

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 23, 2015

Diane M. Fremgen
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP2625-CR

Cir. Ct. No. 2012CT711

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ZACH GEYER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sauk County:
PATRICK J. TAGGART, Judge. *Affirmed.*

¶1 BLANCHARD, P.J.¹ Zach Geyer appeals a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant (OWI),

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

second offense, denial of his motion for suppression of evidence, and denial of his motion for reconsideration of the suppression decision. He argues that the State failed to show that the arresting sheriff's deputy had probable cause to arrest him for OWI. I disagree and affirm.

BACKGROUND

¶2 After Geyer was charged with OWI following his involvement in a highway crash, he moved to suppress all evidence resulting from his arrest and a suppression hearing was held. The two deputies who were involved in Geyer's arrest were the only witnesses at the suppression hearing.

¶3 Deputy William Vertein testified to the following. Deputy Vertein has arrested between 50 and 100 suspected impaired drivers and his periodic law enforcement training has included some training specific to OWI enforcement.

¶4 On November 15, 2012, at approximately 10:25 p.m., Deputy Vertein was dispatched based on a report that a motorist may have struck a highway guardrail. Dispatch reported that an SUV had towed the vehicle from the accident scene to the parking lot of a commercial business on the same highway, and Deputy Vertein drove to that location, where he found three vehicles and three persons: Geyer, Geyer's wife, and Dale Geitz.

¶5 Geitz told the deputy that he had towed Geyer's Camry to the parking lot after Geyer "hit the guardrail up by County Highway F." Deputy Vertein observed that the Camry "was damaged extensively on the passenger side front and down the length of the passenger side." This was consistent, in the deputy's view, with the Camry having struck an object such as a guardrail. Asked by the deputy why he had not contacted police about the accident, Geyer replied

“that he did not know he needed to and wanted to get the vehicle off the roadway so no one else would be involved in an accident.”

¶6 Deputy Vertein made the following observations of Geyer. He appeared “lethargic and slow in answering my questions.” When asked for identification, Geyer dropped his card on the ground and appeared to be moving “in slow motion” when he picked it up, even though Geyer did not appear to be physically injured. Geyer took “a couple seconds to respond to me when I was asking him questions.” He appeared to be “having difficulty with his eye, hand coordination.” His breath carried an odor of intoxicants.

¶7 At the same time, Geyer did not seem to slur his speech, and the deputy did not observe that his eyes were glassy or bloodshot. Also, Geyer was able to answer questions posed by the deputy appropriately, and did not provide confusing answers.

¶8 Asked about any alcohol consumption, Geyer reported that he had consumed one beer that day. When asked about what caused him to run into the guardrail, Geyer initially said he did not know what the deputy meant.

¶9 About 10 to 15 minutes after Deputy Vertein arrived on the scene he was joined by Deputy Joseph Uminski, and Vertein briefed Uminski. Thereafter, Deputy Uminski observed and interacted with Geyer, and placed Geyer under arrest. Neither deputy asked Geyer to perform field sobriety tests or to submit to a preliminary breath test before the arrest.

¶10 Deputy Uminski also testified at the suppression hearing. His testimony overlapped to a large degree with that of Deputy Vertein, and included the following. Deputy Uminski has made between 350 and 400 OWI arrests and

has worked as a patrol deputy for 13 years. On the night of November 15, 2012, the area in question was “clear,” with “dry roads,” and not “overcast” or “foggy.” When Deputy Uminski arrived at the location to which Geyer’s Camry had been towed, he observed that the rim of a tire on the Camry was jutting out at “almost a 90-degree angle to” the Camry, “which would be consistent with the information about striking a guardrail.”

¶11 Geyer’s wife explained to Deputy Uminski that Geyer had called her at around 9:45 p.m. to say that he had been involved in a crash. Geitz told Deputy Uminski that Geyer had called Geitz at 9:40 p.m. to say that Geyer had been in a crash and that he could not move his car. Geitz said that he went to help Geyer by towing his car “out of the roadway so no one else would be involved in an additional crash.”

¶12 Deputy Uminski observed that Geyer’s eyes were “[g]lassy” and “blood shot,” and there was a “strong odor of intoxicants coming from his breath.”

¶13 In a written decision, the circuit court denied the motion to suppress, concluding:

Based on the totality of the circumstances as observed by Deput[ies] Vertein and Uminski, the Court finds that a reasonable officer with the deputies’ training and experience could ... conclude that the Defendant had probably been operating a motor vehicle while under the influence of intoxicants [before placing him under arrest.]

¶14 Geyer filed a motion to reconsider, on the grounds that the court had improperly considered testimony from the deputies that Geyer, after initially answering questions posed by Deputy Vertein, declined to answer the deputies’ questions without having an attorney present. The court denied the motion for reconsideration, on the ground that a sufficient basis for probable cause was

established without reference to the refusal to answer questions from the deputies without the benefit of legal counsel.²

¶15 After entering a no contest plea, Geyer filed this appeal from the judgment of conviction, the decision denying suppression, and the decision denying the motion for reconsideration.

DISCUSSION

¶16 The pertinent legal standards are well established:

A warrantless arrest is not lawful except when supported by probable cause. Probable cause to arrest for operating while under the influence of an intoxicant refers to that quantum of evidence within the arresting officer's knowledge at the time of the arrest that would lead a reasonable law enforcement officer to believe that the defendant was operating a motor vehicle while under the influence of an intoxicant. The burden is on the state to show that the officer had probable cause to arrest.

The question of probable cause must be assessed on a case-by-case basis, looking at the totality of the circumstances. Probable cause is a "flexible, common-sense measure of the plausibility of particular conclusions about human behavior." When the facts are not disputed, whether probable cause to arrest exists in a given case is a question of law that this court determines independently of the circuit court and court of appeals but benefiting from their analyses. In determining whether there is probable cause, the court applies an objective standard, considering the information available to the officer and the officer's training and experience.

² Consistent with my decision not to include any reference in the background facts to the topic of Geyer declining, before his arrest, to answer questions from the deputies without benefit of counsel, I do not consider the topic as a potential factor in the probable cause analysis below. I express no view on the legal issues that would arise if I were to address testimony on this topic. In other words, I reach the same conclusion expressed in the circuit court's order denying the motion for reconsideration, namely, without considering Geyer's refusal to answer the deputies' questions, there was probable cause for the OWI arrest.

State v. Lange, 2009 WI 49, ¶¶19-20, 317 Wis. 2d 383, 766 N.W.2d 551 (quoted sources and footnotes omitted).

¶17 Geyer acknowledges on appeal that a probable cause determination can be made in the absence of field sobriety tests or a preliminary breath test. However, he argues that the following factors undermine a conclusion that there was probable cause here: the deputies did not inspect the scene of the crash and “possessed little to no information about how or why the accident occurred”; neither deputy “had personally observed Geyer driving” and they lacked “witness accounts of Geyer’s driving”; Deputy Vertein did not observe Geyer to have glassy, blood shot eyes; and the deputies lack the relatively strong proof that can result from field sobriety tests and preliminary breath tests.

¶18 The only one of these arguments that has any weight is the last, which I will now address, before turning to the others. Testimony from Deputy Vertein about Geyer’s odor of alcohol, admission of drinking, “slow motion,” and “difficulty with his eye, hand coordination,” and from Deputy Uminski that Geyer’s eyes were “[g]lassy” and “blood shot,” and there was a “strong odor of intoxicants coming from his breath”—while not the equivalent of failed field sobriety tests or a high measurement on a preliminary breath test—all point in the same direction as those tests. I do not mean to suggest that, as a general matter, field sobriety tests and preliminary breath tests are not superior methods of investigation to mere observations and mild admissions. Across cases, officers who skip these steps risk making arrests that violate Fourth Amendment rights. However, given significant factors here indicating impairment to the deputies, these pre-arrest tests were not necessary. That is, even without these tests, the officers were presented with sufficient evidence from which reasonable officers in

their positions would believe that Geyer had operated a motor vehicle while under the influence of an intoxicant.

¶19 Turning to the other arguments Geyer makes, they have little weight. Based on the uncontested testimony at the suppression hearing, the deputies had strong reasons to believe that Geyer had recently been involved in a serious, one-vehicle crash on a dry highway on a clear night, and then had apparently left the scene as quickly as he could arrange without alerting authorities. Geyer does not explain why the circuit court could not credit the testimony from Deputy Uminski that Geyer's eyes were glassy and blood shot, even if Deputy Vertein did not detect either sign of potential impairment.

¶20 The crux of Geyer's argument is that the deputies here "lacked the crucial connecting evidence between the accident and impairment" and that the crash was "unexplained." To the contrary, I conclude that "connecting evidence" was plentiful and the crash was sufficiently explained for probable cause purposes, based on the reasonable inferences available to the experienced deputies. By all appearances, an impaired Geyer had been involved in a serious accident and left the scene of the accident without alerting authorities in an attempt to avoid accountability for the fact that he had driven while impaired.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

