

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 4, 2000

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

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 99-2097

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

CITY OF MILWAUKEE,

PLAINTIFF-RESPONDENT,

v.

EARL MEREDITH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: CLARE L. FIORENZA, Judge. *Affirmed.*

¶1 WEDEMEYER, P.J.¹ Earl Meredith appeals from a judgment entered after a jury found him guilty of operating a vehicle with a prohibited blood alcohol concentration, contrary to WIS. STAT. § 356.63(1)(b). He challenges the order denying his motion to suppress this evidence, where he argued that the

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

police officer lacked probable cause to arrest him for operating a vehicle while under the influence of an intoxicant. 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 Meredith was driving his motor vehicle while under the influence of an intoxicant, this court affirms.

I. BACKGROUND

¶2 On March 22, 1997, Meredith and his wife had a friend over for dinner. Meredith had a couple of beers, but stopped drinking at 8:30 p.m. He stopped because he had to drive to pick up his mother-in-law, who was working until 11:00 p.m. While en route to do so, Meredith got involved with another vehicle in a “road rage” incident. The other vehicle followed Meredith and both were speeding and swerving at each other. Meredith’s wife, who was also in the car, suggested that Meredith turn around and head back toward the intersection of 60th and Villard, where they had seen two squad cars. Both Meredith and the other vehicle made a U-turn and drove back to where the two squad cars were located. The driver of the other vehicle, Christopher Davis, jumped out of his vehicle and told the police officers that Meredith was driving erratically and had to be stopped. The police officers issued Davis a ticket for reckless driving.

¶3 Milwaukee police officer Jerry Whiteley was instructed to speak with Meredith. Whiteley and officer Thomas Skovera were at 60th and Villard investigating a stabbing. Skovera told Whiteley to handle the Meredith incident and he called in additional assistance to continue with the stabbing investigation.

¶4 Whiteley recalled Meredith’s and Davis’s cars because he had observed the two vehicles stopped at the intersection, saw both vehicles punch the accelerator in an attempt to pass each other, saw the vehicles swerve toward each

other, and drive off. When the drivers of the vehicles returned to seek assistance from the police, Whiteley noticed a strong odor of alcohol from Meredith, observed that Meredith was agitated and excited, heard Meredith speak in a slurred fashion, and believed that Meredith was operating his vehicle while intoxicated. Whiteley asked Meredith to perform five field sobriety tests: the walk and turn, the balance, the finger-to-nose, counting backward and the alphabet. After administering these tests, Whiteley concluded that Meredith passed two of the five: the finger-to-nose test and the alphabet test. Whiteley proceeded to arrest Meredith for operating a vehicle while under the influence of an intoxicant.

¶5 At the police station, Meredith submitted a breath sample, which was determined to contain .13% blood alcohol concentration. Accordingly, he was charged with one count of operating a vehicle while under the influence of an intoxicant and operating a vehicle with a prohibited blood alcohol concentration.

¶6 Meredith filed a motion to suppress the blood alcohol test, alleging that the police officer did not have probable cause to arrest. At the suppression hearing, Whiteley testified that when he approached Meredith, he could smell a strong odor of alcohol, he could see Meredith was very irate, argumentative, had slurred speech, and bloodshot, glassy eyes. Whiteley proceeded to testify that five field sobriety tests were administered and that Meredith passed only two of the five tests. Midway through cross-examination of the officer, during which Meredith's counsel was attempting to show that Meredith, in fact, passed all five of the sobriety tests, the trial court asked Meredith's counsel whether he would "concede the officer's testimony that your client smelled of alcohol, had glassy eyes and slurred speech." Counsel so stipulated for the purposes of the suppression hearing. The trial court then asked the City if it would stipulate that

Meredith passed all five sobriety tests. The City so stipulated. Thereafter, the trial court ruled that, even with the stipulations, the police officer had probable cause to arrest for operating a vehicle under the influence of an intoxicant.

¶7 Meredith pled not guilty and the case proceeded to a jury trial. The jury returned a not guilty verdict on the operating under the influence charge, but found Meredith guilty of operating a vehicle with a prohibited blood alcohol concentration. Judgment was entered. Meredith now appeals.

II. DISCUSSION

¶8 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).

¶9 Meredith's argument in this case is simple. He contends that the odor of alcohol, glassy eyes and slurred speech gives the police officer *reasonable*

suspicion to conduct further investigation into whether Meredith was operating a vehicle under the influence. He claims that these factors alone, however, cannot rise to the level of probable cause to arrest for operating while under the influence. He further states that these factors, combined with the additional information that Meredith passed all five field sobriety tests, should have resulted in the trial court concluding that the police officer lacked *probable cause* to arrest Meredith. In support of his position, Meredith relies heavily upon the following passage from a footnote in *State v. Swanson*, 164 Wis. 2d 437, 475 N.W.2d 148 (1991).

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. at 454 n.6. Meredith argues that in the instant case, the police officer had even less evidence to establish probable cause because five field sobriety tests were administered and were completed successfully. This court is not convinced.

¶10 In reviewing the decision of the trial court, this court may affirm the trial court if it reached the right result.² Here, in assessing whether Whiteley had probable cause to arrest Meredith for operating a vehicle under the influence, this court must review the totality of the circumstances to determine whether the

² The trial court found probable cause based on the stipulations referred to above. Notwithstanding, this court's review is based on the totality of the circumstances available to the police officer at the time of the arrest. Therefore, this court reaches the same result as the trial court, i.e., that probable cause existed, but for different reasons.

arresting officer's knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant was operating a vehicle while under the influence. *See Nordness*, 128 Wis. 2d at 35. The facts and circumstances known to Whiteley at the time of the arrest were: (1) Meredith and Davis had engaged in erratic driving, including excessive speed limits and swerving toward each other's vehicle; (2) Meredith smelled of alcohol; (3) Meredith was agitated and argumentative; (4) Meredith's speech was slurred; (5) Meredith's eyes were bloodshot and glassy; and (6) Meredith failed three of the five field sobriety tests that were administered at the scene. This is sufficient to establish probable cause, or "that quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed a crime." *Paszek*, 50 Wis. 2d at 624.

¶11 Meredith's reliance on *Swanson* is misplaced. The facts are not identical. Probable cause determinations must be measured by the facts of the particular case and made on a case-by-case basis. *See Paszek*, 50 Wis. 2d at 625. The facts of this particular case, notwithstanding the *Swanson* language, support the probable cause determination.

¶12 Although Meredith raises some very good points about whether, in fact, Whiteley was correct or incorrect about his assessment as to Meredith's passing or failing the field sobriety tests, these issues are more appropriately addressed by a jury for a factual and credibility determination. In fact, that did occur here, and the jury apparently believed that Meredith passed the sobriety tests because they acquitted him on the operating while intoxicated charge. Nonetheless, this court's standard in reviewing a police officer's probable cause determination is not altered by the jury's conclusion. At the time of the arrest,

there was a sufficient quantum of information to support the police officer's conclusion that probable cause existed to arrest Meredith.

By the Court.—Judgment affirmed.

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

