COURT OF APPEALS
DECISION
DATED AND FILED

May 7, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3629

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

CITY OF SHULLSBURG,

PLAINTIFF-RESPONDENT,

v.

RONALD L. MONAHAN,

DEFENDANT-APPELLANT.

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

DYKMAN, P.J.[1] Ronald Monahan appeals from a judgment convicting him of operating a motor vehicle while intoxicated (OMVWI), contrary to § 346.63(1)(a), STATS., and operating a motor vehicle with a prohibited blood alcohol content (BAC), contrary to § 346.63(1)(b), STATS. Monahan argues that

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

the testimony of the police officer who arrested him was not credible and that the officer did not have probable cause to arrest him.

We conclude that witness credibility is for trial courts to determine and that the arresting officer had probable cause to believe that Monahan was driving while intoxicated. We therefore affirm Monahan's judgment of conviction.

On September 29, 1996, City of Shullsburg Police Chief John Strause was driving west on Estey Street in Shullsburg when he saw a red Ford Escort make a right turn and proceed east on Estey Street. The Escort came into Strause's lane of traffic. Strause pulled to the right as far as possible so that the Escort would not collide with the front of his squad car. Strause looked in his rear view mirror and saw the Escort come completely into the westbound lane of traffic, then swerve back into the eastbound lane. Strause made a U-turn and pursued the vehicle, which was rapidly accelerating. He estimated its speed at forty-five to fifty miles per hour. The Escort "cut the corner" onto Iowa Street, again invading the oncoming lane of traffic. After half a block, the Escort turned right on Blackstone Street, a narrow, alley-like street. Strause followed and activated his red and blue lights. The Escort stopped at a stop sign.

From previous contacts, Strause knew the driver of the Escort to be Monahan, and he knew that the route Monahan took was not a route one would take to Monahan's house. When Strause approached Monahan's car, he noticed that Monahan had rolled down the window and that a strong odor of intoxicants was emanating from the vehicle. Monahan was evasive and uncooperative when answering Strause's questions. Strause noticed that Monahan's speech was slow and slurred, that his face was very red and flushed, and that his eyes were

bloodshot. Monahan tried to avoid facial contact with Strause. He would look straight ahead and put his head down toward his lap. Strause asked Monahan to exit the vehicle. As Monahan got out of the car, he used his left hand for support against the vehicle. As he walked to the rear of the car, he stumbled two steps sideways. When asked for his driver's license, Monahan had a difficult time finding it in his wallet. At one point he dropped the wallet. Monahan became very agitated, and Strause decided that for officer safety, he would arrest Monahan for OMVWI, and did so.

We review the constitutional question of whether Strause had probable cause to arrest Monahan *de novo.* *See* ***State v. Babbit***, 188 Wis.2d 349, 356, 525 N.W.2d 102, 104 (Ct. App. 1994). However, the trial court is the ultimate arbiter of witness credibility. ***State v. Marty***, 137 Wis.2d 352, 359, 404 N.W.2d 120, 123 (Ct. App. 1987), *overruled on other grounds*, ***State v. Sanchez***, 201 Wis.2d 219, 548 N.W.2d 69 (1996).

> Discrepancies in the testimony of a witness do not necessarily render it so incredible that it is unworthy of belief as a matter of law. Testimony may be so confused, inconsistent, or contradictory as to impair credibility as to parts of the testimony without being so incredible that all of it must be rejected as a matter of law.

State ex rel. Brajdic v. Seber, 53 Wis.2d 446, 450, 193 N.W.2d 43, 46 (1972).

Monahan asserts that although Strause was trained in writing thorough reports, he testified to facts not on his reports, and his testimony was in some respects at variance with what he had written on the reports. We do not view Strause's testimony as confused, inconsistent or contradictory to any significant degree. But even if we were to accept Monahan's view of Strause's testimony, his plea is to the wrong court. The trial court rejected Monahan's

attack on Strause's testimony, and because the trial court is the ultimate arbiter of the credibility of that testimony, we will not second guess the trial court's decision to believe Strause's testimony. Testimony must be more than confused, inconsistent, and contradictory before we can conclude that it is incredible as a matter of law. *See* ***id.***

We next consider Monahan's assertion that Strause did not have probable cause to arrest him for OMVWI. First, however, we will address the method by which counsel argues this issue.

Supreme Court Rule 20:3:3(a)(3) (West 1998) provides that a lawyer shall not knowingly "fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." The comment to SCR 20:3.3 provides:

> **Misleading Legal Argument**
>
> Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(3), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction which has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Counsel relies upon ***State v. Swanson***, 164 Wis.2d 437, 453 n.6, 475 N.W.2d 148, 155 (1991), to support an argument that Police Chief Strause did not have probable cause to arrest Monahan. Counsel argues that "[t]he comments of the Supreme Court in ***Swanson***, at footnote 6, illustrate the proper mechanism for an officer to follow in investigation of suspected drunk driving." Counsel further

argues that "[t]he explicit import of this footnote to the ***Swanson*** opinion is unmistakable." Indeed, ***Swanson*** plays a significant role in counsel's argument. But counsel must know that in ***State v. Kasian***, 207 Wis.2d 611, 558 N.W.2d 687 (Ct. App. 1996), the court of appeals said that ***Swanson***, and in particular, footnote six of ***Swanson***, has been qualified.

Kasian explains that ***State v. Wille***, 185 Wis.2d 673, 518 N.W.2d 325 (Ct. App. 1994), qualified the language of footnote six in ***Swanson***:

> Citing ***State v. Swanson***, 164 Wis.2d 437, 475 N.W.2d 148 (1991), Kasian contends that, absent the administration of field sobriety tests confirming a suspicion of intoxication, the officer did not have probable cause to arrest. We acknowledge that ***Swanson*** contains certain language which supports this argument. *See* ***id.*** at 453-54 n.6, 475 N.W.2d at 155. However, this language has since been qualified. It "does not mean that under all circumstances the officer must first perform a field sobriety test, before deciding whether to arrest for operating a motor vehicle while under the influence of an intoxicant." ***Wille***, 185 Wis.2d at 684, 518 N.W.2d at 329. Thus, the question of probable cause is properly assessed on a case-by-case basis. In some cases, the field sobriety tests may be necessary to establish probable cause; in other cases, they may not. This case, we conclude, falls into the latter category.

Kasian, 207 Wis.2d at 622, 558 N.W.2d at 692.

Though counsel cites ***Wille*** several times and concedes that field sobriety tests are sometimes unnecessary, he does not cite ***Kasian***, where we held that the language in footnote 6 of ***Swanson*** was qualified by ***Wille***. ***Kasian*** necessarily plays a part in any discussion of footnote 6 of ***Swanson.***

This is not the first time that counsel's firm has been warned that briefs may have violated the canons of ethics. *See* ***State v. Freye,*** No. 97-2375, unpublished slip op. at 5-6 (Wis. Ct. App. Apr. 2, 1998), for three examples, and

State v. Johnson, No. 97-2708-CR, unpublished slip op. at 5 n.2 (Wis. Ct. App. Apr. 16, 1998). An attorney does not help his or her client either by violating SCR 20:3.3 or by closely skirting that rule. We anticipate that in the future, counsel will more carefully craft arguments that will recognize precedent directly adverse to his position.

We return to the issue Monahan raises: Did Police Chief Strause have probable cause to arrest Monahan for OMVWI? ***Kasian*** notes that this question is properly assessed on a case-by-case basis. We will do so.

This is not a close case. Probable cause is the common sense use of cause and effect. The standard is low. In ***State v. Pozo***, 198 Wis.2d 705, 711, 544 N.W.2d 228, 231 (Ct. App. 1995), we explained:

> Probable cause, the idea running through all these rules, is neither a technical nor a legalistic concept; rather, it is a "flexible, common-sense measure of the plausibility of particular conclusions about human behavior,"—conclusions that need not be unequivocally correct or even more likely correct than not. It is enough if they are sufficiently probable that reasonable people—not legal technician—would be justified in acting on them in the practical affairs of everyday life.

(Citations omitted.)

Strause's conclusion that Monahan was intoxicated could have been wrong, yet probable cause could still exist. Probable cause does not demand any showing that Strause's conclusion was correct, or more likely true than false. *See* ***Texas v. Brown***, 460 U.S. 730, 742 (1983). All that is necessary is that there be more than a possibility or suspicion that a person committed an offense. ***State v. Mitchell***, 167 Wis.2d 672, 681-82, 482 N.W.2d 364, 367-68 (1992). Strause knew or could have reasonably inferred the following: While making a right turn,

Monahan invaded the oncoming traffic lane, and then swerved back into the correct lane. He then quickly accelerated to about forty-five or fifty miles per hour. During another turn, he again invaded the oncoming lane of traffic while trying to evade Strause. When Monahan stopped and rolled down his window, Strause noticed a strong odor of intoxicants coming from the car. Monahan's speech was slow and slurred, his face was red and flushed, and his eyes were bloodshot. He tried to avoid facial contact with Strause and was evasive and uncooperative when answering questions. Exiting his car, Monahan needed to use his car for support. He stumbled two steps sideways. He had difficulty finding his driver's license and dropped his wallet.

There may be explanations for this evidence that do not include intoxication. But that is not the test. The test is whether Monahan was probably intoxicated. The answer is not difficult: He probably was. Because Strause had probable cause to arrest Monahan for OMVWI, the arrest and resulting search were proper. There is no infirmity underlying Monahan's judgment of conviction. Accordingly, we affirm that judgment.

By the Court.—Judgment affirmed.

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