

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

April 2, 1998

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

**NOTICE**

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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.

**No. 97-3006**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**RALPH E. PEAT,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Crawford County:  
MICHAEL KIRCHMAN, Judge. *Affirmed.*

DYKMAN, P.J.<sup>1</sup> Ralph Peat appeals from a judgment convicting him of operating a commercial motor vehicle with a blood alcohol concentration of 0.04 or more, contrary to § 346.63(5)(a), STATS. Peat argues that he and his vehicle were seized without probable cause when he was ordered to drive his truck

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<sup>1</sup> This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

to a scale. We conclude that an inspector with the Wisconsin State Patrol had probable cause to believe that Peat's truck was overloaded on its rear axles when he ordered Peat to accompany him to a scales to have his truck weighed. Accordingly, we affirm Peat's conviction.

James Norquay, an inspector with the Wisconsin State Patrol, testified that on April 7, 1997, he was headed south on Highways 18 and 35 when he noticed a red dump truck coming toward him. He observed that a load of gravel in the truck was piled above the cab of the truck. When the truck went by, Norquay noticed that the truck had a steering axle and two drive axles. He turned around, stopped the truck, and identified the driver. He thought that he smelled the odor of an intoxicant and asked Peat if he had been drinking. Peat said that he had not. Officer Norquay testified:

Q: Can you give me a little more information about how it is you figured that this truck was going to be overweight?

A: Just through my experience as an Inspector, the way it's loaded. If it's loaded more towards the back. When I stopped him I got up on the box and looked in and it was loaded towards the rear of the box. Usually if it's loaded—if on a dump truck if the load is not loaded right up to the very front of the box and it's loaded farther back and it's any kind of substantial load it will overload the rear axles.

Q: What about before you stopped him?

A: The size of the load.

Q: Because it was above the top?

A: When I saw him coming it was over the top of the cab and then when he went by I saw that he only had two axles.

....

Q: And your experience was that vehicles that have it loaded that high and they only have two axles are overloaded?

A: Yes.

Officer Norquay told Peat that he believed his truck was overloaded and “that I needed him to follow me to the scale to weigh him.” Norquay testified that Peat did not have a choice as to whether to follow him to the scale. While at the scale, Norquay noticed a strong odor of intoxicants and asked Peat if he would submit to a preliminary breath test. Peat did so, and tested .04. Norquay arrested Peat for operating a commercial motor vehicle with a blood alcohol concentration above 0.0, contrary to § 346.63(7)(a), STATS.

Peat argues that he was seized in violation of the Fourth Amendment to the United States Constitution when he was ordered to drive his truck to the scales to be weighed. He asks that the fruits of the seizure, including the breath test, be suppressed.

We review facts found by the trial court to determine whether they are clearly erroneous. Section 805.17(2), STATS. Whether the facts satisfy Fourth Amendment requirements is a question of law that we decide *de novo*. See *State v. Kasian*, 207 Wis.2d 611, 621, 558 N.W.2d 687, 691 (Ct. App. 1996). Peat does not take issue with the trial court’s findings, and therefore we consider those facts to determine whether a Fourth Amendment violation occurred.

Peat notes that aside from Officer Norquay’s six years of experience as an inspector with the Wisconsin State Patrol, there was nothing to show that Norquay’s observations had weight or validity. While this observation might prove useful at trial, the only question we need to consider is whether there was probable cause for the officer to arrest Peat. In determining whether probable cause exists, we must look to the totality of the circumstances to determine whether the arresting officer’s knowledge at the time of the arrest would lead a

reasonable police officer to believe that the defendant had committed a crime. *See Kasian*, 207 Wis.2d at 621, 558 N.W.2d at 691. Probable cause is neither technical nor legalistic, but a flexible, common-sense measure of the plausibility of particular conclusions about human behavior. *State v. Pozo*, 198 Wis.2d 705, 711, 544 N.W.2d 228, 231 (Ct. App. 1995). “There must be more than a possibility or suspicion that defendant committed an offense, but the evidence need not reach the level of proof beyond a reasonable doubt or even that guilt is more likely than not.” *State v. Mitchell*, 167 Wis.2d 672, 681-82, 482 N.W.2d 364, 367-68 (1992).

Here, the existence of probable cause depends upon the probability that Officer Norquay’s experience was adequate for him to determine from looking at a dump truck that it was probably overloaded. Would a nine-year veteran of the state patrol, with six years of experience as an inspector, *probably* be able to do so? The answer must be “yes.”

It is possible that Officer Norquay held a desk job or for some reason had no background from which to determine what an overloaded dump truck looked like. But that scenario is not probable. Norquay’s nine years with the state patrol, six of which were as an inspector, suggests that he knew of what he spoke. His experience, which he cited, told him that if a dump truck was loaded towards the back, the rear axles would be overloaded. Common sense tells us that this is reasonable. As gravel is piled on top of axles, it is reasonable to conclude that the weight on the axles will increase. Although a judge may not know how much gravel it takes to overload two axles, Officer Norquay was emphatic that when a substantial load is not placed at the front of a dump truck’s box, “it will overload the rear axles.”

To determine whether Officer Norquay had probable cause to arrest Peat, the test is whether a reasonable police officer with Norquay's knowledge and experience would have had more than a suspicion that the truck's rear axles were overloaded. That test is easily met here. Thus, the officer had probable cause to arrest Peat for the overload. His requirement that Peat follow him to the scales was therefore not prohibited by the Fourth Amendment to the United States Constitution.

Section 348.19(1)(a), STATS., permits a traffic officer having reason to believe that the gross weight of a vehicle is unlawful to require the vehicle to be driven to the nearest scale. Peat argues that this statute did not permit Officer Norquay to require Peat to drive his truck to the scale because the officer did not know whether the gross weight of the dump truck was unlawful. But we need not address this assertion. We have concluded that Peat was lawfully arrested, permitting the officer to force Peat to drive to the scale.

Because Peat was lawfully arrested, we need not suppress the fruits of the arrest, including the Intoxilyzer breath test result. The Intoxilyzer result was sufficient to convict Peat of operating a motor vehicle with a blood alcohol concentration in excess of 0.04. Accordingly, we affirm the judgment of conviction.

*By the Court.*—Judgment affirmed.

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

