an officer's experience-based conclusions may be considered in determining whether probable cause exists. ***State v. DeSmidt***, 155 Wis.2d 119, 134-35, 454 N.W.2d 780, 787 (1990).

¶5 In this case, the arresting officer, Sergeant David Hoege of the Reedsburg Police Department, testified that he received a dispatch at 2:40 a.m. indicating that a man had been seen leaving his car on a roadside and "staggering" down the middle of the highway. Arriving at the scene almost immediately, Hoege observed a pickup truck stuck in a snowbank and a single set of fresh footprints going away from the vehicle. He looked down the road and saw an individual, later identified as Creviston, "walking down the roadway in a zigzag type course." According to Hoege, there was an inch of fresh snow on the ground, and no tracks were visible other than those made by the truck, his squad car and Creviston. Pulling his squad car alongside Creviston, Hoege noted that he (Creviston) was holding a glass in his right hand and a plastic, grocery-type bag in his left. When Creviston saw Hoege, he threw the glass into the snow.[2] Hoege

[2] Hoege testified that, in his experience, when someone immediately discards a beverage container upon first spotting a police officer or squad car at that time in the morning, it is usually because the container contains intoxicants.

stopped, got out of the squad car and told Creviston to stop. He refused and continued to walk away. Hoege then took hold of Creviston's arm to stop him from leaving the area.[3]

¶6 Hoege testified that, prior to arresting him, he asked Creviston if the truck belonged to him and Creviston said it did. Hoege noticed that the footprints in the snow led precisely from where Creviston was standing to the truck, and he testified that, during the course of the conversation, he could smell intoxicants on Creviston's breath. According to Hoege, Creviston's eyes were bloodshot, his speech was "almost slurred," and he had trouble enunciating his words. Hoege saw no indication that Creviston could have acquired the suspected intoxicant from any point other than inside his vehicle. At that point, Hoege arrested Creviston for possession of open intoxicants, handcuffed him and placed him in the squad car.[4]

¶7 From all of the facts known to Hoege at that time, he could reasonably infer that Creviston had been driving the truck when it went into the snowbank, for his was the only set of footprints in the area, and they led directly to the truck. He could also infer that the container Creviston threw into the snowbank contained an intoxicant because of his experience as a police officer in

[3] Creviston claims this was the moment he was arrested for possession of open intoxicants, and that because all Hoege knew at the time was that he had thrown an unwanted glass into a snowbank and was walking in a zigzag pattern down the roadway, he did not have probable cause to make the arrest. We assume this mistaken assertion stems from the fact that, at one point, Hoege stated that when Creviston started to walk away from him he grabbed his arm and then placed him under arrest. As we discuss immediately below, however, Hoege elaborated on the specific timing of these events later in his testimony when he specifically stated that he did not arrest Creviston until after he had talked to him and made several other incriminating observations.

[4] Hoege continued his investigation, which eventually led to Creviston's arrest for driving while intoxicated. He was never charged with the open intoxicants violation.

similar situations. Such an inference also finds support in the evidence of intoxication observed by Hoege—Creviston's slurred speech, bloodshot eyes and odor. Finally, when Creviston continued walking away after being ordered to stop, Hoege could conclude that he was attempting to avoid arrest or to flee, which, also in his experience, is not unusual behavior for a culpable individual trying to avoid arrest. We conclude that, based on the totality of the circumstances, a reasonable police officer in Hoege's position, could believe that Creviston had probably been driving with an open container of intoxicants in violation of § 346.935(2), STATS. In other words, probable cause existed for the arrest.

¶8 Creviston also claims his arrest for open intoxicants was simply a pretext to permit Hoege to investigate further. He bases this assertion primarily on the fact that he was never charged with the possession of open intoxicants, but only with DWI. We have ruled, however, that probable cause existed for the possession arrest; and Creviston's "pretext" argument must fail as a result.[5]

By the Court.—Order affirmed.

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

[5] Creviston also contends that the absence of any ***Miranda*** warnings somehow implicates the field sobriety tests administered by Hoege after his arrest for the possession charge—and which were, he says, a vital element of his subsequent arrest and conviction for driving while intoxicated. The argument appears to be grounded on his assertion that the possession arrest was really a sham, implemented by Hoege only for the purpose of effectuating the DWI arrest—a position we have already rejected in holding that probable cause existed for the first arrest. Beyond that, the State argues that, because field sobriety tests are not testimonial in nature, ***State v. Babbit***, 188 Wis.2d 349, 361, 525 N.W.2d 102, 106 (Ct. App. 1994), ***Miranda*** is inapplicable. Creviston does not respond to the argument in his reply brief, and we consider the point conceded. *See* ***Schlieper v. DNR***, 188 Wis.2d 318, 322, 525 N.W.2d 99, 101 (Ct. App. 1994) (appellant cannot complain if propositions of the respondents which appellant does not undertake to refute in his or her reply brief are taken as confessed).