

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 8, 2006

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. 2005AP2289-CR

Cir. Ct. No. 2005CT1

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WAYLON R. ZRINSKY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: BARBARA H. KEY, Judge. *Affirmed.*

¶1 SNYDER, P.J.¹ Waylon R. Zrinsky appeals from a judgment of conviction for operating a motor vehicle while under the influence of an

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

intoxicant, third offense, contrary to WIS. STAT. § 346.63(1)(a). Prior to his conviction, the circuit court denied his motion to suppress the results of a preliminary breath test performed in the field. Zrinsky contends that the PBT results should have been suppressed because the officer did not testify that he used an approved PBT device under WIS. STAT. § 343.303. In its response brief, the State concedes that “the PBT result should not have been admitted in the absence of further testimony” on the PBT device used and the underlying scientific principles of a PBT. We therefore limit our discussion to the remaining issue of whether there was probable cause to arrest absent the PBT results.

¶2 Zrinsky further contends that, without the PBT evidence, the officer lacked probable cause to arrest him. We hold that sufficient evidence to demonstrate probable cause did exist, and we affirm the judgment of the circuit court.

FACTS

¶3 On December 14, 2004, Winnebago County Sheriff’s Deputy James Giese was on patrol, traveling west on State Highway 44. At approximately 2:41 a.m., Giese noticed two vehicles traveling west in front of him. He followed the vehicles, noticing that the white car directly in front of him was driving in a normal fashion. The vehicle ahead of the white car, however, was swerving in the lane. Giese passed the white car and got back into the westbound lane directly behind the swerving vehicle. As Geise followed, the vehicle swerved over the center line and then drifted back and crossed the fog line.

¶4 Giese activated his emergency lights and the vehicle pulled to the side of the road. He identified the driver of the vehicle as Waylon Zrinsky. Giese noticed that Zrinsky’s eyes were bloodshot and watery and that he was slurring his

words. Though Geise did not smell any alcohol, he did notice two cans of beer inside the car. Zrinsky told Geise that he had been at Applebee's, where he had consumed alcohol "earlier but not in a while."

¶5 Geise then asked Zrinsky to perform field sobriety tests. First, Geise asked Zrinsky to stand with his feet together and hands at his side, and follow a penlight with his eyes. During the test, commonly called the horizontal gaze nystagmus, or HGN, test, Geise looked for clues of jerkiness or jumpiness in contrast to smooth movement of the eyes. Of a possible six clues in the test, all six were present with Zrinsky.

¶6 Geise next had Zrinsky perform the walk-and-turn test, which Zrinsky completed, but he failed to touch his heel to his toe four times. Of a possible eight clues in this test, Zrinsky failed only the heel-to-toe clue. Geise then asked Zrinsky to perform the one-legged stand test. During the test, Zrinsky swayed back and forth and used his arms for balance at the end of the test. He exhibited two of the four clues associated with the one-legged stand test.

¶7 As a result of the sobriety tests, Geise asked Zrinsky to perform a preliminary breath test and Zrinsky agreed. Geise subsequently arrested Zrinsky for OWI.

¶8 Zrinsky moved for suppression of all evidence. At the motion hearing, he challenged the admissibility of the PBT results because Geise's testimony did not establish that the test was administered using "a device approved by the department" as required under WIS. STAT. § 343.303. Geise then testified that he had used a testing unit that was "approximately three inches by four inches by one inch. Just a hand-held unit they use to blow through a tube." The court overruled Zrinsky's objection to admission of the PBT results.

¶9 During the hearing, Giese also testified that as a result of the observations he had made of Zrinsky's driving, the results of the field sobriety tests, and the preliminary breath test, he determined that Zrinsky was impaired. The court determined that probable cause to arrest existed even without the PBT. Zrinsky then pled guilty and a judgment of conviction for OWI, third offense, was entered. Zrinsky appeals.

DISCUSSION

¶10 We note that although the result of a PBT is not admissible at a trial to prove a charge of OWI, it is admissible at a proceeding to determine whether there was probable cause for an OWI arrest. WIS. STAT. § 343.303 ("The result of the preliminary breath screening test shall not be admissible in any action or proceeding except to show probable cause for an arrest, if the arrest is challenged"). Here, however, the parties have but one dispute: whether there was probable cause to arrest Zrinsky for OWI without the results of the PBT.

¶11 In OWI cases, probable cause is demonstrated "where the totality of the circumstances within the arresting officer's knowledge at the time of the arrest would lead a reasonable police officer to believe ... the defendant was operating a motor vehicle while under the influence of an intoxicant." *State v. Nordness*, 128 Wis. 2d 15, 35, 381 N.W.2d 300 (1986). A trial court's findings of fact will not be reversed on appeal unless they are clearly erroneous. *See Olen v. Phelps*, 200 Wis. 2d 155, 160, 546 N.W.2d 176 (Ct. App. 1996). Whether probable cause exists for an arrest, however, is reviewed independently as a question of law. *See State v. Kasian*, 207 Wis. 2d 611, 621, 558 N.W.2d 687 (Ct. App. 1996).

¶12 Zrinsky does not dispute that probable cause to arrest can exist without a PBT result. Rather, he asserts that the evidence adduced at the motion

hearing was “marginal at best,” and did not rise to the level of probable cause. Zrinsky acknowledges the following factual findings: “Zrinsky exhibited bloodshot and watery eyes, slurred his words, and crossed the center and fog line once.... Zrinsky admitted to consuming alcohol earlier in the evening, failed the Horizontal Gaze Nystagmus test (HGN), and exhibit[ed] two clues on the one leg stand test.”

¶13 Those findings, Zrinsky argues, are outweighed by the following facts: “Giese observed no odor of intoxicant ... no motor coordination problems when [Zrinsky] produced his license and no balance problems while [Zrinsky] walked outside the vehicle.” Furthermore, Zrinsky passed the walk-and-turn test and, with regard to the one-legged stand test, Zrinsky “kept his foot up for thirty seconds, did not hop, and raised his arms from his side only at the end of the test.” Taking all of this into consideration, Zrinsky argues that in this case “a PBT is needed to move from ‘probable cause to believe’ to ‘probable cause to arrest.’”

¶14 We conclude that, even without Zrinsky’s PBT result, probable cause existed to arrest him for OWI based on the following: (1) Zrinsky’s erratic driving, (2) Zrinsky’s bloodshot and watery eyes, (3) his slurred speech, (4) his admission to having consumed alcohol earlier in the evening, and (5) the presence of six out of six clues on the HGN test. These five indicia of impairment are at least as compelling as those in *Kasian*, where we determined that probable cause was established by the arresting officer’s observation of three indicia of intoxication: a one-vehicle accident; the odor of intoxicants emanating from Kasian, and Kasian’s slurred speech. See *Kasian*, 207 Wis. 2d at 622. Here, Giese had the added benefit of observing Zrinsky’s erratic driving, Zrinsky’s admission of prior consumption of alcohol, and the clues gleaned from the HGN test.

CONCLUSION

¶15 We need not address Zrinsky's first appellate issue because the State concedes the argument. On the issue of whether Giese had probable cause to arrest Zrinsky for OWI without the benefit of the PBT result, we conclude that under the totality of the circumstances, he did.

By the Court.—Judgment affirmed.

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