COURT OF APPEALS
DECISION
DATED AND FILED

June 22, 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. 00-0443-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JERRY A. FOSKETT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Jefferson County: JOHN ULLSVIK, Judge. *Affirmed.*

¶1 EICH, J.[1] Jerry Foskett appeals from a judgment convicting him of driving while intoxicated (third offense). Specifically, he challenges the circuit

[1] This case is decided by a single judge pursuant to WIS. STAT. § 752.31(2)(c) (1997-98).

court's denial of his motion to suppress evidence of his arrest on grounds that the officer lacked probable cause to arrest him. We disagree and affirm the judgment.

¶2 The facts are not in dispute. City of Jefferson Police Officer Scott Durkee observed Foskett's car exceeding the speed limit—driving 38 m.p.h. in a 25 m.p.h. zone—at 1:30 a.m. Durkee stopped Foskett without incident and observed that he smelled "moderate[ly] to strong[ly]" of intoxicants, and that his eyes were "glassy." When asked whether he had been drinking, Foskett initially denied consuming any alcohol, but later said that he had had "one beer." Foskett agreed to submit to field sobriety testing and Durkee noted that he failed the Horizontal Gaze Nystagmus test. On the "Walk and Turn" test, Durkee said that Foskett had stepped to the left of the straight line twice and failed to turn in the manner requested and demonstrated by Durkee. He also failed to count his steps as he had been instructed. Then, while not "failing" them, Foskett had some difficulty performing two other coordination tests. Based on this evidence, and his own training and experience, Durkee believed that Foskett's ability to safely operate his car may have been impaired and arrested him.

¶3 We said in ***State v. Pozo***, 198 Wis. 2d 705, 711, 544 N.W.2d 228 (Ct. App. 1995), that:

> Probable cause [to arrest] is neither a technical nor a legalistic concept; rather, it is a flexible, common-sense measure of the plausibility of particular conclusions about human behavior—conclusions that need not be unequivocally correct or even more likely correct than not. It is enough if they are sufficiently probable that reasonable people—not legal technicians—would be justified in acting on them in the practical affairs of everyday life.

(Citations and quoted sources omitted.)[2] We have also recognized that:

> Probable cause to arrest exists where the officer, at the time of the arrest, has knowledge of facts and circumstances sufficient to warrant a person of reasonable prudence to believe that the [person arrested] is committing, or has committed, an offense. As the very name implies, it is a test based on probabilities; and, as a result, the facts faced by the officer need only be sufficient to lead [him or her] to believe that guilt is more than a possibility. It is also a commonsense test. The probabilities with which it deals are not technical: They are the factual and practical considerations of everyday life on which reasonable and prudent men and women, not legal technicians, act.

Dane County v. Sharpee, 154 Wis. 2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990).

¶4 Finally, the quantum of information which constitutes probable cause to arrest must be measured by the facts of the particular case, ***State v. Wilks***, 117 Wis. 2d 495, 502, 345 N.W.2d 498 (Ct. App. 1984), and in making that measurement, we look to the totality of the circumstances within the officer's knowledge at the place and time of the arrest. ***State v. Koch***, 175 Wis. 2d 684, 701, 499 N.W.2d 152 (1993).

¶5 In his opening brief, Foskett cites ***State v. Seibel,*** 163 Wis. 2d 164, 471 N.W.2d 226 (1991), as "[holding on similar facts] that there was no probable cause to arrest [the defendant] for operating under the influence." He does not provide a page citation for the citation, however—nor does he respond to the State's assertion in its brief that such a holding does not appear anywhere in the ***Seibel*** opinion. Nor was any such holding apparent to us in our reading of the case. Indeed, ***Seibel*** had nothing to do with probable cause to arrest, but only with whether the police had a

[2] It is also recognized that the officer's experience-based conclusions may be considered in determining whether probable cause exists. ***State v. Wille***, 185 Wis. 2d 673, 683, 518 N.W.2d 325 (1994).

reasonable suspicion that the defendant's blood contained evidence of a crime that would justify ordering the taking of a blood sample in the absence of a search warrant. We consider ***Seibel*** as doing no more than concluding that, while none of the factors present in that case, considered separately, would give rise to the type of reasonable suspicion necessary for drawing a sample of a person's blood without a search warrant, taken together they would.[3]

¶6 What we have in this case is a combination of the following factors: (a) it was "bar time;" (b) Foskett was speeding; (c) his eyes were glassy; (d) there was a moderate to strong odor of intoxicants about his person; (e) he first denied, then admitted, consuming at least one alcoholic beverage; (f) he failed the HGN test; and (g) while not failing them, he performed somewhat erratically on several other field sobriety tests. We can't say that, considering these facts, Foskett's driving was in fact impaired by his consumption of alcohol—or even that it is more likely than not that it was. But, applying a "common-sense measure" of the plausibility of the conclusions drawn by Durkee in light of these facts, we believe

[3] The language apparently viewed by Foskett as the "no probable cause" holding, is this statement by the ***Seibel*** court: "While none of these indicia alone would give rise to a reasonable suspicion that the defendant's driving was impaired by alcohol, taken together they gave the police reason to suspect that the defendant's driving was impaired by alcohol." ***Id.*** at 183. To us, all that says is that the factors present in the case—erratic driving, odor of intoxicants, and belligerent conduct—considered individually, wouldn't give the officers a "reasonable suspicion" that the defendant's blood contained evidence of a crime within the meaning of ***Schmerber v. California***, 384 U.S. 757 (1966), but, taken together, they would.

Foskett claims that, in a later case, the supreme court recognized that ***Seibel*** did indeed "hold" that the three factors—even taken together—did not give rise to probable cause to arrest. That reference, however, is a single sentence in a footnote stating no more than: "*See* ***State v. Seibel***, 163 Wis. 2d 164, 183, 471 N.W.2d 226 (1991), where we held that similar factors add up to a reasonable suspicion but not probable cause." ***State v. Swanson***, 164 Wis. 2d 437, 453 n.6, 475 N.W.2d 148 (1991). First, the statement in the footnote appears to be at odds with the court's actual pronouncement in ***Seibel***. Second, because of the lack of any discussion of the case, we do not consider it a pronouncement by the court of what it had intended to state in ***Seibel***. We thus agree with the State that, if anything, the statement is a *dictum*.

they constituted probable cause for him to believe that Foskett's driving ability may have been impaired as a result of his alcohol consumption. In other words, probable cause existed for Foskett's arrest.

By the Court.—Judgment affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5 (1997-98).