COURT OF APPEALS
DECISION
DATED AND FILED

January 28, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2079-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CRAIG A. ZEMPEL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waushara County: LEWIS MURACH, Judge. *Affirmed.*

DEININGER, J.[1] Craig Zempel appeals his conviction for operating a motor vehicle while under the influence of an intoxicant (OMVWI), contrary to § 346.63(1)(a), STATS. Zempel challenges the sufficiency of the complaint, contending that it fails to establish a sufficient factual basis for the

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

charges of OMVWI and operating a motor vehicle with a prohibited blood alcohol concentration (PAC). We conclude that the complaint sets forth a sufficient factual basis to establish probable cause that Zempel committed the offenses, and thus, we affirm the conviction.

BACKGROUND

The parties have stipulated to the following facts, which are, for the most part, stated in the amended complaint.[2] While on routine patrol, a Waushara County Sheriff's deputy received a report of a vehicle being operated erratically. The deputy traveled to the area in which the vehicle had been reported, observed a vehicle that was consistent with the report and made contact with the driver. The driver identified himself as Craig Zempel. The deputy detected the odor of intoxicants on Zempel's breath, and observed that Zempel had difficulty exiting his vehicle and standing up. The deputy administered a series of field sobriety tests, on which Zempel performed poorly. The deputy arrested Zempel for OMVWI. At the Waushara County Sheriff's Department, Zempel agreed to provide a sample of his blood for chemical analysis. The complaint contains the following statement regarding the drawing of the blood:

> [The arresting deputy] reports that he supervised the withdrawal of blood at Wild Rose Memorial Hospital within three (3) hours of the described traffic stop, and a sample of same was forwarded to the Wisconsin Department of Hygiene whereupon Laboratory Analyst conducted chemical testing upon same.

[2] The original complaint against Zempel was filed on June 24, 1997. [r2] An amended complaint was filed on October 28, 1997. Only the amended complaint is at issue in this appeal.

The analysis of Zempel's blood sample indicated that Zempel's blood alcohol concentration was .228. Zempel's driving record indicated that he had been convicted of OMVWI on two prior occasions within the preceding five years.

Zempel was charged with OMVWI and operating with a PAC, both as third offenses. Zempel moved to dismiss the complaint on the grounds that, for several reasons, it did not establish probable cause to believe that he had operated a motor vehicle with a PAC. The motion was denied. Zempel consented to a trial to the court on the basis of the facts alleged in the complaint, the blood test report and his driving record. On the basis of those items, the court found that at the time he was stopped, Zempel had a blood alcohol concentration "in excess of the applicable legal limit," and thus that he "did commit the offense charged in the criminal complaint." More specifically, the court found "that Mr. Zempel did operate under the influence and the Court enters a judgment of conviction for that misdemeanor criminal offense." The judgment of conviction indicates that Zempel was convicted of OMVWI in violation of § 346.63(1)(a), STATS. He appeals the judgment of conviction.

ANALYSIS

The sufficiency of a complaint is a matter of law that we review de novo. *See* ***State v. Adams***, 152 Wis.2d 68, 74, 447 N.W.2d 90, 92 (Ct. App. 1989). Section 968.01, STATS., requires that a criminal complaint meet probable cause requirements to confer personal jurisdiction on the court. *See* ***id***. at 73, 447 N.W.2d at 92. A complaint is sufficient when the alleged facts, together with reasonable inferences drawn from them, allow a reasonable person to conclude that a crime was probably committed by the defendant. *See* ***id***.

The facts alleged in the complaint need only be "minimally adequate," and the complaint will be held sufficient if it contains enough information to allow a fair-minded magistrate to reasonably conclude that the charges are not simply capricious, and that further proceedings against the defendant are justified. *See* ***State v. Dekker***, 112 Wis.2d 304, 310, 332 N.W.2d 816, 819 (Ct. App. 1983). The supreme court has repeatedly admonished our courts to use a "common sense" rather than a "hypertechnical" approach to determine whether a complaint is minimally adequate in stating the essential facts that establish probable cause. *See, e.g.,* ***State v. Olson***, 75 Wis.2d 575, 581, 250 N.W.2d 12, 15-16 (1977) (quoting ***State ex rel. Evanow v. Seraphim***, 40 Wis.2d 223, 226, 161 N.W.2d 369, 370 (1968)).

Zempel asserts that the complaint was insufficient because it failed to establish the factual basis required for admissibility of the blood test result to show his alcohol concentration at the time of his driving. Zempel points out that under § 885.235, STATS., a blood sample is generally admissible to show intoxication or the level of alcohol concentration only if it is drawn within three hours of driving.[3] Zempel contends that in light of § 885.235, the complaint must establish that the blood sample was drawn within three hours of driving. Even if this contention were correct, Zempel's argument fails because the amended complaint sufficiently establishes that the three-hour requirement was met. It states that "[the arresting officer] supervised the withdrawal of blood at Wild Rose Memorial Hospital within three (3) hours of the described traffic stop."

[3] A blood sample drawn more than three hours after driving is admissible if expert testimony establishes its probative value. *See* § 885.235(3), STATS. This provision is not at issue in this appeal.

Zempel argues, however, that this statement is a mere conclusion that "may not be considered in assessing the existence of probable cause." Zempel cites several cases that he suggests support his position. We are not persuaded. The officer's statement that the blood was drawn within three hours of the traffic stop is not a "conclusion," but a statement of fact. The cases on which Zempel relies hold that the *legal* conclusions of law enforcement officers do not establish probable cause. *See*, *e.g.*, ***State v. Kerr***, 181 Wis.2d 372, 378, 511 N.W.2d 586, 588 (1994) ("The warrant-issuing commissioner's determination of probable cause cannot be upheld, however, if the affidavit provides nothing more than the legal conclusions of the affiant."). The statement in the amended complaint, that the officer "supervised the withdrawal of blood at Wild Rose Memorial Hospital within three (3) hours of the described traffic stop," is not a legal conclusion.

In ***Ritacca v. Kenosha County Court***, 91 Wis.2d 72, 83-84, 280 N.W.2d 751, 757 (1979), our supreme court found insufficient a complaint which "[did] no more than state in conclusory language that the defendant had marijuana 'in his possession and under his control.'" The term "possession" at issue in ***Ritacca*** had a technical legal meaning:

> Possession is "imputed when the contraband is found in a place immediately accessible to the accused and subject to his exclusive or joint dominion and control, provided that the accused has knowledge of the presence of the drug."

Id. at 82-83, 280 N.W.2d at 756 (citations omitted). The ***Ritacca*** court held that the complaint must state the underlying facts on which the trial court can base a determination of whether the defendant's conduct meets the legal definition of possession. *See* ***id***. In Zempel's case, the allegation that the blood was drawn within three hours of the traffic stop is a simple statement of fact. The deputy's

statement does not involve the application of a legal definition, and it is therefore not a conclusory statement of the kind that is insufficient to support probable cause.

Zempel's attack on the sufficiency of the complaint also fails because, even if the complaint had made no reference whatsoever to the blood draw or test results, it contained enough facts for the court to determine that Zempel had probably committed the offense of OMVWI, thus confirming the court's personal jurisdiction over Zempel. A blood alcohol test result is not a necessary element of proof in an OMVWI prosecution. *See* ***State v. Burkman***, 96 Wis.2d 630, 642-43, 292 N.W.2d 641, 647 (1980). The facts alleged in the complaint were more than "minimally adequate" to establish that Zempel was probably OMVWI when stopped. According to the amended complaint, the arresting deputy received a report that Zempel's vehicle had been observed driving "all over the road"; the deputy detected the odor of intoxicants on Zempel, and noted his slurred speech and difficulty exiting the vehicle; and he determined that Zempel performed poorly on the field sobriety tests.

As we have explained, minimal adequacy is all that is required of the complaint. *See* ***Dekker***, 112 Wis.2d at 310, 332 N.W.2d at 819. We conclude, therefore, that the amended complaint sets out a sufficient factual basis to establish probable cause that Zempel was OMVWI and operating with a PAC at the time of his arrest. Accordingly, we affirm his conviction.

By the Court.—Judgment affirmed.

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