COURT OF APPEALS
DECISION
DATED AND FILED

November 20, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2184-FT

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

VILLAGE OF BARNEVELD,

PLAINTIFF-RESPONDENT,

v.

WILLIAM R. STONESTREET,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Iowa County: WILLIAM D. DYKE, Judge. *Affirmed.*

ROGGENSACK, J.[1] William Stonestreet appeals a judgment convicting him of operating a motor vehicle while intoxicated (OMVWI) and with a prohibited alcohol concentration (PAC), on the ground that evidence of his intoxication obtained after his arrest should have been suppressed because his arrest was not supported by probable cause. However, because the officer did

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

have probable cause to arrest Stonestreet, prior to conducting additional sobriety tests, we affirm.

BACKGROUND

On January 4, 1997, at about 3:15 a.m., Officer Dennis Jenks of the Barneveld Police Department observed Stonestreet's pickup truck traveling 33 mph in a 25 mph zone, partially over the double yellow center line. Jenks followed the vehicle and observed Stonestreet activate his turn signal and start to turn left toward an embankment where no road or driveway existed. The truck kept its turn signal on until it was able to turn left at an intersection leading to a business district. Jenks followed and found Stonestreet's truck sitting in a parking lot, with Stonestreet slumped down in his seat, either asleep or unconscious.

Jenks tapped on Stonestreet's window several times, until he awoke. Stonestreet was groggy, and his speech was slurred, but he identified himself and initially indicated that he was heading to Platteville from Spring Green. Later, Stonestreet said that he had been in Sauk City rather than Spring Green. He admitted he had been drinking. Jenks noticed that Stonestreet's face was flushed and his eyes were red. When Jenks asked Stonestreet if he knew where he was, he said he was in Dodgeville, rather than Barneveld.

Jenks asked Stonestreet to recite a portion of the alphabet, which he was unable to do correctly, although he made three attempts. Jenks also asked Stonestreet to perform a finger-contact test, which he did incorrectly the first time, but correctly on a second attempt. At that point, Jenks requested that Stonestreet accompany him to the Village Hall in order to perform more sobriety tests, where they could be performed out of the rain and wind. There, Jenks administered the horizontal gaze nystagmus and the walk-and-turn tests, both of which the

defendant failed, and the one-leg stand, which he passed. Another officer administered a preliminary breath test which registered 0.19. Jenks then informed Stonestreet that he was under arrest, and blood tests were obtained.

Stonestreet was issued citations and charged with OMVWI and PAC. He challenged the admission of any evidence which was gathered after he was taken to the Village Hall, on the basis that his removal from the traffic scene constituted an illegal arrest, without probable cause. After the circuit court denied Stonestreet's motion to suppress the evidence, Stonestreet agreed to a trial on stipulated facts and was found guilty on both counts. The circuit court dismissed the OMVWI count and sentenced Stonestreet on the PAC. Stonestreet now appeals the denial of his suppression motion, and the resulting conviction.

DISCUSSION

Standard of Review.

Whether Stonestreet's arrest was lawful presents a mixed question of fact and law. Here, the parties stipulated to the facts; therefore, whether those facts establish probable cause to arrest is a question of law which 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.

Every warrantless arrest must be supported by probable cause. ***Molina v. State***, 53 Wis.2d 662, 670, 193 N.W.2d 874, 878 (1972); *see also* U.S. CONST. amend. IV, WIS. CONST. art. I, § 11, and § 968.07(1)(d), STATS. A police officer has probable cause to arrest when the totality of the circumstances within that officer's knowledge at the time of the arrest would lead a reasonable police

officer to believe that the defendant probably committed a crime. ***State v. Koch***, 175 Wis.2d 684, 701, 499 N.W.2d 152, 161 (1993). This is a practical test, based on "considerations of everyday life on which reasonable and prudent men, not legal technicians, act." ***State v. Drogsvold***, 104 Wis.2d 247, 254, 311 N.W.2d 243, 247 (Ct. App. 1981) (citation omitted). The objective facts before the police officer need only lead to the conclusion that guilt is more than a possibility. ***State v. Richardson***, 156 Wis.2d 128, 148, 456 N.W.2d 830, 838 (1990).

Stonestreet cites ***State v. Swanson*** to support his position that Jenks lacked probable cause to arrest him for OMVWI without the results of the field sobriety tests which were performed at the Village Hall. He relies on a footnote in ***Swanson*** which commented:

> Unexplained erratic driving, the odor of alcohol, and the coincidental time of the incident [with bar closing] form the basis for a reasonable suspicion but should not, in the absence of a field sobriety test, constitute probable cause to arrest someone for driving while under the influence of intoxicants. A field sobriety test could be as simple as a finger-to-nose or walk-a-straight-line test. Without such a test, the police officers could not evaluate whether the suspect's physical capacities were sufficiently impaired by the consumption of intoxicants to warrant an arrest.

State v. Swanson, 164 Wis.2d 437, 453-54 n.6, 475 N.W.2d 148, 155 n.6 (1991). However, there is nothing in ***Swanson*** to indicate that the arrest in this case was illegal. First, the ***Swanson*** footnote has not been interpreted by subsequent decisions to require a field sobriety test before arrest in all cases. *See, e.g.*, ***State v. Wille***, 185 Wis.2d 673, 518 N.W.2d 325 (Ct. App. 1994) (holding that an officer had probable cause to arrest a suspect who had hit the rear end of a car parked along the highway, smelled of intoxicants, and stated in his hospital room that he had "to quit doing this") and ***Babbitt***, 188 Wis.2d at 357-58, 525 N.W.2d at 104-05 (holding that an officer had probable cause when a suspect drove erratically,

smelled of intoxicants, walked slowly and deliberately and was uncooperative). Thus, field sobriety tests are but part of the totality of circumstances to be taken into account by the arresting officer. Furthermore, the officer in this case *did* administer two field sobriety tests on the scene—specifically, the alphabet test and the finger-contact test. The fact that more evidence was gathered later does not negate the sufficiency of the evidence already within the officer's possession at the time when he decided to bring Stonestreet to the Village Hall.

In short, Jenks had significantly greater evidence of intoxication and physical incapacity than did the arresting officer in ***Swanson***. For example, Swanson "did not have slurred or impaired speech," ***Swanson***, 164 Wis.2d at 442, 475 N.W.2d at 150; whereas here, Stonestreet's speech was so slurred that the officer had difficulty making out what he was saying. In addition, Stonestreet's eyes were red; his face was flushed; he admitted that he had been drinking; he was confused about where he was and where he had been. Jenks also knew that Stonestreet had been driving erratically, and was slumped over asleep at the wheel when he approached the vehicle. Coupled with Stonestreet's inability to recite the alphabet and his difficulty contacting his fingers, the facts of this case would lead a reasonable police officer to conclude that there was more than a possibility that Stonestreet had been driving while under the influence. Jenks had probable cause to arrest Stonestreet at the scene.

CONCLUSION

Assuming, *arguendo*, that Stonestreet was placed under arrest in the parking lot and before some of the sobriety tests were performed, his arrest was nonetheless supported by probable cause to believe that he had been operating a

motor vehicle while under the influence of intoxicants. His motion to suppress was properly denied and the judgment of conviction is affirmed.

By the Court.—Judgment affirmed.

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