

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 5, 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. 2015AP585

Cir. Ct. No. 2014TR7212

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

COUNTY OF WINNEBAGO,

PLAINTIFF-RESPONDENT,

V.

KELLI M. KOSMOSKY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: THOMAS J. GRITTON, Judge. *Affirmed.*

¶1 REILLY, P.J.¹ Kelli Kosmosky appeals the circuit court’s denial of her motion to suppress evidence and subsequent conviction for operating a motor vehicle with a prohibited alcohol concentration. Kosmosky was arrested by state patrol officer Phil Koehler, who responded to a call of an unconscious female in the driver’s seat of a car parked at a gas station. Koehler arrested Kosmosky after he observed signs of intoxication and she failed field sobriety tests. We affirm.

BACKGROUND

¶2 Koehler was dispatched to a Kwik Trip gas station where a female was reported to be unconscious in a parked car. When Koehler arrived at the gas station, he overheard EMTs say that the car was on when they arrived. The EMT told Koehler that Kosmosky said she pulled over because she was feeling the effects of alcohol. Koehler observed that Kosmosky’s car was parked over the line of two parking stalls.

¶3 Koehler made contact with Kosmosky and observed that she seemed awake, but “a little lethargic” with “glassy, bloodshot” eyes, slurred speech, and a distinct smell of alcohol emanating from the car’s interior. Kosmosky told Koehler that she had been driving home from a bar when she pulled over at the Kwik Trip at an undisclosed time. Koehler arrested Kosmosky for drunk driving.

¶4 The circuit court denied Kosmosky’s motion to suppress evidence, and, following a court trial, convicted Kosmosky under WIS. STAT. § 346.63(1)(b)

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

for operating a motor vehicle with a prohibited alcohol concentration. Kosmosky appeals.

DISCUSSION

¶5 Kosmosky argues on appeal that Koehler did not have probable cause to arrest as he did not offer testimony as to the time that Kosmosky operated her vehicle. Kosmosky did not make this argument to the circuit court; rather, Kosmosky argued that Koehler did not have reasonable suspicion to extend his stop of Kosmosky. Kosmosky does not argue reasonable suspicion on appeal.

¶6 Generally, we do not consider issues that were not raised before the circuit court. *Wirth v. Ehly*, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980). However, this court has discretionary authority to address such issues if an issue has been fully briefed and lacks factual disputes. *Estate of Hegarty v. Beauchaine*, 2001 WI App 300, ¶¶11-13, 249 Wis. 2d 142, 638 N.W.2d 355. As such, we independently review the undisputed and fully briefed facts of this case to determine if probable cause existed at the time of Kosmosky's arrest.

¶7 An officer must have probable cause to make a warrantless arrest. *State v. Lange*, 2009 WI 49, ¶19, 317 Wis. 2d 383, 766 N.W.2d 551. Probable cause is determined “on a case-by-case basis [by] looking at the totality of the circumstances.” *Id.*, ¶20. Evidence need not conclusively prove guilt to establish probable cause; an officer only needs evidence indicating the defendant's “guilt is more than a possibility.” *State v. Paszek*, 50 Wis. 2d 619, 625, 184 N.W.2d 836 (1971). In cases where an officer arrests a defendant for drunk driving, “[p]robable cause ... 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.” *Lange*, 317 Wis. 2d 383, ¶19. The County has the burden of proving an officer had probable cause at the time of a defendant’s arrest. *Id.*

¶8 The County met its burden of proving Koehler had probable cause to arrest Kosmosky. A reasonable officer would be led to believe there was more than a possibility Kosmosky had been operating a motor vehicle while intoxicated under the facts presented. Kosmosky parked her car in a location distant from the bar where she admitted she had been drinking. Koehler made observations of Kosmosky’s lethargic condition, her glassy and bloodshot eyes, her slurred speech, her smell of alcohol, and her failure on field sobriety tests. Koehler was also made aware of Kosmosky’s statement to the EMT that she had pulled into the Kwik Trip and parked because she was feeling the effects of alcohol. Koehler had probable cause to arrest Kosmosky without a warrant.

¶9 Koehler did not need to testify as to when Kosmosky operated her vehicle based upon the facts presented at the motion hearing. Koehler could make reasonable inferences from all the facts to conclude it was more likely than not that Kosmosky drove her car while intoxicated. Koehler did not need to rule out innocent explanations for Kosmosky’s time of operation to have probable cause for the arrest. *See State v. Nieves*, 2007 WI App 189, ¶14, 304 Wis. 2d 182, 738 N.W.2d 125.

By the Court.—Judgment affirmed.

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

