COURT OF APPEALS
DECISION
DATED AND FILED

September 18, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1093-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

BRENDA K. PIERSTORFF,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: JACK AULIK, Judge. *Affirmed.*

DYKMAN, P.J.[1] Brenda Pierstorff appeals from a judgment convicting her of operating a motor vehicle while under the influence of an intoxicant (OMVWI), contrary to § 346.63(1)(a), STATS., and operating a motor vehicle with a prohibited alcohol concentration (PAC), contrary to § 346.63(1)(b).

[1] This case is decided by one judge pursuant to § 752.31(2)(c), STATS.

Pierstorff argues that: (1) the officer who arrested her did not have probable cause to do so; (2) the officer failed to comply with the twenty minute observation period prior to administering an Intoxilyzer test; and (3) the Intoxilyzer used by the officer was not approved for use by the proper authority. We conclude that the officer had probable cause to arrest Pierstorff. We will not address whether the Intoxilyzer test was properly performed because Pierstorff was convicted of both OMVWI and PAC, and she has not argued that the evidence was insufficient to convict her of OMVWI without the results of the Intoxilyzer test. Accordingly, we affirm.

BACKGROUND

On August 20, 1996, at approximately 9:45 p.m., Madison Police Officer Roger Baker observed a vehicle turn from Gammon Road onto Old Sauk Road. Baker followed the vehicle for two or three blocks and observed it swerve from the eastbound lane of Old Sauk Road into the bicycle lane several times. Baker then stopped the vehicle. Baker identified Pierstorff from her driver's license.

Baker noticed a "strong odor" of intoxicants on Pierstorff's breath during a conversation in which Pierstorff admitted to having consumed a beer that evening. Baker asked Pierstorff to perform several field sobriety tests. During the administration of a horizontal gaze nystagmus test, Baker observed a "distinct jerking" of Pierstorff's eyes, indicating that Pierstorff was under the influence of alcohol. During that test Baker had to request twice that Pierstorff hold her head still. Pierstorff was able to satisfactorily perform the vertical gaze nystagmus test (a test used to detect drugs other than alcohol). Pierstorff attempted to perform the heel-to-toe test but she failed to keep her heel to her toe, placed one of her feet to

the side twice to regain her balance, and swayed. While attempting to perform the one-legged-stand test, Pierstorff informed Baker that she had a metal plate in her left ankle that could "impede her balance." However, Pierstorff was unable to satisfactorily perform this test with her right foot on the ground. Pierstorff was able to recite the alphabet. Based on his observations, Baker arrested Pierstorff for operating a motor vehicle while under the influence of an intoxicant and had her transported to the Madison Police Department.

Upon arrival at the police department, Baker observed Pierstorff and then had another officer administer an Intoxilyzer test. Pierstorff's breath alcohol level was recorded at .17 grams per 210 liters of her breath. Baker issued Pierstorff two citations. The first was for OMVWI, contrary to § 346.63(1)(a), STATS., and the second was for PAC, contrary to § 346.63(1)(b).

Pierstorff moved the trial court to suppress all testimony and evidence gathered as a result of her arrest on the grounds that the officer did not have probable cause to arrest her. The trial court denied the motion. Pierstorff also moved the trial court to suppress all evidence obtained through use of the Wisconsin implied consent law. The trial court denied the motion as untimely. At trial, the jury found Pierstorff guilty of both OMVWI and PAC. The trial court entered judgment on the verdicts on both counts, but sentenced Pierstorff under only the OMVWI conviction. Pierstorff appeals.

DISCUSSION

Pierstorff contends that Officer Baker did not have probable cause to arrest her. She argues that the field sobriety tests were not probative of impairment and that the facts as a whole give rise only to reasonable suspicion, not probable cause. Whether undisputed facts constitute probable cause is a question

of law that we review *de novo*. ***State v. Babbitt***, 188 Wis.2d 349, 356, 525 N.W.2d 102, 104 (Ct. App. 1994). Probable cause to arrest exists when a reasonable police officer could conclude, based on the circumstances, that the defendant probably committed an offense. *See* ***State v. Wille***, 185 Wis.2d 673, 682, 518 N.W.2d 325, 329 (Ct. App. 1994). This is a common sense test based on probabilities. The facts need not be sufficient to convince the officer of guilt beyond a reasonable doubt or even that guilt is more probable than not. ***State v. Dunn***, 121 Wis.2d 389, 396, 359 N.W.2d 151, 154 (1984). Rather, the officer must be reasonably convinced only that guilt is more than a possibility. *See* ***County of Dane v. Sharpee***, 154 Wis.2d 515, 518, 453 N.W.2d 508, 510 (Ct. App. 1990).

We conclude that there was sufficient evidence to reasonably convince Baker that Pierstorff was operating a motor vehicle while under the influence of an intoxicant. The facts in this case are similar to the facts in ***Babbitt***. In ***Babbitt***, the officer received a report from a citizen that the operator of a vehicle was driving erratically. The officer observed Babbitt's vehicle cross the centerline several times. The officer noticed an odor of intoxicants coming from Babbitt's vehicle when the window was lowered. Babbitt's eyes were "glassy and bloodshot" and her walk was "slow and deliberate." Babbitt also was uncooperative and complied reluctantly with the officer's requests. These facts were sufficient to establish probable cause to arrest. ***Babbitt***, 188 Wis.2d at 357, 525 N.W.2d at 104.

Here, Baker observed Pierstorff swerving in and out of a bicycle lane. Upon being stopped, Pierstorff admitted to having consumed a beer earlier that evening. Baker noticed a "strong odor" of intoxicants on Pierstorff's breath. While Pierstorff was able to recite the alphabet, she was not able to satisfactorily

perform the HGN test, the heel-to-toe test, or the one-legged-stand test. Although the record does not establish that Pierstorff was uncooperative, as was Babbitt, we not believe that the absence of this factor removes probable cause. Because the facts were sufficient to permit an officer to reasonably conclude that Pierstorff was operating a motor vehicle while intoxicated, we conclude that Baker had probable cause to arrest her.

Pierstorff argues that an odor of intoxicants and an admission of drinking are indicia of intoxication sufficient to support a reasonable suspicion of impairment, but not probable cause. Pierstorff relies on ***State v. Krause***, 168 Wis.2d 578, 484 N.W.2d 347 (Ct. App. 1992), ***State v. Swanson***, 164 Wis.2d 437, 475 N.W.2d 148 (1991), and ***State v. Seibel***, 163 Wis.2d 164, 471 N.W.2d 226 (1991).

Pierstorff misconstrues ***Krause***. In that case, we concluded only that many different facts could be sufficient to establish a reasonable suspicion that Krause was operating a motor vehicle while under the influence of an intoxicant. We did not determine whether that evidence would also support a determination of probable cause. Therefore, ***Krause*** is irrelevant to our discussion.

In ***Seibel*** the court noted four indicia of intoxication: (1) erratic driving; (2) a strong odor of intoxicants coming from Seibel's companion; (3) an officer's belief that he smelled intoxicants on Seibel's breath; and (4) Seibel's belligerence and lack of contact with reality at a hospital. ***Seibel***, 163 Wis.2d at 181-83, 471 N.W.2d at 234. In ***Swanson*** the court held that these indicia could support reasonable suspicion, but not probable cause. ***Swanson***, 164 Wis.2d at 453 n.6, 475 N.W.2d at 155. The ***Swanson*** court also noted that erratic driving, an odor of intoxicants emanating from the driver, and an incident around bar time

were indicia of intoxication sufficient to provide reasonable suspicion, but not probable cause. ***Id.***

The facts here are not analogous to the facts of ***Swanson*** or to the facts of ***Seibel***. Pierstorff's indicia of intoxication did include an odor of intoxicants and erratic driving, factors found present in both ***Swanson*** and ***Seibel***. But Pierstorff also had trouble following Baker's instructions and had trouble balancing during both the heel-to-toe test and the one-legged-stand test. In addition, her eyes jerked during the HGN test, indicating probable intoxication. With these additional indicia of intoxication present, the supreme court would have determined that there was probable cause to arrest in both ***Seibel*** and ***Swanson***. Therefore, we conclude that these cases are irrelevant to our decision.

Pierstorff also argues that Officer Baker did not comply with the required twenty minute observation period prior to executing the Intoxilyzer test and that the Intoxilyzer used was not properly approved. Therefore, Pierstorff contends that the results of the Intoxilyzer test should have been suppressed.

Pierstorff was convicted of both OMVWI and PAC, and the court sentenced her on the OMVWI charge. If we were to accept Pierstorff's argument regarding the Intoxilyzer test, we would reverse the PAC conviction. However, the OMVWI conviction under § 346.63(1)(a), STATS., would remain. Pierstorff does not argue that, in the absence of the Intoxilyzer test results, the evidence was insufficient for an OMVWI conviction. We generally do not address issues not raised by the parties. *See* ***Waushara County v. Graf***, 166 Wis.2d 442, 451, 480 N.W.2d 16, 19 (1992).

Section 346.63(1)(c), STATS., provides that when a person is found guilty of both OMVWI and PAC, there will be only a single conviction for the

purpose of counting convictions and sentencing. The effect of this section is that Pierstorff would have received the same number of convictions and the same sentence, regardless of whether she was convicted of OMVWI, PAC, or both. Therefore, the question of whether the PAC conviction was properly obtained is irrelevant because Pierstorff was also convicted of OMVWI. We do not need to address whether the results of the Intoxilyzer test should have been suppressed.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports. *See* RULE 809.23(1)(b)4, STATS.