COURT OF APPEALS
DECISION
DATED AND FILED

August 19, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-0445

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RAY J. CAMPBELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Portage County: FREDERIC FLEISHAUER, Judge. *Affirmed.*

DYKMAN, P.J.[1] Ray J. Campbell appeals from a judgment convicting him of operating under the influence in violation of § 346.63(1), STATS. Campbell contends that the arresting officer did not have probable cause to request a preliminary breath test (PBT), and without the PBT results, the officer lacked probable cause to arrest. We disagree and conclude that the officer's

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

observations established probable cause to administer the preliminary breath test and to place Campbell under arrest.

On July 5, 1998, Officer Nowack of the Wisconsin State Patrol stopped Campbell in Portage County for traveling nineteen miles an hour over the speed limit. Nowack approached the vehicle and tapped on the driver's side window to get Campbell's attention. Campbell initially avoided eye contact. When Campbell opened the window, Nowack noticed the odor of alcohol coming from the vehicle. He also observed a wet brown paper bag directly behind Campbell containing crushed beer cans. Campbell initially spoke softly and when Nowack stuck his head into the vehicle to hear him, he noticed that Campbell's breath smelled of alcohol. Nowack also noticed that Campbell's eyes were glassy and red.

After Campbell admitted that he had a few drinks with his meal earlier that day, Nowack asked him to step out of the vehicle for field sobriety tests. Nowack testified that Campbell had problems with his balance and swayed slightly back and forth. Nowack administered the Horizontal Gaze Nystagmus (HGN) test, the one-legged stand test, and the walk and turn test. During the HGN test, Nowack noticed that Campbell's eyes lacked smooth pursuit, which is the ability of the eyes to follow an object. Campbell also had problems performing the one-legged stand test. He told Nowack that a dead skunk lying in the road was making him sick to his stomach. Nowack took Campbell away from the skunk to perform the test. Again, Campbell could not complete the one-legged stand test. Campbell also had problems during the walk and turn test. He began too soon, had problems walking, banged his feet back and forth together to a point where he almost fell over, and spun on one foot rather than using small choppy steps as instructed. Campbell successfully recited the alphabet but when asked to count

backwards from sixty-three to fifty-two, he continued to count backwards past fifty-two.

Based on his observations, Nowack had Campbell submit to a preliminary breath test. The PBT result showed an alcohol level of .10. Nowack placed Campbell under arrest for operating while intoxicated.

Campbell contends that Nowack lacked the necessary probable cause required to administer a PBT. Under § 343.303, STATS., a law enforcement officer may request that a person submit to a preliminary breath test if the officer has probable cause to believe the person is operating under the influence of an intoxicant.[2] We have already determined that § 343.303 requires the same standard of probable cause that is constitutionally required to make an arrest. *See* ***County of Jefferson v. Renz***, 222 Wis.2d 424, 443, 588 N.W.2d 267, 276 (Ct. App. 1998), *review granted*, 222 Wis.2d 673, 589 N.W.2d 628 (1998). In ***Renz***, we concluded that "the legislature intended that an officer must have probable cause to arrest a person for a violation of § 346.63(1)(a), STATS., before the officer may request a PBT." ***Id.***

[2] Section 343.303, STATS., states:

> If a law enforcement officer has probable cause to believe that the person is violating or has violated s. 346.63 (1) or (2m) or a local ordinance in conformity therewith, … the officer, prior to an arrest, may request the person to provide a sample of his or her breath for a preliminary breath screening test using a device approved by the department for this purpose. The result of this preliminary breath screening test may be used by the law enforcement officer for the purpose of deciding whether or not the person shall be arrested for violation of s. 346.63 (1)….

Whether a set of facts constitutes probable cause is a question of law that we review de novo. *See* ***State v. Babbitt,*** 188 Wis.2d 349, 356, 525 N.W.2d 102, 104 (Ct. App. 1994). In deciding whether probable cause exists, we look at whether "the totality of the circumstances within 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." ***State v. Nordness***, 128 Wis.2d 15, 35, 381 N.W.2d 300, 308 (1986). That a reasonable officer could conclude, based on the information known to the officer, that the "defendant probably committed" the offense is sufficient to establish probable cause. ***State v. Koch***, 175 Wis.2d 684, 701, 499 N.W.2d 152, 161 (1993).

There were many facts relevant to a determination of whether Nowack had probable cause to administer a PBT to Campbell. Campbell was speeding at 84.8 miles per hour in a 65 mile per hour zone. Nowack had to tap on the driver's window to get Campbell's attention. Nowack noticed an odor of alcohol coming from the vehicle through the open window and he saw a wet paper bag behind the driver containing crushed beer cans. Campbell spoke softly as if he did not want to be heard, and Nowack smelled alcohol upon Campbell's breath when he leaned in to hear him. Campbell's eyes were glassy and red. He admitted he had been drinking. Nowack noted that Campbell had trouble with his balance—he did not have a sure-footed stance and swayed slightly. Nowack observed a number of indicators that Campbell's blood-alcohol content (BAC) was over .10 during the walk and turn test. Campbell began too soon, had problems walking and banged his feet back and forth together to a point where he almost fell over. He spun on one foot rather than with small choppy steps as

instructed. Although Campbell accurately recited the alphabet, when asked to count backwards, he counted past the number at which he was told to stop.

Using the ***Nordness*** standard, we conclude that the totality of these facts would lead a reasonable officer to believe Campbell was operating a motor vehicle while under the influence of an intoxicant. Nowack admitted he did not base his decision to arrest on any single factor, but made his decision "based on everything from the first clock on the speed." The facts, taken as a whole, are sufficient to establish probable cause to arrest for operating while intoxicated.

The Wisconsin Supreme Court established a minimum for probable cause in an OMVWI case in ***State v. Swanson***, 164 Wis.2d 437, 475 N.W.2d 148 (1991). In ***Swanson***, the court determined that the following indicators were not sufficient to constitute probable cause: (1) the defendant's erratic driving, (2) the odor of intoxicants emanating from the defendant as he spoke, and (3) that the incident occurred approximately at the time when bars close in Wisconsin. ***Id.*** at 453 n.6, 475 N.W.2d at 155 n.6. The ***Swanson*** court determined these three indicia formed a basis for a reasonable suspicion, but were not enough for probable cause.

The facts before us differ markedly from the facts in ***Swanson.*** Unlike in ***Swanson***, there were many indicators that Campbell had probably been operating his vehicle while intoxicated. There might be a possible, non-alcohol-related explanation for Campbell's speeding, or that the officer had to tap on his window to get his attention, or the smell of alcohol coming from Cambell's vehicle, or the wet brown paper bag that had crushed beer cans in it, or Campbell's glassy and red eyes, or his imperfect performance on the walk and turn test and the one-legged stand test, but it is probable that Campbell was operating his motor

vehicle while intoxicated. Probable cause is a test with a low threshold. The evidence need not even reach the level that guilt is more likely than not. *See* ***State v. Mitchell***, 167 Wis.2d 672, 681-82, 482 N.W.2d 364, 367-68 (1992). Campbell fails to persuade us that Nowack did not have probable cause to require a PBT.

Campbell also argues that Nowack could not use the PBT results to determine whether there was probable cause to arrest. However, we determined in ***Renz***, 222 Wis.2d at 443, 588 N.W.2d at 276, that the standard for probable cause required to perform a PBT is the same as that necessary for an arrest. Since we have already determined that Nowack had probable cause to administer the PBT, it follows that he had probable cause to arrest with or without the PBT results.

Finally, we address Campbell's counsel's characterization of the facts. SCR 20:3.3 requires an attorney to exercise candor toward a tribunal.[3]

[3] SCR 20:3.3 (West 1998), Candor Toward the Tribunal, reads:

> (a) A lawyer shall not knowingly:
>
> (1) make a false statement of fact or law to a tribunal;
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> (2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
>
> (3) Fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
>
> (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.
>
> (b) The duties stated in paragraph (a) apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
>
> (c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(continued)

Counsel, in explaining why probable cause to request a breath test did not exist, writes in her brief: "[T]he defendant-appellant's coordination and balance were not impaired[.]"

The testimony of Officer Nowack was to the contrary:

> I took him back to, between the two vehicles and was keeping my eye on traffic, so I wasn't watching him real closely, but I noticed he was, as we were standing for the field sobriety tests, he was having problems with his balance.
>
> ….
>
> More or less a—not a sure-footed stance. He was kind of back and forth, swaying slightly.

It is not possible to reconcile counsel's statement in her brief with the testimony of Officer Nowack. Reputation for candor and care is a valuable commodity in the practice of law. We anticipate that counsel will more carefully prepare her briefs in the future.

By the court.—Judgment affirmed.

Not recommended for publication in the official reports. *See* RULE 809.23(1)(b)4, STATS.

> (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.