

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 17, 2005

Cornelia G. Clark
Clerk of Court of Appeals

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.

Appeal No. 2004AP2906-CR

Cir. Ct. No. 2004CT9

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

KYLE J. NELSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Pepin County:
ROBERT W. WING, Judge. *Affirmed.*

¶1 CANE, C.J.¹ Kyle Nelson appeals a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant (OWI). He argues the police officer did not have reasonable suspicion to stop his vehicle or

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

probable cause to administer a preliminary breath test (PBT). Therefore, he contends the evidence resulting from his stop and subsequent arrest should be suppressed. Nelson also argues the court relied on facts not in the record when it denied his suppression motion. We disagree with Nelson and affirm the judgment.

BACKGROUND

¶2 On February 15, 2004, City of Durand police officer Luis Lopes-Serrao observed a vehicle make an illegal U-turn. Lopes-Serrao stopped the vehicle and identified the driver as Nelson. When Lopes-Serrao approached the vehicle he detected an odor of intoxicants coming from the vehicle. Lopes-Serrao asked Nelson if he had been drinking. Nelson replied that he had had four to five beers. Lopes-Serrao testified that Nelson's speech was not slurred and he had no difficulty exiting the vehicle.

¶3 Lopes-Serrao then administered field sobriety tests on a roadway that was on an incline. Nelson complained of difficulty performing the tests on an incline. Based on Nelson's performance, Lopes-Serrao administered a PBT, which showed a reading of .10%. Lopes-Serrao arrested Nelson for OWI.

¶4 Nelson was charged with OWI and operating a motor vehicle with a prohibited alcohol concentration. He filed a motion to suppress evidence from the stop because he argued there was no reasonable suspicion to stop him, no probable cause to administer the PBT, and therefore no probable cause to arrest him. He argued Lopes-Serrao based his decision to arrest him solely on field sobriety tests conducted under substandard conditions. The court denied the motion and Nelson subsequently pled guilty. Nelson now appeals.

DISCUSSION

¶5 In reviewing the denial of a motion to suppress evidence, we will uphold the circuit court's findings of fact unless they are clearly erroneous. *State v. Williamson*, 113 Wis. 2d 389, 401, 335 N.W.2d 814 (1983). We then independently review those facts to determine whether the constitutional requirement of reasonableness is satisfied. *Id.*

¶6 Nelson first argues Lopes-Serrao did not have reasonable suspicion to stop his vehicle. A traffic stop is generally permissible if an officer has reasonable grounds to suspect a traffic violation had been committed. *State v. Gaulrapp*, 207 Wis. 2d 600, 605, 558 N.W.2d 696 (Ct. App. 1996). Nelson argues he pulled into a parking lot when he made the turn, and therefore did not make an illegal U-turn.

¶7 However, Lopes-Serrao testified regarding what he observed. He stated that Nelson went into the parking lot "in the process of making the U-turn." Lopes-Serrao stated, "He didn't drive into the gas station and then pull back in the roadway, he made the U-turn, and in the process of making the U-turn, his vehicle did go in the parking lot of the gas station." Based on this observation, Lopes-Serrao stopped Nelson's vehicle. We agree with the circuit court that Lopes-Serrao reasonably suspected that Nelson had committed a traffic violation. Thus, his stop of Nelson's vehicle was justified.

¶8 Second, Nelson argues Lopes-Serrao did not have probable cause to administer the PBT. WISCONSIN STAT. § 343.303 provides:

If a law enforcement officer has probable cause to believe that the person is violating or has violated s. 346.63(1) or (2m) ... the officer, prior to an arrest, may request the person to provide a sample of his or her breath for a

preliminary breath screening test using a device approved by the department for this purpose.

We review probable cause under a de novo standard of review. *County of Jefferson v. Renz*, 231 Wis. 2d 293, 316, 603 N.W.2d 541 (1999). In determining whether probable cause exists, we must look to the totality of the circumstances to determine whether Lopes-Serrao’s knowledge at the time of the arrest would lead a reasonable police officer to believe that Nelson was operating a motor vehicle while under the influence of an intoxicant. *See State v. Babbitt*, 188 Wis. 2d 349, 356, 525 N.W.2d 102 (Ct. App. 1994).

¶9 Nelson notes that he was performing the field sobriety tests on an incline and that was the reason he had difficulty performing the tests. He argued even “a completely sober person would likely struggle with a One Legged Stand test conducted on an incline.” Therefore, he maintains the results of the field tests were unreliable. He also claims Lopes-Serrao was unable to testify accurately regarding Nelson’s performance on the tests. For example, Nelson states that Lopes-Serrao could not remember what the gap between Nelson’s feet was during the heel-to-toe test. Thus, he argues Lopes-Serrao’s testimony is unreliable. Because of these deficiencies in the evidence, Nelson argues that there were not enough indicia of intoxication to justify the PBT. He contends the only factor present, absent the field sobriety tests and PBT results, was the odor of intoxicant emanating from his vehicle. He argues that other cases have many more indicia.

¶10 We first point out that Nelson ignores another important factor present here besides the odor of alcohol coming from his vehicle—Nelson’s admission that he had had four or five beers. Furthermore, there is no specified number or type of indicia of intoxication that must be present in order to establish probable cause. Rather, a probable cause determination is made on a case-by-case

basis looking at the totality of the circumstances in each particular case. *See State v. Multaler*, 2002 WI 35, ¶34, 252 Wis. 2d 54, 643 N.W.2d 437. That other cases had more or different indicia of intoxication than this case is therefore irrelevant.

¶11 Additionally, that the field sobriety tests were done on an incline does not necessarily negate Lopes-Serrao's ability to judge whether Nelson's performance was affected by intoxication. In fact, many of the deficiencies Lopes-Serrao noted were unrelated to the incline. These included: failing to follow instructions properly, having a gap between his feet during the walk and turn tests, and not adequately performing the finger to nose test. We therefore conclude that the fact the field sobriety tests were performed on an incline does not make the results of those tests unreliable. Consequently, the information available to Lopes-Serrao was sufficient for him to reasonably suspect that Nelson was operating while under the influence of an intoxicant, and he was justified in administering the PBT. Also, while Nelson argues Lopes-Serrao's testimony regarding his performance on the field sobriety tests was not reliable, that is a credibility issue. Determinations as to the credibility of a witness and the weight to be accorded a witness's testimony are left to the circuit court. *Lessor v. Wangelin*, 221 Wis. 2d 659, 665, 586 N.W.2d 1 (Ct. App. 1998).

¶12 Finally, Nelson argues the circuit court relied on evidence not in the record when it decided the suppression motion. The court stated the PBT was necessary in order to determine whether Nelson's difficulty performing field sobriety tests was due to the unlevel ground or intoxication. Nelson argues that under this rationale, corrupt officers would have drivers perform field sobriety tests on icy surfaces so that they can administer a PBT to see if trouble performing the tests was due to the ice or intoxication. However, the situation present here is a long way from the type of corruption Nelson prophesies. We deem it unlikely

the circuit courts would allow this sort of thing to happen. Therefore, we are unpersuaded by this argument.

¶13 Nelson also makes much of the fact that the court stated Lopes-Serrao detected an odor of an intoxicant coming from Nelson's breath, when in fact he testified the odor came from inside the vehicle. He also takes issue with the court's statement that Nelson had difficulty walking, when Lopes-Serrao never stated that was the case. Therefore, Nelson contends the court's determination was based on evidence not in the record. The court's apparent misstatements aside, the fact remains that Lopes-Serrao noted an odor of an intoxicant coming from the vehicle and Nelson admitted to drinking four to five beers. Lopes-Serrao had probable cause to administer the PBT. The result of the PBT was .10%. Therefore, Lopes-Serrao had probable cause to arrest Nelson, and we conclude that any misstatement by the court was harmless error.

By the Court.—Judgment affirmed.

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

