

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 5, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 98-0214

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

VILLAGE OF WALWORTH,

PLAINTIFF-RESPONDENT,

V.

STEPHEN F. MEYER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County:
ROBERT J. KENNEDY, Judge. *Affirmed.*

NETTESHEIM, J. Stephen F. Meyer appeals from a judgment of conviction for operating a motor vehicle while intoxicated (OWI) contrary to § 346.63(1)(a), STATS., and for operating a motor vehicle with a prohibited

alcohol concentration (PAC) contrary to § 346.63(1)(b).¹ Meyer argues on appeal that (1) the Village failed to prove that the police had probable cause to arrest because it did not present any objective proof as to the validity and probative value of the field sobriety tests administered by the arresting officer, and (2) absent such proof, the administration of the field sobriety tests exceeded the scope of the detention. We reject Meyer's arguments. We affirm the judgment.

On July 12, 1997, at approximately 7:25 p.m., Officer Andrew J. Long of the Village of Walworth Police Department clocked Meyer's vehicle traveling in excess of the speed limit. Long pursued Meyer's vehicle and activated the squad car's warning lights. Long testified that the vehicle "did not pull over right away. The vehicle slowed way down [and] as it was slowing down, I noticed the passenger in the car ... moving around a lot ... leaning forward." Long then activated the siren in order to get the driver's attention. Long testified that it took an unusually long period of time for the vehicle to finally pull over.

After making contact with Meyer, Long requested his driver's license. As he was talking to Meyer, Long detected an odor of intoxicants on Meyer's breath. Long additionally observed that Meyer's eyes were "glassy and bloodshot, and his speech was slow and slurred or thick-tongued." Long formed the opinion that Meyer might be intoxicated and called for a backup squad. While conversing with Meyer, Long noticed a cooler on the passenger side of the vehicle. When Long opened the cooler, he discovered an open bottle of beer.

¹ Section 346.63(1)(c), STATS., allows a finding of guilt as to both operating while intoxicated and operating with a prohibited alcohol concentration, but permits only one conviction for purposes of sentencing. The judgment of conviction arguably runs afoul of this statute because it recites convictions for both offenses, even though the penalties imposed were for a single offense. This potential defect is not raised as an appellate issue.

Long then asked Meyer if he had been drinking, to which Meyer replied that “he had a beer about an hour ago.” At this point, a second officer arrived.

Long asked Meyer to exit the vehicle to perform field sobriety tests. First, Long asked Meyer to recite the alphabet. Meyer was unable to do so. Second, Long asked Meyer to perform the one-leg stand test. Long testified that Meyer’s raised foot touched down twice during the test and his upper body “swayed from side to side.” Third, Meyer performed the heel-to-toe test. Although Long testified that Meyer performed well on the first half of the test, on the return portion, Meyer never touched his heel to his toe and his upper body was again swaying back and forth. Next, Long asked Meyer to count backwards from fifty-nine to forty-nine. Meyer was able to do so but failed to stop at forty-nine. Long testified that he is trained and certified in OWI detection and standard field sobriety testing. In Long’s opinion, Meyer failed to adequately perform any of the tests.

Finally, Long performed the horizontal gaze nystagmus (HGN) test. Long testified in detail as to the method used and observations made during the test. According to Long, his observations during the test indicated that Meyer was under the influence of an intoxicant. After administering a preliminary breath test which indicated an illegal blood alcohol level, Long placed Meyer under arrest.

On September 25, 1997, Meyer filed a motion to suppress evidence based on the inadequacy of the field sobriety tests administered by Long. Specifically, Meyer argued that his performance on the alphabet test and the backwards count test did not support probable cause because these tests have not been “scientifically or empirically shown to produce results correlative in any

manner with determining whether the subject's ability to drive is impaired." Meyer additionally argued that Long did not properly administer the other tests.

The trial court held a hearing on Meyer's motion on October 23, 1997. The court found that even excluding any evidence of Meyer's performance on the alphabet test and the backwards count test, the officers had probable cause to believe Meyer was intoxicated. The court relied upon Long's observations regarding the odor of intoxicants emanating from Meyer, his bloodshot eyes and slurred speech, and Long's assessment of Meyer's performance on the heel-to-toe, balancing and HGN tests. The court noted that Long had fourteen years of experience as an officer and had administered breath tests on numerous occasions. The court determined that the officers had "ample probable cause that [Meyer] was under the influence of intoxicants."² The trial court denied Meyer's motion for suppression of evidence and found him guilty of both OWI and PAC. Meyer appeals.

We begin by noting that Meyer does not challenge the officer's initial stop of his vehicle. Rather, Meyer contends that the Village did not establish probable cause for his arrest because it failed to prove that the tests administered by Long were reasonably related to determining whether a driver's ability is impaired by alcohol consumption. As we understand it, Meyer is essentially arguing that the Village must present scientific or expert testimony establishing that the tests are valid indicators of an impaired ability to drive before

² The accompanying officer additionally testified as to his observations of Meyer's performance on the heel-to-toe, balancing and HGN tests. He testified that Meyer was unable to satisfactorily perform the tests. However, the trial court gave little weight to the accompanying officer's testimony because he had little experience in the detection of intoxicated drivers. Instead, the court gave weight only to Long's opinion that Meyer was intoxicated.

the results of the tests may be relied upon to establish probable cause. Absent such evidence, Meyer argues that the officer's administration of the tests was outside the scope of a lawful detention under *Terry v. Ohio*, 392 U.S. 1 (1968). Meyer does not cite to any authority which supports his position, nor are we persuaded by his arguments.

“Probable cause to arrest exists where the officer, at the time of the arrest, has knowledge of facts and circumstances sufficient to warrant a person of reasonable prudence to believe that the arrestee is committing, or has committed, an offense.” *County of Dane v. Sharpee*, 154 Wis.2d 515, 518, 453 N.W.2d 508, 510 (Ct. App. 1990). Where the historical facts are undisputed, the question of whether there was probable cause for arrest is a question of law which this court may subject to an independent review. See *Village of Elkhart Lake v. Borzyskowski*, 123 Wis.2d 185, 189, 366 N.W.2d 506, 508 (Ct. App. 1985).

After observing signs of intoxication, Long requested that Meyer do the following routine tests: recite the alphabet, count backwards, walk heel-to-toe, balance on one foot and cooperate with the HGN test. Meyer argues that before any of these tests may be relied upon as evidence of “intoxication vs. sobriety,” it is necessary to establish that the ability to do any one of the tests is “a stable indicia of sobriety.” In doing so, Meyer presents as an example an officer requesting that a person recite a foreign alphabet. Meyer argues that the probative value of such a test would have to be scientifically proven. However, Meyer's argument overlooks that none of the tests administered by Long were unusual or extraordinary in any way. These commonly accepted tests measure a person's basic mental ability and physical dexterity. As such, they are reasonable indicators as to whether the individual is under the influence of intoxicants.

We decline Meyer's invitation to require expert or scientific evidence establishing that these basic tests are valid indicators of impairment. Most lay persons, particularly police officers, have the ability to make this determination. No special expertise is required.

We bear in mind that probable cause is a commonsense test and the probabilities with which it deals are not technical—they are the factual and practical considerations of everyday life on which reasonable and prudent persons act. *See Sharpee*, 154 Wis.2d at 518, 453 N.W.2d at 510. Were we presented with a situation in which an officer requested an individual to perform an unusual, exotic or extraordinary test, we might agree with Meyer's argument and hold that expert testimony would be necessary to show the probative value of the test. However, none of the tests administered in this case presents such a situation.

Given the totality of the circumstances, Long had reason to believe that Meyer was operating a motor vehicle while under the influence of intoxicants. First, Meyer took an unusually long time to pull over. When Long made contact with Meyer, he smelled intoxicants on Meyer's breath. He observed that Meyer's eyes were "glassy and bloodshot" and his speech was "slow and slurred." Meyer failed to satisfactorily complete any of the field sobriety tests and while performing them his upper body swayed back and forth indicating a difficulty maintaining balance. Under these circumstances, Long reasonably determined that Meyer's inability to do so was due to his intoxication.

We conclude that the tests administered in this case were probative as to Meyer's impairment and did not require scientific explanation. Because the tests were reasonably related to determining whether Meyer's driving abilities

were impaired, we reject Meyer's argument that the administration of the tests exceeded the scope of the lawful detention.

By the Court.—Judgment affirmed.

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

