

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 17, 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. 98-0773

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

STEVEN M. KUENZI,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
DANIEL R. MOESER, Judge. *Affirmed.*

VERGERONT, J.¹ Steven Kuenzi appeals from a judgment of conviction for operating a motor vehicle while intoxicated contrary to § 346.63(1)(a), STATS. He contends the trial court erred in denying a motion to

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

suppress evidence due to an unlawful arrest and due to a violation of the implied consent law, § 343.305(3), STATS. We conclude that the trial court properly denied the motion on each ground and we therefore affirm.

BACKGROUND

Wisconsin State Trooper Jeffery Zuzunaga and Kuenzi were the two witnesses at the evidentiary hearing on the motion to suppress evidence. Trooper Zuzunaga testified as follows. He has been a state trooper for eleven years. During that time he has arrested between 350 and 400 people for operating a motor vehicle while under the influence of an intoxicant (OWI). That represents about half the number of persons he has investigated for that offense. He described his training on investigating potential OWIs, administering standard field sobriety tests and OWI case law updates.

According to Trooper Zuzunaga, early in the morning on May 23, 1997, he was dispatched to an automobile accident on the I-90/94 westbound exit ramp to Highway 51 in Dane County. Upon arriving, the person there identified himself as Kuenzi. Kuenzi was standing in the roadway next to a semi truck. There was blood running down his face and dripping onto his shirt and blood around the area that he had been standing. There were cuts on his face and head. His vehicle had rolled over into the area between the ramps. Another police officer was already on the scene and advised Trooper Zuzunaga that there were no other persons around the vehicle and that he had already called for an ambulance.

Trooper Zuzunaga spoke with Kuenzi. Kuenzi swayed back and forth and appeared to Trooper Zuzunaga to be unsteady and disoriented. After initially stating that he did not remember what had happened, Kuenzi said he was the driver of the vehicle and he was not really sure what happened to cause it to

roll over. The vehicle marks indicated to Trooper Zuzunaga that the vehicle was sideways at the time that it left the roadway, went down an embankment and rolled over several times. The weather conditions were clear, there was no rain or limitation on visibility and the driving conditions were fine. There was no obstruction or disrepair in the roadway.

Trooper Zuzunaga detected a strong odor of intoxicants coming from Kuenzi. Standing down wind from Kuenzi, five to ten feet away, Trooper Zuzunaga could smell intoxicants coming from Kuenzi's person. Kuenzi's speech was slurred and at times it was difficult to understand him. When asked a question, Kuenzi would stare for a long period of time before answering. Because Kuenzi was swaying, Trooper Zuzunaga was concerned that he might fall over and told him several times to sit down. Kuenzi either did not understand or did not want to cooperate. Trooper Zuzunaga asked Kuenzi how much he had had to drink that evening and Kuenzi said he did not know for sure. In answer to other questions, Kuenzi stated that the accident happened a few minutes ago and he was coming from Madison and going to Lodi. He said he had not been drinking since the accident occurred.

Trooper Zuzunaga did not have Kuenzi perform any field sobriety tests. It appeared to him that Kuenzi was in serious need of medical attention and he thought that having Kuenzi perform the tests would be futile. He also thought performing the tests could possibly be dangerous to Kuenzi, possibly aggravating his injuries or causing him to fall into the lane of traffic. Trooper Zuzunaga did not perform the horizontal gaze nystagmus test (HGN) because Kuenzi was squinting and with the dirt and blood on his face, it was hard for Trooper Zuzunaga to see his eyes.

Based on Kuenzi's statements and Trooper Zuzunaga's investigation at the scene, which revealed that the engine compartment of the vehicle was still warm, Trooper Zuzunaga determined the accident had happened at approximately 3:25 a.m. The time of the accident was significant to Trooper Zuzunaga because, based on his training and experience, accidents involving operating while under the influence of intoxicants frequently occur at or shortly after bar time, which 3:25 a.m. was.

One of the factors Trooper Zuzunaga considered relevant in deciding there was probable cause to arrest Kuenzi for driving while under the influence of an intoxicant was that it was a one vehicle crash without any apparent cause on a one lane ramp in good weather.

An ambulance took Kuenzi to the hospital and Trooper Zuzunaga followed in his squad car. When Trooper Zuzunaga arrived at the hospital, Kuenzi was in the emergency room lying on his back on a gurney. Trooper Zuzunaga testified that he advised Kuenzi he would be placing him under arrest for operating while under the influence of an intoxicant and he then read Kuenzi the Informing the Accused form, making a check mark beside each paragraph as he read it. He gave Kuenzi a copy of the Informing the Accused form and gave him a citation for operating while under the influence of an intoxicant.

Trooper Zuzunaga asked Kuenzi whether he would submit to an evidentiary chemical test of his blood. He decided to administer a blood test because he did not think Kuenzi was in a condition to be giving a breath sample because of his injuries. He did not think Kuenzi would be released from the hospital that evening; and the blood test was most convenient because they were already at the hospital. In response to the questions from Kuenzi, Trooper

Zuzunaga told him that he could not give him legal advice but that he could tell him that the implied consent law requires him to submit to the test and if he does not, the consequences would be revocation of his license. Trooper Zuzunaga also advised Kuenzi that he would not be taking the blood sample “with force”; that it was purely voluntary. Kuenzi decided to submit to the blood test.

On cross-examination, Trooper Zuzunaga acknowledged that it was unlighted where the accident occurred. He also acknowledged that disorientation and problems with memory, speech and balance are possible signs of a head injury. Trooper Zuzunaga did not try and determine whether there was anything mechanically wrong with the vehicle. He did not offer a preliminary breath test. Trooper Zuzunaga did not feel that questioning would hurt Kuenzi’s health. Trooper Zuzunaga learned from a driver of a semi truck that had been parked on the ramp that Kuenzi had walked to his truck for help. The semi driver called for assistance on his CB radio and that led to Trooper Zuzunaga being dispatched to the scene. The semi truck was located approximately 100 yards away from Kuenzi’s vehicle and that is where Kuenzi was standing when Trooper Zuzunaga arrived at the scene.

Before reading Kuenzi the Informing the Accused form, Trooper Zuzunaga told him either, “I’m going to be placing you under arrest for OWI,” or “I’m going to be citing you for the OWI.” Trooper Zuzunaga testified that he did not remember which phrase he used; that he has used both in the past. Trooper Zuzunaga did not take Kuenzi into custody at that time because he assumed the hospital would not be releasing him until the next day. He did not give Kuenzi his *Miranda* rights.

On redirect, Trooper Zuzunaga testified that although he did not place Kuenzi in handcuffs or tell him that he was not free to leave, he did not consider that Kuenzi was free to leave. He also testified that he attributed Kuenzi's unsteady balance and other physical characteristics to being under the influence of an intoxicant rather than to the accident, based on his experience in investigating OWIs.

Kuenzi testified that Trooper Zuzunaga told him that he was going to cite him for OWI but never said the words "[y]ou're being put under arrest." Kuenzi at one point answered that Trooper Zuzunaga said he was "charging" him with operating while under the influence of an intoxicant, but later testified that what Trooper Zuzunaga had said was that "he was going to issue me a citation for OWI." According to Kuenzi, Trooper Zuzunaga did not show him a copy of the citation, but did indicate to Kuenzi that he was putting it on Kuenzi's pile of property items. Kuenzi acknowledged it was clear to him that at some point in the future he was going to have to go to court to answer the OWI charge.

The court concluded Trooper Zuzunaga had probable cause to arrest Kuenzi based on the one car accident with no other persons around at bar time; Kuenzi's acknowledgment that he had been drinking; his swaying, unsteadiness and disorientation; the car going off the road sideways; Kuenzi's inability to recall what happened; the strong odor of intoxicants; the slurred speech; the lack of responsiveness to questions; and the fact that he did not know how much he had had to drink. The court considered that it was reasonable not to administer field sobriety tests because of Kuenzi's injuries, observing that, had Trooper Zuzunaga done so, there might be an argument that he should not have because of Kuenzi's injuries. With respect to the implied consent law, the court found that the requirement that the driver be under arrest was met. The court did not consider it

essential that the officer state the exact words, “you are under arrest.” It was sufficient the court concluded, that Trooper Zuzunaga told Kuenzi he was going to be cited for OWI; Kuenzi knew he was being cited and had been given a citation, a copy of which was placed in his property; and Kuenzi understood the Informing the Accused form that the officer read to him. The court concluded that a reasonable person under these circumstances would understand that he had been charged with a violation at that point.

DISCUSSION

On appeal, Kuenzi argues that at the time Trooper Zuzunaga gave him the citation, he did not have probable cause to arrest him for operating while under the influence of an intoxicant. In determining whether probable cause exists for the arrest, 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 was operating a motor vehicle while under the influence of an intoxicant. *State v. Babbitt*, 188 Wis.2d 349, 356, 525 N.W.2d 102, 104 (Ct. App. 1994). Probable cause 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,” *State v. Petrone*, 161 Wis.2d 530, 547-48, 468 N.W.2d 676, 682 (1991), conclusions that need not be unequivocally correct or even more likely correct than not. *Texas v. Brown*, 460 U.S. 730, 742 (1983). It is enough if they are sufficiently probable that reasonable people—not legal technicians—would be justified in acting on them in the practical affairs of everyday life. *State v. Wisumierski*, 106 Wis.2d 722, 739, 317 N.W.2d 484, 492 (1982).

In reviewing a trial court's decision on a motion to suppress evidence, we do not reverse a trial court's findings of fact unless they are clearly erroneous. *State v. Richardson*, 156 Wis.2d 128, 137-38, 456 N.W.2d 830, 833 (1990). The only potential area of factual dispute Kuenzi discusses is whether Trooper Zuzunaga told Kuenzi he was placing him under arrest for OWI or told him he was citing him for OWI. However, as we understand the trial court's decision, it found that Trooper Zuzunaga told Kuenzi he was going to be cited for OWI. According to Kuenzi, that is the correct finding. Whether the facts as found by the trial court meet the constitutional standard is a question of law, which we review de novo. *Id.*

Kuenzi relies on *State v. Swanson*, 164 Wis.2d 437, 475 N.W.2d 148 (1991), to support his argument that, absent a field sobriety test, an officer does not have probable cause to make the arrest. Although *Swanson* does contain certain language that seems to support Schnelz's argument, that language has been qualified by *State v. Wille*, 185 Wis.2d 673, 684, 518 N.W.2d 325, 329 (1994). Whether probable cause exists is assessed on a case-by-case basis. Sometimes a field sobriety test is required to establish probable cause and sometimes it is not. *Id.* We conclude that all of the facts present in this case were sufficient to establish probable cause without requiring field sobriety tests. Specifically, there was no apparent cause for the one vehicle accident in which the car left the highway sideways and rolled over. Based on Trooper Zuzunaga's experience, the early morning hour just after bar closing increased the likelihood of an intoxicated driver. Kuenzi admitted he had been drinking before the accident but could not remember how much. The officer could smell intoxicants even when standing five to ten feet away from Kuenzi. Kuenzi was swaying, appeared to be disoriented and his speech was slurred.

Kuenzi argues that the injuries he received in the accident could account for the slurred speech, disorientation and swaying, and therefore these cannot be considered as indications of intoxication. We reject this argument. Trooper Zuzunaga was well aware that Kuenzi had been injured because he could see the cuts to his face and head. However, he also knew that Kuenzi had walked over to the semi truck to obtain help before he arrived, and Kuenzi was able to understand and answer some of Trooper Zuzunaga's questions appropriately. We conclude that a reasonable officer could rely on Kuenzi's slurred speech, swaying and apparent disorientation as indications of intoxication, and that those, together with the nature of the accident, the apparent lack of other explanations for the accident, the time of day, the admission of drinking, and the strong odor of intoxicants are sufficient to establish probable cause at the time Trooper Zuzunaga told Kuenzi he was going to give him a citation for OWI.

Kuenzi's second contention on appeal is that the Implied Consent Law requires that an officer arrest a person before requesting he or she provide a sample of blood, breath or urine for testing, and that Trooper Zuzunaga had not placed Kuenzi under arrest at the time he requested that he submit to a blood test. Section 343.305(3)(a), STATS., provides:

(3) REQUESTED OR REQUIRED. (a) *Upon arrest of a person for violation of s. 346.63 (1), (2m) or (5) or a local ordinance in conformity therewith, or for a violation of s. 346.63 (2) or (6) or 940.25, or s. 940.09 where the offense involved the use of a vehicle, a law enforcement officer may request the person to provide one or more samples of his or her breath, blood or urine for the purpose specified under sub. (2). Compliance with a request for one type of sample does not bar a subsequent request for a different type of sample. [Emphasis added.]*

An arrest occurs when a reasonable person in the defendant's position would have considered himself or herself to be in "custody," given the degree of restraint under the circumstances. *Swanson* at 446-47, 475 N.W.2d at 152. The circumstances include "what has been communicated by the police officers, either by their words or actions." *Id.* at 447, 475 N.W.2d at 152. Kuenzi emphasizes that Trooper Zuzunaga did not tell him he was "under arrest" before asking him to submit to a blood test, but in his reply brief he asserts that he is not contending that those specific words need to be used. However, Kuenzi does not explain why a reasonable person would not understand he was under arrest in the circumstances of this case. Trooper Zuzunaga had followed Kuenzi to the hospital, told him he was citing him for OWI and gave him a copy of the citation by placing it on the pile of his belongings. Kuenzi acknowledged that he understood that a citation meant that he was being charged with OWI. The fact that Trooper Zuzunaga did not tell Kuenzi he was not free to leave is not dispositive under these circumstances: Kuenzi was in the hospital for medical treatment of his injuries and a reasonable person in this situation would understand that he was going to be in the hospital for some period of time. What is significant under these circumstances is that Trooper Zuzunaga communicated to Kuenzi that he was being cited for OWI. A reasonable person would understand that, even if he wanted to leave the hospital without medical treatment, he was not free to leave without Trooper Zuzunaga's permission.

The evident purpose of the arrest requirement in § 343.305(3)(a), STATS., is to ensure there is probable cause to believe the individual has committed an OWI offense before requesting the submission to tests, because a refusal to submit may result in license revocation. *See* § 343.305(9)(a). We have already held that there was probable cause to arrest Kuenzi at the time Trooper

Zuzunaga advised him that he was citing him for OWI. Kuenzi does not explain how, if there was probable cause to arrest at that time, there was any violation of § 343.305(3)(a). We are satisfied there was not.

By the Court.—Judgment affirmed.

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

