COURT OF APPEALS
DECISION
DATED AND RELEASED

May 8, 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, 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. 95-3358-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARK ANDERSON,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Waukesha County: MARIANNE E. BECKER, Judge. *Affirmed*.

NETTESHEIM, J. The issue on appeal is whether the police had probable cause to arrest the appellant, Mark Anderson, for operating a motor vehicle while intoxicated. The trial court ruled that probable cause supported the arrest. Following a jury trial, Anderson was convicted. He appeals the ensuing judgment of conviction, specifically challenging the trial court's probable cause ruling.

Anderson's specific contention is that the arresting officer did not have probable cause to believe that Anderson had driven or operated a motor vehicle. The facts pertaining to Anderson's arrest are not disputed. On January 15, 1995, at approximately 12:20 a.m., Officer Scott Smith[1] of the City of Brookfield Police Department was awaiting the arrival of a person to pick up a prisoner whom Smith had just completed processing. Smith asked Corporal Ronald LaGosh to assist in locating this person.

As Smith and LaGosh were standing in front of the police department, LaGosh noticed a car parked in the parking lot with its lights on. LaGosh observed a single occupant in the car seated behind the steering wheel. The lights on the vehicle then went out, and the occupant exited the vehicle and approached the officers. LaGosh noticed that the person staggered as he walked across the parking lot and into the police department.

LaGosh approached the person at the area of the front desk. LaGosh noticed that the person had bloodshot eyes and gave off an odor of intoxicants. In response to LaGosh's inquiry, the person identified himself to LaGosh as Mark Anderson. Based on his suspicion that Anderson was intoxicated, LaGosh administered a field sobriety test known as horizontal gaze nystagmus. This test requires the subject to follow the track of a pen light with his or her eyes. LaGosh observed that Anderson had difficulty focusing and

[1] The transcript of the probable cause hearing identifies this officer as "Officer Schmidt." However, at the jury trial this officer testified and identified himself as "Scott *Smith*."

following the track of the pen light. Based on his training and experience, LaGosh concluded that Anderson was intoxicated and he arrested Anderson.

LaGosh conceded that he did not ever: (1) see Anderson operate the vehicle in the parking lot, (2) see the vehicle arrive at the police parking lot, (3) hear the vehicle's engine running, or (4) see the vehicle move.

The question of whether probable cause exists to support an arrest requires that we apply a constitutional standard to a given set of facts. *See* ***State v. Riddle***, 192 Wis.2d 470, 475, 531 N.W.2d 408, 410 (Ct. App. 1995). When the facts are undisputed, we review this question de novo. ***Id***. "Probable cause to justify an arrest means facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." ***Henes v. Morrissey***, 194 Wis.2d 338, 351, 533 N.W.2d 802, 807 (1995) (quoted source omitted). Probable cause does not require proof beyond a reasonable doubt or even that guilt is more likely than not. ***State v. Babbitt***, 188 Wis.2d 349, 357, 525 N.W.2d 102, 104 (Ct. App. 1994). Moreover, when a police officer is confronted with two reasonable competing inferences, one justifying arrest and the other not, the officer is entitled to rely on the reasonable inference justifying the arrest. *Cf.* ***State v. Tompkins***, 144 Wis.2d 116, 125, 423 N.W.2d 823, 827 (1988).[2]

[2] ***State v. Tompkins***, 144 Wis.2d 116, 423 N.W.2d 823 (1988), addressed probable cause to search. However, we see no reason why the rule should be any different when the issue is probable cause to arrest.

Here, although LaGosh did not actually see Anderson operate or drive the vehicle, such is not always required to ultimately establish such activity. *See, e.g.*, ***Village of Elkhart Lake v. Borzyskowski***, 123 Wis.2d 185, 188-89, 366 N.W.2d 506, 508 (Ct. App. 1985). Evidence that a person is the sole occupant of a vehicle can, in appropriate circumstances, reasonably suggest that the person operated the vehicle. *See* ***State v. Dunn***, 158 Wis.2d 138, 146, 462 N.W.2d 538, 541 (Ct. App. 1990).

Here, despite LaGosh's failure to directly observe Anderson operate the vehicle, the circumstantial facts established abundant probable cause of such fact. The vehicle was observed in the police parking lot, clearly supporting a reasonable inference that it had been driven to that location. LaGosh observed but one occupant of the vehicle who was seated behind the steering wheel. In addition, LaGosh observed no person in the area, other than Anderson, who might have operated the vehicle. In some situations, circumstantial evidence can be as strong or stronger than direct evidence. WIS J I—CRIMINAL 170. This, we conclude, is such a case.

We uphold the trial court's probable cause ruling. We therefore affirm the judgment of conviction.

By the Court.—Judgment affirmed.

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