

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

April 30, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-2849-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOSEPH V. HOTYNSKI,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Outagamie County: JAMES T. BAYORGEON, Judge. *Affirmed.*

MYSE, J. Joseph V. Hotynski appeals a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant contrary to § 346.63(1)(b), STATS., second offense. Hotynski contends that: (1) the trial court lacked personal jurisdiction over him because of a false statement contained in the probable cause section of the criminal complaint; (2) the officer lacked probable cause to arrest him; (3) the trial court improperly construed his refusal to perform field sobriety tests as consciousness of guilt when the failure to take the tests resulted from Hotynski's repeated attempts to assert his rights; and (4) his criminal prosecution for operating a motor vehicle while under the influence of an intoxicant violates double jeopardy because the administrative suspension of his driver's license constituted punishment for double jeopardy purposes.

This court concludes that: (1) there was sufficient information contained in the criminal complaint after eliminating the incorrect assertion to give the trial court personal jurisdiction over Hotynski; (2) the officer had probable cause to arrest Hotynski; (3) Hotynski's refusal to perform field sobriety tests raised a permitted inference of consciousness of guilt; and (4) the administrative suspension of his driver's license does not constitute punishment for double jeopardy purposes. Therefore, the judgment of conviction is affirmed.

A Town of Grand Chute police officer observed Hotynski's vehicle drift onto the shoulder of the road and subsequently drift over the white dividing line of the highway. The officer activated his emergency lights and Hotynski stopped on the straight portion of a concrete off-ramp leading from the highway. The officer parked his squad car approximately twenty feet behind Hotynski when Hotynski started backing up, closing the distance between his vehicle and the squad car. The officer put his squad car in reverse to avoid a collision and began honking his horn and flashing his lights. Gradually both vehicles came to a stop on the shoulder of the highway and the officer approached Hotynski's vehicle. The officer observed that Hotynski's speech was slow and thick-tongued and the odor of intoxicants emanated from the vehicle. Hotynski had considerable difficulty getting his driver's license out of his wallet, so the officer looked at the license while still in the holder to identify him. When Hotynski attempted to step to the rear of the vehicle at the officer's request, he was unsteady and leaned on the vehicle for support.

As the officer requested Hotynski to perform field sobriety tests, Hotynski handed a card to the officer that Hotynski's attorney contends in an affidavit was an assertion of rights card. The officer declined to read the card and repeated his demand that Hotynski perform field sobriety tests. Hotynski again asked the officer to respond to the card and the officer continued to insist that Hotynski perform field sobriety tests. The officer ultimately concluded that Hotynski was refusing to perform the tests and placed him under arrest for operating a motor vehicle while under the influence of an intoxicant.

A criminal complaint was filed alleging among other things that Hotynski had failed to accurately perform the field sobriety tests. The State concedes that this allegation was incorrect. The trial court denied Hotynski's motion to dismiss based on the false assertion in the complaint. The court also

denied Hotynski's motion to suppress evidence based on his contention that the officer lacked probable cause to arrest. Hotynski was subsequently convicted of the offense after a trial to the court.

Hotynski first contends that the false allegation in the criminal complaint deprived the trial court of personal jurisdiction. When the defendant demonstrates a misstatement in the criminal complaint, the court is obligated to examine the balance of the complaint to determine whether the information contained therein, excluding the erroneous information, is sufficient to establish probable cause. *State v. Mann*, 123 Wis.2d 375, 393, 367 N.W.2d 209, 217 (1985). If probable cause is established independently in the criminal complaint after discarding the false allegation, the complaint is valid and there is no defect in the court's jurisdiction to proceed. *Id.*

The issue whether the allegations are sufficient to constitute probable cause presents a question of law that this court resolves de novo. *State v. Babbitt*, 188 Wis.2d 349, 356, 525 N.W.2d 102, 104 (Ct. App. 1994). Probable cause is that quantum of evidence which would lead a reasonable officer to believe the defendant probably committed the offense. *Id.* Probable cause does not require "proof beyond a reasonable doubt or even that guilt is more likely than not." *Id.* at 357, 525 N.W.2d at 104 (citing *State v. Welsch*, 108 Wis.2d 319, 329, 321 N.W.2d 245, 251 (1982)).

Excluding the false allegation, the probable cause section of the criminal complaint asserts that (1) the officer observed Hotynski drive his vehicle on the shoulder of the road and over the lane divider; (2) after Hotynski pulled over, he backed up his vehicle forcing the officer to back up his squad to avoid a collision; (3) Hotynski had difficulty removing his driver's license from his wallet; (4) a strong odor of intoxicants emitted from Hotynski's breath; (5) Hotynski's speech was slurred and slowed; and (6) Hotynski fell against the door of his vehicle when he was getting out.

This court concludes that the totality of these allegations is sufficient to form probable cause for the offense charged. The allegations of erratic driving, the odor of alcohol, Hotynski's poor balance and slurred speech are all indices of intoxication. Those facts coupled with Hotynski's rather peculiar maneuver of backing his vehicle toward the officer's squad car and the

difficulty in extracting his driver's license rise to a sufficient level to meet the probable cause standard.

Hotynski next argues that even if the complaint was sufficient, the officer lacked probable cause to arrest him. Hotynski contends that to establish probable cause the evidence must reflect a field sobriety test, an admission from which consciousness of guilt may be inferred or other strong evidence of intoxication lacking in this case. This court disagrees. Probable cause is an application of reasonable judgment to a specific set of facts. There is no specific fact that must be present before probable cause can be found; it is merely the quantum of evidence that would cause a reasonable person to believe the defendant probably committed the offense. As discussed before, the totality of the information possessed by the officer at the time he placed Hotynski under arrest included his slowed and slurred speech, poor balance, erratic driving, the odor of alcohol and the peculiar move of backing up toward the squad car. In addition to the foregoing facts, the officer testified regarding Hotynski's refusal to perform field sobriety tests despite his instructions to do so. These circumstances are sufficient for a reasonable person to conclude that Hotynski had probably committed the offense of operating a motor vehicle while under the influence of an intoxicant.

Next, Hotynski contends that the trial court erred when it regarded his alleged refusal to perform field sobriety tests as evidence of consciousness of guilt under *Babbitt*. Hotynski argues that he was asserting his rights and that under *State v. Sayles*, 124 Wis.2d 593, 370 N.W.2d 265 (1985), an assertion of a defendant's rights cannot be used as evidence against him. This court rejects Hotynski's argument.

In *Sayles*, the issue before the court was whether the trial court erred during the jury trial on the operating while under the influence charge when it refused to admit evidence of his explanation for refusing to take a blood test. *Sayles* held that the evidence was relevant because a jury could believe the defendant declined the test, not because of consciousness of guilt, but because he thought he was asserting a legal right. *Id.* at 597, 370 N.W.2d at 267. The State argued that the evidence of the defendant's explanation that he wanted a lawyer before submitting to a blood test would merely be additional evidence of consciousness of guilt. *Id.* at 597 n.3, 370 N.W.2d at 267 n.3. The court rejected the argument saying "it would be most inappropriate in any proceeding to

allow the request for a lawyer to be used as a separate basis for an inference of guilt." *Id.*

This case is distinguishable from *Sayles* in that the trial court allowed the evidence of Hotynski's explanation for refusing to perform the field sobriety tests. The evidence of the explanation is allowed to rebut the inference of consciousness of guilt. *Sayles* did not hold that a defendant's alleged belief that he was asserting his legal rights would always rebut the inference. The trial court as trier of fact could still conclude that Hotynski declined the test because of consciousness of guilt, not because he thought he was asserting a legal right.

Even assuming that the handing of the card to the officer was a request to consult a lawyer, there is no obligation upon the officer to allow a person to consult an attorney when the person is asked to perform field sobriety tests. See *Sayles*, 124 Wis.2d at 597, 370 N.W.2d at 267. A defendant may not under the guise of requesting an attorney or requesting an explanation of rights postpone a proper request for the performance of field sobriety tests made by an officer. It is not a basis to refuse to comply with the properly issued order by a law enforcement officer. This court therefore concludes that the trial court properly found Hotynski's noncompliance to be a refusal and that the refusal can purport the permitted inference of consciousness of guilt.

Finally, Hotynski in an effort to preserve the issue for further review contends that the administrative suspension is punitive and therefore further punishment based upon the conviction of operating while under the influence of an intoxicant is precluded by the provisions of double jeopardy. As Hotynski concedes, this issue was directly addressed and resolved in *State v. McMaster*, 198 Wis.2d 542, 543 N.W.2d 499 (Ct. App. 1995), which holds that an administrative suspension does not constitute punishment for double jeopardy purposes. Accordingly, this court rejects the argument and affirms the judgment of conviction.

By the Court. – Judgment affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.