

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 7, 2000

Cornelia G. Clark
Acting 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 WIS. STAT. § 808.10 and RULE 809.62.

No. 99-2463-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LAWRENCE J. VAN BOXTEL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: JOSEPH TROY, Judge. *Affirmed.*

¶1 CANE, C.J. Lawrence Van Boxel appeals his conviction for operating a motor vehicle while under the influence of an intoxicant (OWI) in violation of WIS. STAT. § 346.63(1)(a) (1997-98).¹ He contends that the police

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

officers did not have probable cause to arrest him, and therefore the trial court erred by denying his motions to suppress evidence and to dismiss based on lack of probable cause. Because the trial court correctly denied the motions, the judgment is affirmed.

¶2 Van Boxel argues that the information available to the officer at the time of the arrest was insufficient to establish probable cause. The trial court accepted Van Boxel's argument that the arrest occurred when the officer escorted Van Boxel to the squad car. Therefore, as did the trial court, this court will review the circumstances leading to the arrest, but will not consider information attained after Van Boxel was led to the squad car.

¶3 On January 1, 1999, at approximately 2:35 p.m., a woman whose truck was parked on the side of the road flagged down a Town of Oneida police officer. She told the officer that the silver car in the ditch beside her truck had been run off the road by a red truck she had been following. She then pointed to the red truck parked crossways in a driveway across the intersection. She told the officer that when following the red truck, she observed it weaving all over the road before it ran the silver car off the road. The officer then went to the red truck and found Van Boxel behind the steering wheel and slightly injured. The officer indicated that Van Boxel had slurred speech, an odor of alcohol from his breath and difficulty in responding to questions. In addition, a neighbor who knew Van Boxel stated that he observed him in the truck before the officer arrived and concluded immediately that he was intoxicated. The trial court accepted the neighbor's testimony for the purpose of supporting the officer's conclusion that Van Boxel was intoxicated.

¶4 On appeal, this court reviews a probable cause determination de novo. *See State v. Babbitt*, 188 Wis. 2d 349, 356, 525 N.W.2d 102 (Ct. App. 1994). In OWI cases, probable cause will be found "where 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 (1986). This is a commonsense test, based on probabilities. The facts need only be sufficient to lead a reasonable officer to believe that guilt is more than a possibility. *See County of Dane v. Sharpee*, 154 Wis. 2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990).

¶5 Van Boxtel argues that there may be other explanations unrelated to intoxicants for his behavior leading to the accident, such as a mechanical failure, and these facts, without further investigation, are insufficient to conclude there was probable cause. This court is not persuaded. The mere fact that an innocent explanation for the driver's conduct, that is mechanical failure, may be imagined is not enough to defeat probable cause. *See State v. Welsh*, 108 Wis. 2d 319, 347, 321 N.W.2d 245 (1982) (Abrahamson, J., dissenting), *rev'd on other grounds*, 466 U.S. 740 (1984). In making a determination of probable cause, the relevant inquiry is not whether the particular conduct is "innocent" or "guilty." *United States v. Sokolow*, 490 U.S. 1, 10 (1989). Here, the facts were sufficient to lead a reasonable police officer to conclude Van Boxtel had probably been operating a motor vehicle while under the influence of an intoxicant. The citizen's report of Van Boxtel's erratic driving behavior, coupled with the arresting officer's personal perception of Van Boxtel's odor of alcohol, slurred speech and abnormal response to questions are sufficient to establish probable cause for the arrest.

¶6 Therefore, the trial court properly denied the motion to suppress the blood test results and the motion to dismiss by concluding there was sufficient evidence for the officer to reasonably believe Van Boxel had been operating a motor vehicle while under the influence of an intoxicant. The judgment of conviction is affirmed.

By the Court.—Judgment affirmed.

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

