

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 23, 1999

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. 98-2721-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT J. KENDALL, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: DEE R. DYER, Judge. *Affirmed.*

MYSE, P.J. Robert J. Kendall, Jr., appeals a judgment of conviction for operating a motor vehicle while intoxicated, second offense. Kendall contends that the trial court erred by denying his motion to dismiss the criminal complaint as failing to establish a sufficient factual basis for the OWI and

operating with a prohibited alcohol level charges.¹ Kendall first asserts the complaint did not establish how his identity was ascertained. He also contends that the complaint fails to establish the factual basis required for admissibility of the blood test result to show he was impaired while driving. Because this court concludes the complaint sets forth sufficient facts and inferences to establish probable cause to believe that Kendall committed the offenses charged, the judgment of conviction is affirmed.

The complaint sets forth the following facts. Outagamie County sheriff's department officers stopped Kendall after one of the officers observed his pickup truck swerving erratically along Highway 41 and riding onto the white edge lane line several times. After approaching the driver, one of the officers detected the odor of intoxicants on Kendall's breath. As Kendall exited his vehicle, they also observed that he was unsteady; he stumbled, had difficulty walking and had to lean on his vehicle to support himself. One of the officers observed that Kendall had bloodshot eyes. Kendall was asked to perform a series of field sobriety tests. When the officers determined that he was unable to satisfactorily perform the tests, he was transported to St. Elizabeth's Hospital where a blood sample was drawn indicating a blood alcohol level of .219%.

Kendall challenges the sufficiency of the complaint contending it fails to allege a sufficient factual basis to establish probable cause for the charges. The sufficiency of a complaint is a matter of law this court reviews de novo. *State v. Adams*, 152 Wis.2d 68, 74, 447 N.W.2d 90, 92 (Ct. App. 1989). A criminal complaint must meet probable cause requirements to confer personal jurisdiction.

¹ Kendall was also charged with operating a motor vehicle with a prohibited blood alcohol level. This charge was dismissed at the sentencing hearing.

State v. White, 97 Wis.2d 193, 197, 295 N.W.2d 346, 347 (1980). A criminal complaint is a self-contained charge that must set forth facts within its four corners that are sufficient, in themselves or together with reasonable inferences derived therefrom, to allow a reasonable person to conclude that a crime was probably committed and that the defendant is probably culpable. *State v. Haugen*, 52 Wis.2d 791, 793, 191 N.W.2d 12, 13 (1971). If the criminal complaint fails to establish probable cause, the court does not obtain personal jurisdiction, and the charge must be dismissed. The criminal complaint, however, is not to be read in a hypertechnical sense but, rather, is to be reviewed on a reasonable basis applying ordinary common sense. *State v. Gaudesi*, 112 Wis.2d 213, 219, 332 N.W.2d 302, 305 (1983). Therefore, the facts alleged and the inferences that may be drawn from them must be sufficient to establish in a common sense way that there is probable cause to believe the defendant committed the offense charged. *See id.*

Kendall charges that the complaint is deficient in two separate respects. First, he contends that the complaint fails to establish how his identity was determined. Apparently, Kendall contends that the complaint must affirmatively allege the specific manner in which he was identified. This court does not agree. It is sufficient to allege that Kendall is the individual alleged to have committed the crime charged. Kendall contends that such an assertion is a legal conclusion of the officers and that legal conclusions are insufficient to support the probable cause requirement of a criminal complaint. *See Ritacca v. Kenosha County Court*, 91 Wis.2d 72, 83-84, 280 N.W.2d 751, 757 (1979).

The assertion that Kendall is the individual who committed the acts charged is not a legal conclusion. It is an assertion of fact, which a reasonable person could infer from the allegations in the complaint. Kendall's name appears in the caption of the complaint as "Defendant." The complaint then refers

interchangeably to “the driver” and “the defendant” in its text, without specifically mentioning Kendall’s name. Nevertheless, this court concludes that a reasonable person could infer that the complaint asserts that Kendall committed the acts charged. The complaint’s allegations that the defendant was the individual who committed the acts is sufficient. A detailed analysis as to how the determination was made or what evidence in support of that allegation could be introduced at trial is unnecessary.

Next, Kendall contends that the complaint is deficient because it fails to establish the factual basis required for admissibility of the blood test result which would show that he was impaired while driving. Kendall notes 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. Kendall contends that because the complaint fails to assert that the blood test was drawn within three hours of the time of his arrest as is required for admissibility by § 885.235, the complaint fails to sufficiently allege that he was impaired at the time of driving.

This challenge to the sufficiency of the complaint fails because the complaint contained sufficient facts for the court to determine that Kendall had probably committed the charged offenses. A common sense reading of the complaint, including the erratic driving, the instability and need to support himself on his vehicle, the odor of alcohol on his breath and glassy eyes, together with his failing the field sobriety tests and the blood alcohol test results, are sufficient to raise the inference of intoxication at the time of driving for the purpose of a criminal complaint. See *Gaudesi*, 112 Wis.2d at 219, 332 N.W.2d at 305. The blood alcohol test is but one of many factors used to support the claim that Kendall was intoxicated. An affirmative showing of its admissibility at trial is

not necessary in the complaint. All that is necessary are sufficient factual allegations to allow a reasonable person to conclude that it is probable that the defendant committed the offenses charged. This complaint meets that standard and, therefore, is not fatally deficient. Accordingly, Kendall's contentions are rejected, and the judgment of conviction is affirmed.

By the Court.—Judgment affirmed.

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

