

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 2, 2000

Cornelia G. Clark
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. 99-3010-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JASON P. SYPHER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Lincoln County: J. M. NOLAN, Judge. *Affirmed.*

¶1 CANE, C.J.¹ The sole issue on appeal is whether probable cause existed to arrest Jason Sypher for operating a motor vehicle while intoxicated. If so, the Intoxilyzer test result showing Sypher's blood alcohol level at 0.15% is

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.

admissible and his conviction for operating a motor vehicle while under the influence of an intoxicant, second offense, contrary to WIS. STAT. § 346.63(1)(a), must be affirmed. The judgment and order² are affirmed.

¶2 The underlying facts are undisputed. Wisconsin State Patrol trooper Don Tinker arrested Sypher for speeding on Highway 86 in the City of Tomahawk. Sypher does not dispute the arrest for speeding forty-five miles per hour in a twenty-five-mile-per-hour speed zone. As Sypher was producing his driver's license, Tinker detected an odor of alcohol coming from Sypher's car. There was no one else in the car. After Tinker observed Sypher's bloodshot eyes, he administered a Horizontal Gaze Nystagmus (HGN) test on Sypher, who tested positive on four of the six clues, indicating an impaired ability to drive and a 60% probability that his blood alcohol level exceeded 0.10%. Tinker then asked Sypher to perform a preliminary breath test, which he refused. Without any further testing, Tinker arrested Sypher for OWI. Subsequently, Sypher submitted to an Intoxilyzer test, with a 0.15% result. Following the trial court's denial of Sypher's motion to suppress the Intoxilyzer test results, the trial court accepted his guilty plea and found him guilty of OWI, second offense.

¶3 Sypher contends that without other field sobriety tests first conducted to determine whether his physical capabilities were impaired, Tinker's observations were insufficient to support probable cause for his OWI arrest. This court is not persuaded.

¶4 Whether undisputed facts constitute probable cause is a question of law that is reviewed without deference to the trial court. *See State v. Babbitt*, 188

² Sypher appeals a judgment of conviction and an order denying his motion to suppress.

Wis. 2d 349, 356, 525 N.W.2d 102 (Ct. App. 1994); *see also State v. Drogsvold*, 104 Wis. 2d 247, 262, 311 N.W.2d 243 (Ct. App. 1981). Probable cause "means facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution [to believe] that the suspect has committed, is committing, or is about to commit an offense." *Henes v. Morrissey*, 194 Wis. 2d 338, 351, 533 N.W.2d 802 (1995) (quoting *Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979)); *see also* WIS. STAT. § 968.07(1)(d). The test for probable cause is one "based on probabilities; and, as a result, the facts faced by the officer 'need only be sufficient to lead a reasonable officer to believe that guilt is more than a possibility.'" *County of Dane v. Sharpee*, 154 Wis. 2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990) (quoting *Village of Elkhart Lake v. Borzyskowski*, 123 Wis. 2d 185, 189, 366 N.W.2d 506 (Ct. App. 1985)). Further, "[t]he quantum of information which constitutes probable cause to arrest must be measured by the facts of the particular case." *State v. Wilks*, 117 Wis. 2d 495, 502, 345 N.W.2d 498 (Ct. App. 1984), *aff'd*, 121 Wis. 2d 93, 358 N.W.2d 273 (1984).

¶5 This court must look to "the totality of the circumstances within the arresting officer's knowledge at the time of the arrest." *State v. Koch*, 175 Wis. 2d 684, 701, 499 N.W.2d 152 (1993). The test for probable cause is a low standard. It could even be likely that Sypher was not guilty of OWI, and yet probable cause for his OWI arrest would still exist. *See State v. Mitchell*, 167 Wis. 2d 672, 681-84, 482 N.W.2d 364 (1992).

¶6 Here, even without considering Sypher's refusal to take the PBT test, there were sufficient facts to support a probable cause determination. Sypher was driving forty-five miles per hour in a twenty-five-mile-per-hour zone; an odor of alcohol could be detected coming from Sypher's car; the trooper could observe

Sypher's bloodshot eyes; and the HGN test results indicated not only that Sypher's driving ability was impaired, but also a 60% probability that his blood alcohol level would exceed 0.10%. It is not necessary to show that Sypher's driving was bizarre or erratic to support a probable cause determination for OWI. *See Milwaukee v. Richards*, 269 Wis. 570, 576, 69 N.W.2d 445 (1955).

¶7 Because the arresting officer had sufficient facts to conclude there was probable cause to arrest Sypher for OWI, the trial court correctly denied the motion to suppress. The judgment and order are therefore affirmed.

By the Court.—Judgment and order affirmed.

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

