

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 10, 2012

Diane M. Fremgen
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. 2011AP1945-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2010CF184

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL L. GEMBICKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Shawano County:
JAMES R. HABECK, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Michael Gembicki appeals a judgment, entered upon his no contest plea, convicting him of operating while intoxicated, sixth offense. Gembicki argues the circuit court erred by denying his motion to

suppress evidence obtained from a blood draw. We reject Gembicki's arguments and affirm the judgment.

BACKGROUND

¶2 The State charged Gembicki with resisting an officer, operating while intoxicated, and operating with a prohibited alcohol concentration, the latter two counts as a seventh offense. Gembicki moved to set aside a prior conviction for penalty enhancement purposes. He also moved to suppress evidence obtained from the blood draw, claiming the officer did not have probable cause to believe Gembicki was operating while intoxicated. The circuit court denied the suppression motion after a hearing.

¶3 Gembicki subsequently entered into a plea agreement under which the State agreed it would not challenge Gembicki's collateral attack of an earlier conviction, and would amend the operating while intoxicated charge to a sixth offense. In exchange for his no contest plea to the amended charge, the State also agreed to dismiss and read in the resisting and PAC charges. The court ultimately imposed a five-year sentence consisting of two and one-half years' initial confinement and two and one-half years' extended supervision. This appeal follows.

DISCUSSION

¶4 “When we review a [circuit] court's ruling on a motion to suppress, we uphold its factual findings unless they are clearly erroneous.” *State v. Bridges*, 2009 WI App 66, ¶9, 319 Wis. 2d 217, 767 N.W.2d 593. Whether the facts satisfy constitutional principles is a question of law we determine independently of the circuit court. *Id.*

¶5 The taking of a blood sample is a search and seizure within the meanings of the United States and Wisconsin Constitutions. *State v. Bentley*, 92 Wis. 2d 860, 863, 286 N.W.2d 153 (Ct. App. 1979). Generally, warrantless searches are per se unreasonable, subject to a few carefully delineated exceptions. *State v. Bohling*, 173 Wis. 2d 529, 536, 494 N.W.2d 399 (1993).

A warrantless blood sample ... is permissible under the following circumstances: (1) the blood draw is taken to obtain evidence of intoxication from a person lawfully arrested for a drunk-driving related violation or crime, (2) there is a clear indication ... the blood draw will produce evidence of intoxication, (3) the method used to take the blood sample is a reasonable one and performed in a reasonable manner, and (4) the arrestee presents no reasonable objection to the blood draw.

Id. at 533-34 (footnote omitted).

¶6 Here, Gembicki contends the blood draw was unlawful because law enforcement lacked probable cause to believe he committed the offense of operating while intoxicated. The first prong of *Bohling*, however, does not require an actual lawful arrest for operating while intoxicated. Rather, the first prong is satisfied when the officer has “probable cause to believe blood currently contains evidence of a drunk-driving related violation or crime.” *State v. Erickson*, 2003 WI App 43, ¶12, 260 Wis. 2d 279, 659 N.W.2d 407.

¶7 Whether probable cause for a search exists is determined by analyzing the totality of the circumstances. *State v. DeSmidt*, 155 Wis. 2d 119, 131, 454 N.W.2d 780 (1990). “The test is objective: what a reasonable police officer would reasonably believe under the circumstances” *Erickson*, 260 Wis. 2d 279, ¶14 (quoting *State v. Londo*, 2002 WI App 90, ¶10, 252 Wis. 2d 731, 643 N.W.2d 869). Probable cause is assessed by looking at practical considerations on which reasonable people, not legal technicians, act. *See State v.*

Pozo, 198 Wis. 2d 705, 711, 544 N.W.2d 228 (Ct. App. 1995). Further, probable cause does not mean more likely than not—“[i]t is only necessary that the information support a reasonable belief that guilt is more than a possibility.” *State v. Paszek*, 50 Wis. 2d 619, 625, 184 N.W.2d 836 (1971).

¶8 At the suppression motion hearing, Shawano County Sheriff’s Deputy Sandra Finger testified that at approximately 7 a.m. on August 22, 2010, she responded to the report of a car in the ditch on a county road. Finger observed two males, later identified as Gembicki and Clifford Huempfner, standing outside the car. When Finger asked the men who had been driving, Gembicki stated that an unknown third man was the driver and left the scene. Huempfner nodded his head in agreement. When Finger approached the men to obtain their identification, she detected the odor of intoxicants from both men. She also observed that the men were having trouble standing, and had to lean on the car for support when walking around the wet, soft ditch. Finger additionally observed that Gembicki’s speech was slurred.

¶9 When Finger asked Gembicki what happened, he twice used the word “I” before switching to “he” when explaining how the car ended up in the ditch. Specifically, Gembicki stated: “This guy pulled out here, he was like a, he had a hay wagon. And he pulled out, and I seen him coming, but he kept coming this way ... and uh, yeah, I just—he just ditched her.” Finger ran a computerized check on the identifications and learned that Gembicki had an outstanding warrant from probation and parole. Just after learning about the warrant, Gembicki’s mother arrived and Finger asked if Gembicki told her he was driving. She responded affirmatively, but then indicated “[h]e didn’t really say.” As Finger returned to her squad car, she discovered that Gembicki had fled the scene through a swampy wooded area next to the ditch. After Gembicki fled, Finger learned he

had prior drunk-driving-related convictions. Finger took Gembicki into custody approximately one and one-half hours later, and transported him to Shawano Medical Center for a blood draw.¹

¶10 As a person with three or more prior drunk-driving-related convictions, Gembicki was prohibited from operating a motor vehicle with an alcohol concentration of .02 or greater. *See* WIS. STAT. §§ 340.01(46m)(c) and 346.63(1) (2009-10).² Thus, the mere odor of alcohol on Gembicki's breath alone strongly supports probable cause for the blood draw. In addition to the alcohol odor, Finger noted Gembicki's implausible story of an unknown third person driver, as well as Gembicki's two verbal slips from "I" to "he." Gembicki's mother initially indicated her son was driving, and Finger observed that Gembicki had difficulty standing in the ditch and had somewhat slurred speech. Although Gembicki challenges Finger's observations, we conclude that under the totality of the circumstances, the known facts and reasonable inferences drawn therefrom gave Finger probable cause for the blood draw.

¶11 This same probable cause necessarily satisfies the second prong of *Bohling*. *See Erickson*, 260 Wis. 2d 279, ¶12. Further, the blood sample was obtained in a reasonable manner, without reasonable objection. The blood draw was performed by medical personnel in a hospital setting, and there is no evidence physicians deviated from medically accepted standards. *See State v. Daggett*, 2002 WI App 32, ¶¶14-18, 250 Wis. 2d 112, 640 N.W.2d 546. Gembicki has not

¹ The sample showed Gembicki had a blood alcohol concentration of .162.

² All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

suggested he had any legitimate basis to object to the blood draw. Because the blood draw was reasonable, the circuit court properly denied Gembicki's suppression motion.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

