

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 22, 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. 98-1574-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES J. BARTOW,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Grant County:
GEORGE S. CURRY, Judge. *Affirmed.*

VERGERONT, J.¹ James Bartow appeals from a judgment of conviction for operating a motor vehicle under the influence of an intoxicant, fourth offense, contrary to §§ 346.63(1)(a) and 346.65(2)(d), STATS. He contends

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

his arrest was unlawful because it was not supported by probable cause and therefore the evidence obtained directly or indirectly as a consequence of the arrest should have been suppressed. We conclude the trial court did not error in determining there was probable cause to arrest and we therefore affirm.

Police Sergeant Bruce Buchholtz was the only witness at the hearing on Bartow's motion to suppress evidence. He testified he had been employed as a police officer by the City of Platteville for over seven-and-one-half years. At approximately 2:00 a.m. on August 31, 1997, he was stopped at the intersection of Oak and Mineral Streets in Platteville when he heard the sound of a "revving" engine. As the revving became louder, he observed the motorcycle that made the noise move toward the intersection of Second and Mineral Streets and, without stopping at the stop sign, turn right off Second Street onto Mineral Street. Officer Buchholtz observed the motorcycle begin traveling east on Mineral Street, which was the wrong way on a one-way street. Officer Buchholtz saw the motorcycle fail to stop at another stop sign and pull into the path of an oncoming car, at which point that car slowed and the motorcycle swerved to the right. It appeared to Officer Buchholtz as though the motorcycle operator was losing control and was going to fall, but the operator accelerated and brought the motorcycle back to an upright position.

Officer Buchholtz put on his red and blue emergency lights, following the motorcycle eastbound on Mineral Street. The officer saw the operator of the motorcycle look behind, toward the squad car, and when the operator did that, the motorcycle swerved a bit. The motorcycle then accelerated again. Officer Buchholtz believed that the motorcycle operator saw him and was attempting to elude him, although on cross-examination the officer acknowledged that he could not state with certainty the motorcycle operator had seen him.

Officer Buchholtz then activated his siren. The motorcycle operator drove through the intersection of Mineral and Water Streets at a high rate of speed, still going the wrong way. After approximately 200 to 300 yards, the operator stopped on Mineral Street, which by that time had become a two-way street. When the motorcycle came to a stop, the operator, later identified as Bartow, got off the motorcycle and kicked the kickstand down. As Officer Buchholtz approached Bartow, he detected a strong odor of intoxicants coming from Bartow.

Officer Buchholtz observed that Bartow was generally unsteady, having difficulty maintaining balance in a standing position without swaying from side to side. He also observed that Bartow's eyes appeared glassy. Officer Buchholtz told Bartow to turn away from him and place his hands behind his back, at which point the officer handcuffed Bartow.

The trial court determined that an arrest occurred when the officer handcuffed Bartow. The court rejected defense counsel's argument that there was not probable cause to arrest at that time because no field sobriety tests had been performed. The trial court stated that field sobriety tests need not be done in every case; the purpose is to determine if coordination and judgment is impaired; and there are other methods to come to that conclusion for purposes of making an arrest. The trial court reviewed the testimony concerning Bartow's driving. The court determined that Bartow's failure to stop at the stop sign and his driving the wrong way down a one-way street showed that his judgment was impaired. Bartow's moving into an oncoming car and almost losing his balance on the motorcycle indicated that his coordination was impaired. Continuing on after the car came toward him was another indication of Bartow's impaired judgment, as were accelerating rather than stopping after looking back at the squad car, and going through another intersection. The court determined that the strong odor of

intoxicants indicated that Bartow had been drinking, and his unsteadiness on his feet after he got off the motorcycle and glassy eyes were further indications of impairment of his physical functions. The trial court concluded that, based on the totality of these circumstances, there was probable cause for Officer Buchholtz to believe that Bartow was driving while under the influence of an intoxicant and, therefore, the arrest was lawful.

On appeal, Bartow renews his argument that Officer Buchholtz lacked probable cause to arrest at the time he placed the handcuffs on Bartow, relying on this statement from *State v. Swanson*, 164 Wis.2d 437, 453 n.6, 475 N.W.2d 148, 155 (1991):

Unexplained erratic driving, the odor of alcohol, and the coincidental time of the incident form the basis for a reasonable suspicion but should not, in the absence of a field sobriety test, constitute probable cause to arrest someone for driving while under the influence of intoxicants. A field sobriety test could be as simple as a finger-to-nose or walk-a-straight-line test. Without such a test, the police officers could not evaluate whether the suspect's physical capabilities were sufficiently impaired by the consumption of intoxicants to warrant an arrest.

Id. Bartow also relies on *State v. Babbitt*, 188 Wis.2d 349, 359, 525 N.W.2d 102, 105 (Ct. App. 1994), quoting the statement that “[t]he purpose of the field sobriety test is to make a preliminary determination of whether the defendant is intoxicated.” Bartow argues that without any field sobriety tests there was not probable cause to arrest him.

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. *Babbitt*, 188 Wis.2d at 356, 525 N.W.2d at 104. 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). Whether undisputed facts meet the constitutional standard is a question of law, which we review de novo. *Babbitt*, 188 Wis.2d at 356, 525 N.W.2d at 104.

Our independent review persuades us that the trial court correctly determined there was probable cause for the arrest, and there is little we need to add to the court’s thorough analysis of the law as applied to the facts in this case. *Swanson* does not establish a rule that field sobriety tests are always required in order to have probable cause to arrest for driving while under the influence of an intoxicant, as we made clear in the later case of *State v. Wille*, 185 Wis.2d 673, 684, 518 N.W.2d 325, 329 (Ct. App. 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.*

Officer Buchholtz observed a series of dangerous acts by the motorcycle operator that indicated that the operator had impaired judgment and coordination, as the trial court correctly observed. In addition to the odor of intoxicants, which was present in *Swanson*, Officer Buchholtz observed Bartow’s unsteadiness and glassy eyes, both common indicators of being under the influence

of an intoxicant. Officer Buchholtz had probable cause to arrest Bartow and the trial court correctly denied Bartow's motion to suppress evidence.

By the Court.—Judgment affirmed.

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

