COURT OF APPEALS
DECISION
DATED AND FILED

December 9, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-1039-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DONALD A. LESAVAGE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Rock County: JOHN W. ROETHE, Judge. *Affirmed.*

¶1 DYKMAN, P.J.[1] Donald A. Lesavage appeals from a judgment resulting in his second conviction of operating a motor vehicle while under the influence of an intoxicant in violation of § 346.63(1)(a), STATS. Lesavage asserts that Deputy Sheriff Bambi Tomas of the Rock County Sheriff's Department did

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

not have probable cause to administer a preliminary breath test (PBT) or to arrest him for OMVWI. Because Deputy Tomas's observations established probable cause to administer a PBT and arrest Lesavage for OMVWI, we affirm.

BACKGROUND

¶2 On November 24, 1998, Rock County Deputy Sheriff Tomas was dispatched to the scene of a one-vehicle rollover accident involving Donald Lesavage. Upon her arrival, Tomas saw Lesavage's car overturned in a ditch, with Lesavage and a witness standing one hundred yards away. Tomas asked whether Lesavage needed an ambulance; he replied that he did not. Noting the presence of blood on Lesavage's wrist, Tomas again asked Lesavage if he needed medical attention and, once more, Lesavage declined. In the course of this interchange, Tomas noticed that Lesavage smelled of intoxicants and was slurring his speech. Unsure as to whether Lesavage's slurred speech was a result of accident trauma or alcohol consumption, Tomas instructed Lesavage to rest in her squad car while she investigated the accident scene. When Tomas asked Lesavage the cause of the accident, he claimed he had swerved to avoid hitting a deer. However, upon returning to her squad car, Deputy Tomas noticed an even stronger odor of intoxicants and asked Lesavage if he had consumed any alcoholic beverages that night. Lesavage replied that he had not. Tomas then asked Lesavage to submit to evidentiary sobriety testing and he agreed.

¶3 The first test was to be the one-leg stand test, however, because of a contusion on Lesavage's shin, Tomas instead asked Lesavage to recite the alphabet. Lesavage twice failed to do so. Tomas then administered a PBT, which registered an alcohol level of .12. Finally, Tomas conducted the horizontal gaze nystagmus test and found Lesavage's eyes to exhibit jerkiness and a lack of

smooth pursuit. Tomas advised Lesavage that he was under arrest for operating a vehicle while intoxicated.

¶4 Lesavage filed a motion to suppress evidence which he claims was procured without probable cause. After the trial court denied this motion, Lesavage entered a plea of no contest and the trial court convicted him of OMVWI. Lesavage appeals.

ANALYSIS

¶5 When reviewing a suppression motion, the findings of fact of the trial court will be upheld unless they are clearly erroneous. *See* ***State v. Roberts***, 196 Wis.2d 445, 452, 538 N.W.2d 825, 828 (Ct. App. 1995). However, 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 other words, we approach the issue of probable cause "anew" and without deference to the trial court. *See* ***id***. In assessing the existence of probable cause, we consider whether "under the totality of the circumstances and based on all of the facts available to the arresting officer at the time of arrest, a reasonable officer would believe that the defendant was driving the vehicle while under the influence of an intoxicant." ***State v. Nordness,*** 128 Wis.2d 15, 36-37, 381 N.W.2d 300, 309 (1986). This standard of probable cause is not limited to violations involving driving under the influence of an intoxicant, but is also used in cases involving other crimes. The officer's observations supporting an arrest need not be sufficient to prove guilt beyond a reasonable doubt, nor adequate to prove that guilt is more likely than not. *See* ***State v. Paszek***, 50 Wis.2d 619, 625, 184 N.W.2d 836, 839-40 (1971). This is a low standard. It can be more likely than not that a potential defendant is innocent, and yet probable cause can exist. It is only

necessary that the evidence would "lead a reasonable officer to believe that guilt is more than a possibility." ***Id.*** at 625, 184 N.W.2d at 840.

¶6 The facts pertinent to establishing whether Deputy Tomas had probable cause to arrest Lesavage are as follows: Lesavage's vehicle had rolled onto its roof, there was an odor of intoxicants emanating from Lesavage, his speech was slurred, and he was unable to recite the alphabet. Accordingly, under the standard set out in ***Nordness***, we conclude the totality of Tomas's observations would lead a reasonable officer to believe that there was more than a possibility that Lesavage was guilty of driving his vehicle under the influence of alcohol. *See* ***Nordness***, 128 Wis.2d at 36-37, 381 N.W.2d at 309.

¶7 Lesavage maintains that the trauma of the auto accident, not the consumption of alcohol, may have been the cause of his slurred speech and inability to recite the alphabet. Specifically, Lesavage asserts his problems in reciting the alphabet may have been due to the accident rollover, trauma, or a concussion.[2] These arguments are not persuasive, however, as the record is devoid of anything to support Lesavage's contention of accident trauma; the only medical problems resulting from the accident involved Lesavage's wrist and shin. And that would not produce the odor of intoxicants deputy Tomas noticed.

¶8 Lesavage further implies that Deputy Tomas erred in not obtaining a statement from the witness when she was evaluating Lesavage for signs of intoxication or accident trauma. Tomas had sufficient grounds for determining that Lesavage was intoxicated without the testimony of a witness. Moreover,

[2] Indeed, we accept Lasavage's assertion that it is possible that the cause of his slurred speech and inability to recite the alphabet was trauma from the accident. But it is also more than a possibility that these failures were caused by alcohol intoxication, and that is the test we use.

Tomas asked Lesavage twice whether he was in need of medical attention, to which replied he was not. The issue is not whether Tomas interviewed the witness, but whether probable cause existed to arrest Lesavage for operating a motor vehicle while intoxicated. It did.

¶9 Lesavage also objects to the trial judge contrasting a six-year-old's ability to recite the alphabet with Lesavage's inability to do so. Lesavage implies that these instances constitute unreasonable bases upon which to decide the existence of probable cause. But, whether facts establish probable cause to arrest is a question of law that we review de novo. *See* ***Babbitt***, 188 Wis.2d at 356, 525 N.W.2d at 104. We will ignore the trial court's comment concerning six-year olds. The trial court's commentary is not binding on us. We review the facts, not the trial court's commentary. Those facts support the existence of probable cause.

¶10 Lesavage also asserts that Tomas improperly administered the field sobriety tests. Specifically, Lesavage insists that Tomas should have requested medical assistance and that she should not have conducted the field sobriety tests under the "adverse conditions" of the accident scene. This claim is without merit. Lesavage twice informed Tomas that he was not in need of medical assistance. And Lesavage cites no authority requiring arresting officers to conduct field sobriety tests under optimum conditions. *See* ***State v. Shaffer***, 96 Wis.2d 531, 545-46, 292 N.W.2d 370, 378 (Ct. App. 1980). Additionally, Lesavage implies that Tomas improperly administered the horizontal nystagmus test by not checking to see if he wore glasses or contact lenses. Because there is no evidence that Lesavage wore glasses or contact lenses, we conclude that the trial court correctly determined that Tomas properly administered the field sobriety tests.

¶11 Lesavage further maintains that Tomas committed perjury while testifying about her police training and her administration of Lesavage's field sobriety tests. This accusation of perjury is unfounded. The crime of perjury is one which goes well beyond semantics and "after the fact" parsing of testimony. Specifically, "[t]he false testimony must be given wilfully and corruptly for the purpose of drawing the curtain over a material fact under investigation, in order to lead the tribunal to a conclusion contrary to the actual fact." ***State v. Evans***, 229 Wis. 405, 409, 282 N.W. 555, 556-57 (1938). The trial court is the decisive authority in determining the amount of weight to be given the witness testimony and the evidence. *See* ***Johnson v. Merta***, 95 Wis.2d 141, 151-52, 289 N.W.2d 813, 818 (1980). Here, there is nothing of record to indicate that Deputy Tomas's testimony was in any way perjurious. Error or inexact language is far from perjury.

¶12 Lesavage asks the Court to "consider the recorded facts which were fresh in [Tomas's] mind from the night of the accident rather than the testimony which was given a couple of months later." Nothing indicates that the trial court considered the wrong testimony or misjudged Deputy Tomas's testimony. We defer to the trial court's weighing of the evidence because of "the superior opportunity of the trial court to observe the demeanor of witnesses and to gauge the persuasiveness of their testimony." ***Kleinstick v. Daleiden*****,** 71 Wis.2d 432, 442, 238 N.W.2d 714, 720 (1976). In her testimony, Tomas explained the events of November 24, 1998, as she recalled them. The trial court had the opportunity to weigh and judge the credibility of her testimony. Accordingly, on appeal, we do not "second-guess" the trial court's weighing of testimony and other evidence.

¶13 Lesavage asserts that his PBT results may have been incorrect, that he could possibly have been at a legal blood alcohol content at the time of his

accident and that he answered Tomas truthfully when asked if he had been drinking "that night." These arguments lack relevance and common sense. The PBT results were not admitted into evidence and were thus not relevant to any issue at the hearing. Lesavage contends that he may have been sober at the time of the accident. However, the test we are to use is a test of probabilities. In any event, blood alcohol content decreases with the passage of time. Accordingly, Lesavage probably had a higher blood alcohol concentration at the time of the accident than when he took the PBT. Finally, Lesavage's contention that he had not been drinking that evening, but merely during the day, is not persuasive. The trial court was not required to believe Lesavage, nor was Officer Tomas. The question was whether Lesavage was operating a motor vehicle while intoxicated, not when he consumed alcohol. When Lesavage consumed alcohol, or whether he was correct or incorrect in telling Officer Tomas that he had not been drinking that evening is irrelevant to our probable cause determination.

¶14 We now turn to Lesavage's assertion that the trial court improperly granted the State a continuance in order to secure the testimony of Deputy Tomas. Specifically, Lesavage alleges that the trial judge showed prejudice in rescheduling the hearing and not questioning the district attorney to see if a subpoena had been either issued or served. These arguments are not compelling. First, had the trial judge dismissed Lesavage's case as a result of Tomas's absence, the district attorney would merely have reissued the charges. Thus, there was nothing prejudicial with regard to the trial judge's rescheduling of the motion to suppress. Furthermore, the trial judge was entitled to accept the district attorney's assertion that a subpoena had been issued. Lawyers are subject to discipline, including disbarment, for rule violations. Courts and judges depend on lawyers to speak and represent themselves with candor. *See* SCR 20:3.3 (West 1999).

Accordingly, the trial court could accept the veracity of the district attorney's assertion that a subpoena had indeed been issued.

¶15 Additionally, Lesavage asserts that the trial judge showed prejudice when he required Lesavage to attend both a hearing and a conference, causing Lesavage to miss two days of work. While Lesavage may have felt this to be an inconvenience, the trial court was well within its discretion in compelling Lesavage's attendance. *See* § 971.04, STATS. When one drinks to excess and then drives, the consequences are not the fault of the trial court.

¶16 Finally, Lesavage claims that his constitutional rights were violated. Because Lesavage does not specify which constitution and which rights were violated, and the record lacks any indication of constitutional violations, we will not address this assertion.

¶17 Lesavage's vehicle had rolled over, he smelled of intoxicants, his speech was slurred, and he was unable to recite the alphabet. We independently conclude that there was probable cause to arrest Lesavage for driving his vehicle under the influence of alcohol. We therefore affirm the trial court's judgment convicting Lesavage of operating a motor vehicle while intoxicated.

By the Court.—Judgment affirmed.

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