

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 11, 2000

Cornelia G. Clark
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. 99-3224-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ARGYLE L. HAGEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Vernon County:
KENT C. HOUCK, Reserve Judge. *Affirmed.*

¶1 ROGGENSACK, J.¹ Argyle L. Hagen appeals from a judgment entered upon a no contest plea to a charge of operating a motor vehicle while under the influence of an intoxicant (OMVWI). Prior to entering the plea, Hagen

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1997-98). Additionally, all further references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

filed a suppression motion, challenging the underlying arrest. He claims that the circuit court erred in denying his motion because the arresting officer did not testify that he was trained in administering field sobriety tests; and therefore, the results of those tests were inadmissible. He also argues that without the results from the field sobriety tests, the arresting officer did not have probable cause for the arrest. Because we conclude that the arresting officer had probable cause to arrest Hagen for OMVWI, even without the results of the field sobriety tests, we affirm the judgment of the circuit court.

BACKGROUND

¶2 Officer Jason Leis, of the Westby Police Department, observed a vehicle driven by Hagen at approximately 7:45 p.m. The vehicle was weaving back and forth while traveling down the road. Leis followed Hagen for one or two miles, observing Hagen's vehicle travel so far on the wrong side of the road that it came within two or three feet of the opposite shoulder as he traversed a knoll in the roadway. Leis also observed the vehicle traveling thirty to thirty-five miles per hour, which was well under the area's speed limit of fifty-five. Leis decided to make a stop to investigate further.

¶3 When Leis made contact with Hagen, he smelled the odor of intoxicants coming from the vehicle. Leis asked Hagen if he had been drinking, and Hagen admitted that he had had a few drinks. Leis also asked Hagen why he was driving so erratically. Hagen did not reply. Leis then asked Hagen for his driver's license. Hagen fumbled through his wallet and passed over his license at least once before he finally retrieved it. Leis then asked Hagen to perform field sobriety tests, to which Hagen consented.

¶4 When Hagen recited the alphabet, Leis noticed that Hagen's speech was slurred, he missed several letters and he garbled some letters together. With respect to the horizontal gaze nystagmus (HGN) test, Leis testified that Hagen had six clues of intoxication out of a possible six. Leis also had Hagen perform the walk and turn test. Leis testified that he could not remember exactly what Hagen did wrong, although he remembered that Hagen failed the test. Finally, Leis had Hagen perform the one-legged stand test, to which Hagen was unable to count past twelve. Based on his observations, Leis arrested Hagen for OMVWI.

¶5 Hagen filed a motion to suppress, arguing that the arrest was without probable cause. He contends that because Leis did not testify that he had been trained in administering field sobriety tests, the result of those tests were inadmissible. And without the results of the field sobriety tests, there was insufficient evidence to conclude there was probable cause that Hagen was OMVWI. The circuit court disagreed, and denied the suppression motion. Hagen appeals.

DISCUSSION

Standard of Review.

¶6 When a suppression motion is reviewed, the circuit court's findings of fact will be sustained unless they are clearly erroneous. *See State v. Roberts*, 196 Wis. 2d 445, 452, 538 N.W.2d 825, 828 (Ct. App. 1995). However, whether the facts as found constitute probable cause to arrest is a question of law which we review without deference to the circuit court. *See State v. Babbitt*, 188 Wis. 2d 349, 356, 525 N.W.2d 102, 104 (Ct. App. 1994).

Probable Cause to Arrest.

¶7 Every warrantless arrest must be supported by probable cause. *See Molina v. State*, 53 Wis. 2d 662, 670, 193 N.W.2d 874, 878 (1972); U.S. CONST. amend. IV; WIS. CONST. art. I, § 11. A police officer has probable cause to arrest when the totality of the circumstances within that officer's knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant probably committed a crime. *See State v. Koch*, 175 Wis. 2d 684, 701, 499 N.W.2d 152, 161 (1993). This is a practical test based on ““considerations of everyday life on which reasonable and prudent men, not legal technicians, act.”” *State v. Drogsvold*, 104 Wis. 2d 247, 254, 311 N.W.2d 243, 247 (Ct. App. 1981) (citation omitted). The objective facts before the police officer need only lead to the conclusion that guilt is more than a possibility. *See State v. Richardson*, 156 Wis. 2d 128, 148, 456 N.W.2d 830, 838 (1990).

¶8 Hagen contends that without testimony that the arresting officer is properly trained to administer and evaluate field sobriety tests, the results of those tests are inadmissible. He cites to *State v. Zivcic*, 229 Wis. 2d 119, 598 N.W.2d 565 (Ct. App. 1999) in support of this proposition. In *Zivcic*, we held that the circuit court had not erroneously exercised its discretion in ruling that there was a sufficient foundation to qualify the arresting officer as an expert witness where the officer had testified that he had been trained in administering and evaluating the HGN test. *See id.* at 129, 598 Wis. 2d at 570. Hagen also argues that if the test results are inadmissible under *Zivcic*, then Leis did not have probable cause for the arrest because the supreme court concluded in *State v. Swanson*, 164 Wis. 2d 437, 475 N.W.2d 148 (1991), that the results of field sobriety tests are necessary to support probable cause. Even assuming, *arguendo*, that *Zivcic* bars an arresting officer's testimony concerning the results of field sobriety tests when that officer's

testimony does not reflect his training in administering the tests, we conclude that Hagen's arrest was nonetheless supported by probable cause.

¶9 In *Swanson*, the supreme court suggested in a footnote that absent the administration of field sobriety tests confirming a suspicion of intoxication, an officer may not have probable cause to arrest. See *id.* at 453-54 n.6, 475 N.W.2d at 155 n.6. However, there is nothing in *Swanson* to indicate that the arrest in this case was illegal. First, the *Swanson* footnote has not been interpreted by subsequent decisions to require field sobriety tests before an arrest may be properly made. See, e.g., *State v. Wille*, 185 Wis. 2d 673, 683, 518 N.W.2d 325, 329 (Ct. App. 1994) (holding that an officer had probable cause to arrest a suspect who had hit the rear end of a car parked along the highway, smelled of intoxicants, and stated in his hospital room that he had “to quit doing this”); *Babbitt*, 188 Wis. 2d at 357-58, 525 N.W.2d at 104-05 (holding that an officer had probable cause when a suspect drove erratically, smelled of intoxicants, walked slowly and deliberately and was uncooperative). Thus, field sobriety tests are but part of the totality of circumstances to be taken into account by the arresting officer.

¶10 Second, Leis had significantly greater evidence of intoxication and physical incapacity than did the arresting officer in *Swanson*. For example, Swanson did not have slurred or impaired speech, see *Swanson*, 164 Wis. 2d at 442, 475 N.W.2d at 150; whereas here, Hagen's speech was slurred, and when reciting the alphabet, he garbled some letters together. Additionally, Hagen was observed driving on the wrong side of the road, weaving back and forth and traveling more than twenty miles under the speed limit. Hagen also smelled of intoxicants, admitted he had been drinking and exhibited an inability to distinguish his driver's license from other forms of identification which he had in his wallet. Therefore, we conclude that the facts of this case would lead a reasonable police

officer to conclude there was more than a possibility that Hagen had been driving while under the influence. Accordingly, Leis had probable cause to arrest Hagen for OMVWI.

CONCLUSION

¶11 Because we conclude that the arresting officer had probable cause to arrest Hagen for OMVWI, even without the results of the field sobriety tests, we affirm the circuit court.

By the Court.—Judgment affirmed.

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

