

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

April 4, 2000

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

**NOTICE**

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**No. 99-1760-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**WILLIAM REMINGTON,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Milwaukee County: MARY M. KUHNMUENCH, Judge. *Affirmed.*

¶1 WEDEMEYER, P.J.<sup>1</sup> William Remington appeals from a judgment entered after he pled no contest to operating a motor vehicle while under the influence of an intoxicant. More specifically, he challenges the order denying his motion to suppress for lack of probable cause to arrest. Remington claims the trial

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2).

court erred in concluding that probable cause existed for his arrest. Because, under the totality of the circumstances and all of the facts available to the arresting officer at the time of the arrest, he could reasonably believe that Remington was driving his motor vehicle while under the influence of an intoxicant, this court affirms.

## **I. BACKGROUND**

¶2 On October 16, 1997, after 11:00 p.m., Bayside police officer Michael Groh arrested Remington for operating a motor vehicle while under the influence of an intoxicant. The site of the arrest was the parking lot of a bank located just south of an Amoco service station, which itself was located on the southwest corner of East Brown Deer Road and North Port Washington Road. The undisputed sequence of events that precipitated the arrest are as follows. At approximately 11:00 p.m., Groh was in the Amoco station where he had stopped to buy a cup of coffee. He was alone and on squad patrol. During this interlude, Remington entered the station, observed Groh and in a loud voice yelled, “Hey security guard, where is Highway 100?” Groh responded that he was not a security guard, but a police officer. He attempted to find out where Remington was trying to go. Remington informed him that he was going to some hotel on Highway 100 and he was not familiar with the area. Groh noticed that Remington’s speech was slurred. He observed that Remington was “standing in there moving around. I could tell there was something going on with him.” During this time, Groh was standing about eight feet from Remington. He could “smell alcohol on him.” Remington then said, “Well, I’m going to go and get the address,” and left the station.

¶3 Groh expressed concern about Remington driving and announced he was not going to let Remington go anywhere. Groh left the station, did not see Remington in the ramp area, but noticed a car leaving the area, and assumed it was Remington. Groh got into his squad car and followed the car east on Brown Deer Road. The car was traveling in the south turn lane. In this lane, at the intersection of North Port Washington Road and East Brown Deer Road, there is a stop sign for vehicles turning right. Groh noticed that the car did not come to a complete stop before it turned south. He observed the car start to turn onto a ramp which led back to the Amoco station, but the car altered its direction and continued south. It then turned onto the ramp leading to a McDonald's restaurant and stopped in the parking area. The driver then exited the car and headed in the direction of a bank building located between the service station and McDonald's. The bank was not open at that hour of the evening. Groh recognized Remington, he drove to where Remington was walking, and asked Remington what he was doing. Remington responded that he was going to get a map. When Groh was within four to five feet of Remington, he could smell alcohol. Groh told Remington that he had rolled through the stop sign and Groh wanted to question Remington further. Groh then asked Remington if he had been drinking. He responded that he had a couple of beers. Groh then asked Remington if he would take a field sobriety test to prove he was not under the influence of an intoxicant. Groh first inquired about Remington's educational background and requested that he recite the alphabet. Remington refused. Remington was standing close enough that Groh could still smell the odor of an intoxicant, observed Remington swaying, and that his speech was slurred. Groh again asked him to recite the alphabet and again, he refused. Groh then announced that from what he had seen—"the way he was driving, my observations of him in the gas station, the odor of intoxicant, he was under arrest for OWI."

¶4 Remington moved to suppress any evidence derived from the unlawful arrest alleging that Groh lacked probable cause to arrest him. An evidentiary hearing was held on January 21, 1999, at which only Groh testified. The trial court denied the motion. Remington pled no contest. The trial court found him guilty, sentenced him to ninety days in the House of Correction, but stayed judgment until he perfected his appeal. Remington now appeals.

## II. ANALYSIS

¶5 Whether undisputed facts constitute probable cause is a question of law which this court reviews independently. *See State v. Babbitt*, 188 Wis. 2d 349, 356, 525 N.W.2d 102 (Ct. App. 1994). In determining whether probable cause exists, we must look to the totality of the circumstances to determine whether the arresting officer's knowledge at the time of the arrest, would lead a reasonable police officer to believe that the defendant was operating a motor vehicle while under the influence of an intoxicant. *See State v. Nordness*, 128 Wis. 2d 15, 35, 381 N.W.2d 300 (1986). Probable cause to arrest does not require proof beyond a reasonable doubt or even that guilt is more likely than not. *See State v. Welsh*, 108 Wis. 2d 319, 329, 321 N.W.2d 245 (1982). It is only necessary that the information lead a reasonable officer to believe that guilt is more than a possibility. *See State v. Paszek*, 50 Wis. 2d 619, 625, 184 N.W.2d 836 (1971). In determining whether probable cause exists, a police officer's conclusions, based upon his investigative experience, may be considered. *See State v. Wille*, 185 Wis. 2d 673, 683, 518 N.W.2d 325 (Ct. App. 1994). A defendant's refusal to submit to a field sobriety test may be used as evidence of probable cause. *See Babbitt*, 188 Wis. 2d at 363.

¶6 Remington, relying heavily upon *State v. Swanson*, 164 Wis. 2d 437, 475 N.W.2d 148 (1991), contends that, absent any coordination tests, evidence of bloodshot eyes, unresponsive replies to questioning, improper signaling, unstable walking, and the consumption of only a couple of beers, probable cause was not established. See *id.* at 454 n.6. This court is not convinced for the reasons that follow.

¶7 Remington first cites the following passage from a footnote in *Swanson* to support his position:

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 capacities were sufficiently impaired by the consumption of intoxicants to warrant an arrest.

*Id.* In *Swanson*, unlike here, the police officers failed to request that the defendant perform any field sobriety test. In *Wille*, this court examined the precedential value of the above cited quotation from *Swanson*. Therein we declared: “The *Swanson* footnote does not mean that under all circumstances the officer must first perform a field sobriety test, before deciding whether to arrest for operating a motor vehicle while under the influence of an intoxicant.” *Willie* at 684.

¶8 *Willie* was decided in 1994 and remains unqualified by any subsequent decision. Thus, this court deems the application of the footnote declaration limited to similar facts, which do not exist in this appeal.

¶9 Here, in fact, Groh had already commenced the field sobriety testing, although just barely, when he inquired about Remington's educational background, and when he observed that Remington's replies to his questions were responsive. It was at the point of requesting a recitation of the alphabet that Remington refused to respond.

¶10 Second, Remington argues that, because he is an experienced criminal lawyer who is familiar with the implications of investigative techniques in this type of case, his refusal to submit to certain types of field sobriety tests ought not be indicative of consciousness of guilt. This court concedes the reasonableness of this line of thinking. But, this court cannot turn its back on its own case law supporting the opposite conclusion. See *Babbitt*, 188 Wis. 2d at 359-60. Thus, Remington's assertion that the refusal to perform field sobriety tests, other than the educational questions to which he responded, could not be used as a reason for arresting him. As we concluded in *Babbitt*, it is permissive for the investigating officer to consider such a refusal.

¶11 Remington argues that his driving pattern should not be used as a factor supporting OWI, because it was consistent with someone being lost and Groh knew this. Here, again, his argument is not unreasonable. But equally reasonable, is the conclusion that failure to completely stop at a stop sign, followed by an aborted attempt to turn onto an entry ramp and then driving on to the next entry ramp, is an indication of disorientation and erratic driving warranting further investigation.

¶12 Remington further contends that the trial court erred in concluding that his refusal to recite the alphabet left the officer no choice but to arrest him.

Remington cites no record reference for this sweeping generality. This court finds no basis in the record for this assertion.

¶13 In contrast to Remington's arguments, the record reasonably demonstrates that Remington attracted Groh's attention when he entered the Amoco service station and, in a loud tone, addressed Groh as a security guard. Groh was an eleven-year veteran of the police force. Remington was seeking information about the location of a hotel. During this exchange, Groh first noticed that Remington's speech was slurred. Groh was close enough to him to pick up the odor of an alcoholic beverage. From his observation of Remington's comportment, he concluded that all was not right with Remington. Remington announced that he was leaving to find the address of the hotel he was seeking, and then left the station. Groh said to the station attendant, if Remington was driving, "he was not going to let him go anywhere." Driving his squad car, Groh followed Remington out of the Amoco premises east on Brown Deer Road. He observed that Remington did not come to a complete stop at a stop sign, started to turn back into the Amoco station premises but then changed direction, and continued south to the next entry ramp at a McDonald's restaurant. He observed Remington park his car, get out, and begin to walk toward a bank building located between the McDonald's and the Amoco station. The bank was not open at that hour. Groh drove to where Remington was located and asked him what he was doing. Remington responded that he was going to get a map. Groh got out of his squad car and, as he approached to within four to five feet, he could still detect the smell of an alcoholic beverage. Groh told Remington about the traffic offenses he had committed, and that was the reason he wanted to talk to him. When asked if he had been drinking, Remington responded that he had consumed a couple of beers. Groh then informed Remington that, based upon his observations of him, he

wanted to administer a field sobriety test. Groh first inquired about his educational background. Next, he asked him to recite the alphabet, but Remington refused. Groh noticed that Remington was swaying as he was standing and again noted that his speech was slurred. After Remington again refused to recite the alphabet, Groh announced that from what he had seen so far, “the way he was driving, my observations of him in the gas station, the odor of an intoxicant, he was under arrest for OWI.”

¶14 After listening to the testimony of Groh, the trial court found that Remington’s speech was slurred, he smelled of alcohol, he had failed to stop for an official sign, he drove erratically and appeared disoriented, and he refused to perform a field sobriety test. Although Remington raises some very good points about what Groh did not observe or note in his records, the trial court was not required to address each of these issues; rather, these facts are more appropriately presented to a jury for a factual and credibility determination. There was sufficient evidence in the record for the trial court’s findings of fact, and they are not clearly erroneous. Based upon these findings of fact, the trial court did not err in concluding, under the totality of the circumstances available to Groh, that he could reasonably believe that Remington was driving his motor vehicle while under the influence of an intoxicant. Accordingly, there was probable cause to arrest Groh for OWI.

*By the Court.*—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.





