COURT OF APPEALS
DECISION
DATED AND FILED

June 14, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2017AP120 **Cir. Ct. No. 2016CV479**

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

CITY OF SHEBOYGAN,

PLAINTIFF-RESPONDENT,

V.

JOHN W. VAN AKKEREN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Sheboygan County: L. EDWARD STENGEL, Judge. *Affirmed*.

¶1 GUNDRUM, J.[1] John W. Van Akkeren appeals his conviction for operating a motor vehicle while intoxicated and the circuit court's finding that he

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

improperly refused a request to provide a chemical sample of his blood. Van Akkeren's sole argument on appeal is that the arresting officer did not have "probable cause to believe" he was operating while intoxicated, as required to justify a request that he submit to a preliminary breath test (PBT). Because we conclude the officer did have "probable cause to believe," we affirm.

Background

¶2 The officer who arrested Van Akkeren was the only witness to testify at the court trial/refusal hearing, and his relevant testimony was as follows.

¶3 The officer testified that around 1 a.m. on November 26, 2015, he observed a vehicle being operated without its headlights on. The officer activated the emergency lights on his squad car and followed the vehicle.

> [F]or approximately half a block [the operator of the vehicle drove it] in a manner that the driver's side tires were on the inner most westbound lane, and the passenger side tires were on the outer most westbound lane so that the vehicle appeared to be straddling the lane of either line.

Although the officer was directly behind the vehicle and his emergency lights were activated, the driver did not immediately pull over, so the officer "blipped" his siren "a couple times." The operator eventually pulled over, but still had not turned on headlights or taillights on the vehicle.

¶4 Making contact with the driver, Van Akkeren, the officer observed his eyes to be glossy and detected a "moderate odor of intoxicants coming from his breath." Van Akkeren informed the officer that he had "a few beers." The officer asked Van Akkeren to perform field sobriety tests. The officer testified that because there was a light rain, he informed Van Akkeren "that if he wanted, he could roll his window up so that the light rain would not get into the car." Van

Akkeren responded by "push[ing] a button on the interior driver's door at which point the rear, driver's side window went down." Van Akkeren commented that the vehicle was a rental car. He then rolled that back window up, but exited the vehicle without "actually roll[ing] up his driver's door window."

¶5 The officer had Van Akkeren perform field sobriety tests, first observing four out of six possible clues of impairment on the Horizontal Gaze Nystagmus test, with four being the "number of clues … indicative of impairment" based on the officer's training. On the walk-and-turn test, Van Akkeren exhibited two out of eight possible clues,[2] with two clues being indicative of impairment. On the one-leg stand test, Van Akkeren exhibited two out of four possible clues,[3] with two being indicative of impairment. The officer testified that Van Akkeren's performance on these tests confirmed his suspicion that Van Akkeren was under the influence of an intoxicant. The officer then administered a PBT to Van Akkeren, which produced a reading of .119. The officer then arrested Van Akkeren for "operating a motor vehicle while impaired." Van Akkeren subsequently refused to provide a chemical sample as requested by the officer.

¶6 Following the testimony at the court trial/refusal hearing, the circuit court concluded that the officer had "sufficient probable cause to ask Mr. Van Akkeren to take the PBT" and the PBT result provided further evidence of Van Akkeren's level of intoxication, supporting the officer's arrest of Van Akkeren.

[2] Van Akkeren "kept his arms away from his sides more than six inches. And he also made an improper turn throughout the test," turning "in one continuous motion as opposed to taking the short, choppy steps that [I] described."

[3] Van Akkeren "kept his arms away from his sides more than six inches" and also swayed slightly.

The court found that Van Akkeren unreasonably refused to provide a chemical sample upon request. Based upon the evidence and the court's ruling, the court, with the stipulation of the parties, further found that Van Akkeren had been "operating under the influence of an intoxicant at the time in question." Van Akkeren appeals.

Discussion

¶7 As Van Akkeren states in his brief-in-chief, "[t]he sole issue [on appeal] is whether Officer Erickson had the requisite level of suspicion to request Mr. Van Akkeren submit to a PBT" because "without the PBT evidence, Officer Erickson did not have the requisite level of suspicion to arrest Mr. Van Akkeren." After listening to the undisputed testimony of the only witness presented at the trial/hearing, the circuit court determined that the officer had "probable cause to believe" Van Akkeren was operating under the influence of an intoxicant, justifying the officer's request to administer the PBT to Van Akkeren. We agree with the circuit court.

¶8 We have stated:

> During an OWI investigation, a law enforcement officer lawfully requests the subject to perform a PBT where the officer has "probable cause to believe" the person has been operating a motor vehicle while under the influence of an intoxicant. '"[P]robable cause to believe' refers to a quantum of proof greater than the reasonable suspicion necessary to justify an investigative stop ... but less than the level of proof required to establish probable cause for arrest." "[A] PBT may be requested when an officer has a basis to justify an investigative stop but has not established probable cause to justify an arrest."
>
> On appeal, we uphold a circuit court's factual findings unless they are clearly erroneous. If the facts are not in dispute, or when we uphold the circuit court's findings of fact, all that remains is the question of whether the facts

> fulfill the probable cause standard. This court reviews that question de novo.
>
> We determine whether probable cause for a PBT existed by considering the totality of the circumstances. In considering whether probable cause exists, we apply "an objective standard."

City of Sheboygan v. Becker, No. 2014AP1991, unpublished slip op. ¶¶8-10 (WI App Feb. 11, 2015) (citations omitted).

¶9 Here, the circuit court did not err in determining that the undisputed facts demonstrated that when the officer administered the PBT to Van Akkeren, the officer had probable cause to believe he had been operating while under the influence of an intoxicant.

¶10 To recap, related to Van Akkeren's driving, the officer observed Van Akkeren: (1) driving without his headlights on at 1 a.m.—a time of day generally providing greater suspicion that poor driving is caused by intoxication, *see* ***State v. Post***, 2007 WI 60, ¶36, 301 Wis. 2d 1, 733 N.W.2d 634; (2) straddling the line between two lanes while driving; (3) not immediately pulling over when the officer activated his emergency lights, suggesting Van Akkeren's lack of awareness of his surroundings; and (4) not even turning on his headlights once he became aware of the officer's presence. When directly interacting with Van Akkeren while Van Akkeren was still seated in his vehicle, the officer observed that Van Akkeren (1) had glossy eyes, (2) had a moderate odor of intoxicants coming from his breath, (3) admitted having consumed "a few" beers, and (4) rolled *down* the back window of his car when the officer invited him to roll *up* his front driver's door window due to the light rain. Further, on each of the field sobriety tests, the officer observed multiple clues of intoxication, helping confirm his suspicion that Van Akkeren was intoxicated.

¶11 At the trial/hearing, Van Akkeren's counsel succeeded in getting the officer to testify to various observations he made which suggested Van Akkeren might not be impaired. Van Akkeren highlights those observations on appeal as the foundation for his contention that the officer did not have probable cause to believe Van Akkeren was intoxicated at the time. Specifically, Van Akkeren points out that the officer testified that Van Akkeren's speech appeared to be normal and his "motor coordination or balance" appeared fine when he exited his vehicle. Van Akkeren further emphasizes parts of the field sobriety tests that Van Akkeren did not fail. While we consider these points raised by Van Akkeren, when an officer "is confronted with two reasonable competing inferences, one justifying arrest and the other not, the officer is entitled to rely on the reasonable inference justifying arrest." ***Becker***, No. 2014AP1991, unpublished slip op. ¶10. Here, at the time the officer administered the PBT to Van Akkeren, the totality of the circumstances clearly provided the officer probable cause to believe Van Akkeren was operating his vehicle while under the influence of an intoxicant. Thus, the officer did not err in administering the PBT to Van Akkeren and the circuit court did not err in concluding probable cause to believe existed.

By the Court.—Order affirmed.

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