

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 23, 2011

A. John Voelker
Acting 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. 2011AP1325-CR

Cir. Ct. No. 2009CT1136

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

HERBERT L. HAMILTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Rock County: MICHAEL R. FITZPATRICK, Judge. *Affirmed.*

¶1 VERGERONT, J.¹ Herbert Hamilton appeals the judgment of conviction for operating a motor vehicle while under the influence, fourth offense,

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) and (3) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

in violation of WIS. STAT. § 346.63(1)(a). He contends there was no probable cause to administer the preliminary breath screening test (PBT), and the circuit court therefore erred in denying his motion to suppress evidence. We conclude there was probable cause and we affirm.

BACKGROUND

¶2 The only witness to testify at the hearing on the motion to suppress was Michael Bogdonas, a police officer with the Town of Beloit Police Department. Based on this officer's testimony, the circuit court made the following factual findings.

¶3 The officer was working on September 2, 2009, at 7:00 p.m. when he was dispatched to an alleged hit-and-run accident on State Highway 81 in the Town of Beloit. When he arrived, he found one car with two people in it. Hamilton was the driver and identified himself to the officer. Hamilton told the officer that he had just left a local grocery store and was traveling westbound on Highway 81 with a red vehicle behind him tailgating him. He put on his brakes and the vehicle went around him onto the right shoulder of the road. Hamilton told the officer that at that point the other vehicle made contact with his vehicle. Hamilton told the officer that his vehicle did not leave the roadway. Hamilton had valid driving privileges at that time.

¶4 The officer did not recall seeing any paint transfer or other evidence of another vehicle making contact with Hamilton's vehicle. He did observe front end damage and some damage to the passenger side of the vehicle, but he did not think it was damage from another vehicle.

¶5 The officer began to look for evidence of a second vehicle. He observed a set of tire tracks that went off the road close to the area that Hamilton pointed out to him. He noticed that the tire tracks went onto the gravel, into the ditch, back onto the gravel, back into the ditch, and then up the shoulder of the road to the point where Hamilton's vehicle had stopped. The officer came to the conclusion that only one vehicle had left the roadway and, in his opinion, it was Hamilton's vehicle. The officer saw vehicle parts along the shoulder of the road and in the ditch that matched Hamilton's vehicle. The officer did not find anything that did not match Hamilton's vehicle. The officer also saw a culvert that Hamilton's vehicle could have hit, but he was not sure what Hamilton's vehicle had hit. The officer explained to Hamilton that, from his preliminary investigation, it looked as though one vehicle left the roadway and the tracks led to Hamilton's vehicle. Hamilton denied going off the roadway.

¶6 The officer could smell a slight odor of alcohol emitting from Hamilton and asked Hamilton if he had been drinking. Hamilton denied that he had been drinking. When the officer spoke to Hamilton after investigating the car tracks, Hamilton was chewing gum, which the officer took as potentially a sign that Hamilton was trying to mask the smell of alcohol on his breath.

¶7 The officer did not ask Hamilton to perform any standard field sobriety tests because Hamilton's speech was good, he appeared to walk appropriately, and he did not seem to be off-balance. However, even though Hamilton was not exhibiting common signs of intoxication, the officer asked Hamilton to take the PBT because of the smell of intoxicants and because, in the officer's opinion, Hamilton had not had control of his vehicle. The officer wanted to make sure that Hamilton was not intoxicated to the point where he had actually caused his own accident; and the officer was concerned about safety if, in fact,

Hamilton was intoxicated. The PBT showed a result of .09, whereupon the officer arrested Hamilton for OWI.²

¶8 The officer acknowledged on cross-examination that it is not typical for people who have been involved in accidents and are drunk to call someone to the scene.

¶9 In arriving at these findings, the court explained that it generally credited the officer's testimony and explained why.³ Based on these findings, the circuit court concluded that there was probable cause to request a PBT.

DISCUSSION

¶10 WISCONSIN STAT. § 343.303 authorizes an officer to administer a PBT when the officer has “probable cause to believe” that the person taking the PBT is violating or has violated a drunk driving law. In this context, “‘probable cause to believe’ refers to a quantum of proof greater than the reasonable suspicion necessary to justify an investigative stop ... but less than the level of proof required to establish probable cause for arrest.” *County of Jefferson v. Renz*, 231 Wis. 2d 293, 316, 603 N.W.2d 541 (1999).

² A blood alcohol content of .08 is required for a conviction for OWI, first offense. WIS. STAT. § 340.01(46m)(a). The court made no findings on when the officer became aware that Hamilton had prior OWI convictions, and the officer's testimony is unclear on this point. However, it is not necessary to resolve this timing because the .09 blood alcohol content was sufficient to support probable cause to arrest for OWI, first offense.

³ There was a conflict in the officer's testimony in that the officer testified on direct-examination that Hamilton had admitted he had been drinking, but on cross-examination the officer acknowledged that his report stated that Hamilton had denied he had been drinking. The court resolved this conflict by finding, as we have recounted above, that Hamilton denied he had been drinking. The court explained why, despite this inconsistency between the officer's testimony and his report, the court found him credible on other significant points.

¶11 Thus, the standard for “probable cause to believe” under WIS. STAT. § 343.303 is marginally lower than the standard for probable cause to arrest. Probable cause to arrest is commonly defined as the quantum of proof that would lead a reasonable police officer to believe that a person “probably committed” a crime. *Renz*, 231 Wis. 2d at 302. In either instance, the test is a nontechnical, common-sense one, in which courts consider the totality of the circumstances known to the police at the time. *See County of Dane v. Sharpee*, 154 Wis. 2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990).

¶12 When reviewing the denial of a motion to suppress evidence, we uphold the circuit court’s findings of fact unless they are clearly erroneous. *State v. Eckert*, 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996); WIS. STAT. § 805.17(2). It is the role of the circuit court acting as fact finder, not this court, to weigh a witness’s credibility. *See Lessor v. Wargelin*, 221 Wis. 2d 659, 665, 586 N.W.2d 1 (Ct. App. 1998) (citations omitted). Whether the facts as found by the circuit court satisfy the statutory standard of probable cause is a question of law, which we review de novo. *Renz*, 231 Wis. 2d at 316 (citation omitted).

¶13 Hamilton contends that the facts here do not meet the requisite probable cause standard. He contends the slight odor of alcohol with no signs of physical impairment, the time of day (early evening, not late), his denial of drinking, and his explanation of how his car was damaged are insufficient to meet the correct standard. He adds that, even if he had been in a one-car accident, the facts would still be insufficient. Hamilton does not contend that any of the circuit court’s factual findings are clearly erroneous.

¶14 We disagree with Hamilton’s position that the facts here as found by the circuit court do not meet the statutory standard. We conclude for the following

reasons that the totality of the circumstances known to the officer at the time he administered the PBT shows he had probable cause to believe that Hamilton had violated a drunk driving law. WIS. STAT. § 343.303.

¶15 First, the officer testified to a slight odor of alcohol. The court credited this testimony despite Hamilton's denial that he had been drinking.

¶16 Second, as the circuit court correctly noted, a reasonable officer was entitled to infer from the denial, despite the odor to the contrary, that Hamilton was showing a consciousness of guilt. In addition, given the officer's testimony that in his experience people chew gum to get rid of the odor of alcohol, a reasonable officer could infer that Hamilton's gum chewing was further evidence of Hamilton's consciousness that he was guilty of driving while intoxicated.

¶17 Third, although the officer did not see physical signs that Hamilton was intoxicated, his observations of the scene were an ample basis from which a reasonable officer could infer that Hamilton had consumed enough alcohol to impair his driving. The officer could see that only one set of tire tracks left the road and the tracks ended up where Hamilton's car was located; the car parts strewn along the tire tracks matched Hamilton's car; the culvert provided a logical though not conclusive source of the damage to Hamilton's car; and the officer saw no red paint on Hamilton's car where Hamilton said the other car had hit his. Driving off the road as the tire tracks had shown is certainly an indication of impaired driving.

¶18 Hamilton points out that he called the police to report a hit-and-run. As the circuit court stated, there is an inference from this that Hamilton had not been driving while intoxicated. But, as the circuit court also correctly recognized, there are plausible explanations for why Hamilton might have been willing to take

the risk of calling even though he was driving while intoxicated. For example, Hamilton might have thought he needed to report an accident to the police for a successful insurance claim to repair the damage to his car from his own driving off the road. Given the evidence indicating that Hamilton's car went off the road and that there was no second vehicle, a reasonable officer could conclude Hamilton's driving was impaired regardless of the fact that he called the police to report a hit-and-run. Certainly the officer did not have to accept Hamilton's denial that he drove off the road, given the officer's own observations of the physical scene.

¶19 Hamilton also points out the time of early evening as a fact in his favor. We conclude that the time of 7:00 p.m. is a neutral factor in this case and does not weigh in his favor against the other circumstances of the slight odor of alcohol, the reasonable inferences that he was denying and hiding the fact that he had been drinking, and the evidence that he drove off the road.⁴

CONCLUSION

¶20 We affirm the circuit court's denial of Hamilton's motion to suppress, the denial of his postconviction motion on the same ground, and the judgment of conviction.

By the Court.—Judgment and order affirmed.

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

⁴ Hamilton discusses the facts in a number of unpublished opinions, arguing that these opinions support his position. We do not discuss those cases because, given the case-by-case analysis involved in determining if there is probable cause under WIS. STAT. § 343.303, none of those cases resolves the issue before us.

