COURT OF APPEALS
DECISION
DATED AND FILED

January 9, 2018

Diane M. Fremgen
Acting Clerk of Court of Appeals

Appeal No. 2017AP636-CR **Cir. Ct. No. 2014CT1063**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TERRY SANDERS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County: TIMOTHY A. HINKFUSS, Judge. *Affirmed.*

¶1 SEIDL, J.[1] Terry Sanders appeals a judgment convicting him of second-offense operating a motor vehicle while intoxicated (OWI). Sanders

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

argues the circuit court erred in denying his motion to suppress evidence because law enforcement lacked probable cause to arrest him for OWI. We disagree and affirm the judgment.

BACKGROUND

¶2 At the hearing on Sanders' motion to suppress, De Pere police officer Alicia Bagley testified she observed a vehicle stop in an intersection three-quarters of the way into the intersection. The time was about 2:30 a.m., and Bagley knew a bar was located in the general vicinity of the intersection. Bagley pulled behind the vehicle, and when she saw that it displayed no license plate, she performed a traffic stop.[2]

¶3 Bagley contacted the vehicle's driver, later identified as Sanders, who Bagley thought seemed "very defensive." Bagley observed a passenger in the front seat and smelled a strong odor of intoxicants. Sanders was unable to talk to Bagley and search for his proof of insurance at the same time. As a result of these observations, Bagley had Sanders exit his vehicle and perform standardized field sobriety tests. After Sanders exited the vehicle, Bagley smelled intoxicants coming from Sanders. Bagley testified she was certified both as a standardized field sobriety test instructor and a drug recognition expert.

¶4 Bagley first administered a horizontal gaze nystagmus test, during which she observed six out of the six standard clues of impairment. She testified

[2] After Bagley stopped the vehicle, she observed an Illinois temporary registration tag affixed inside the vehicle's rear windshield. In his motion to suppress, Sanders also argued Bagley lacked reasonable suspicion to stop him for a traffic violation. However, he has abandoned that issue on appeal.

that at least four out of six clues on that test correlated to a .08 or higher blood-alcohol concentration. Bagley next administered a vertical gaze nystagmus test, but did not observe any clues during that test.[3] Bagley asked Sanders to perform a walk-and-turn test. However, she then declined to administer this test out of concern for Sanders' safety once he informed her of a right leg injury he previously suffered. Bagley also administered a one-leg-stand test. She testified that at least two out of four standardized clues on this test correlated to intoxication. Bagley observed one standardized clue was that Sanders swayed while balancing on his leg. Additionally, Sanders twice counted the number "twenty-one thousand" and had to be reminded to look at his foot as he counted.[4] Bagley found these non-standard clues to be relevant to impairment.

¶5 In addition, Bagley asked Sanders to count from sixty-seven down to fifty-two. She observed Sanders counted unusually slowly and that he stopped counting at fifty-one instead of fifty-two. Bagley also characterized Sanders as "argumentative" throughout the field sobriety tests. Based on her pre- and post-stop observations, as well as her training and experience, Bagley concluded there was probable cause to believe that Sanders was intoxicated and arrested him for OWI. After his arrest, Sanders consented to a blood draw. His blood sample was later tested and revealed a .09 blood alcohol concentration.

[3] During redirect examination, Bagley explained that "for somebody that has a[n] extremely high tolerance to alcohol, they may not demonstrate vertical gaze nystagmus at a .08 or higher. Where somebody … doesn't drink very much, [that person] might have vertical gaze nystagmus even below the state impairment level at .06. It's a fluid indicator."

[4] Bagley explained that, in administering this test, she asked Sanders "to count one thousand one, one thousand two, one thousand three" while balancing on his leg and looking at his foot until she told him to stop counting.

¶6 The circuit court denied Sanders' motion to suppress. It concluded Bagley's observations gave rise to probable cause to arrest Sanders for OWI.[5] A jury subsequently convicted Sanders of OWI. He was sentenced to ten days in jail and fined $451. This appeal follows.

DISCUSSION

¶7 When reviewing a decision on a motion to suppress, we uphold the circuit court's findings of fact unless they are clearly erroneous. ***State v. Blatterman***, 2015 WI 46, ¶16, 362 Wis. 2d 138, 864 N.W.2d 26. The application of those findings of fact to constitutional principles, including the existence of probable cause that a crime has been committed, is a question of law that we review independently. ***Id.***

¶8 A warrantless arrest is lawful if it is based upon probable cause. ***State v. Lange***, 2009 WI 49, ¶19, 317 Wis. 2d 383, 766 N.W.2d 551. "Probable cause is a flexible, common-sense measure of the plausibility of particular conclusions about human behavior." ***Id.***, ¶20 (citation omitted). We must ask whether the totality of the circumstances known at the time of the arrest would permit a reasonable police officer to believe a crime had probably been committed. ***State v. Koch***, 175 Wis. 2d 684, 701, 499 N.W.2d 152 (1993). To support probable cause, the facts do not need to prove guilt beyond a reasonable doubt, let alone show that guilt is more likely than not. ***Lange***, 317 Wis. 2d 383, ¶38.

[5] Sanders also testified at the hearing and disputed aspects of Bagley's testimony. The circuit court found Bagley more credible. Sanders does not argue the circuit court's findings were clearly erroneous, nor does he argue Bagley incorrectly administered the tests.

¶9 Sanders terms the facts in his case a "mixed bag" in arguing that probable cause did not exist. After acknowledging the clues on the horizontal gaze nystagmus test, Sanders focuses on the lack of clues from the other field sobriety tests and the lack of other typical signs of intoxication, such as slurred speech or bloodshot eyes. He contends the field sobriety testing was inconclusive as to his intoxication and that Bagley simply observed things she "would likely see by day by sober folks."

¶10 Sanders' argument is unavailing. First, Sanders attempts to negate the clues from the horizontal gaze nystagmus test by noting that he displayed no clues on the vertical gaze nystagmus test and only one of four clues on the one-leg-stand test. However, Bagley testified the standardized field sobriety tests are not "pass-fail" in that they only gauge factors correlating with intoxication. The fact that Bagley did not observe more clues from standardized field sobriety testing does not undermine those clues she did observe. *See* ***id.***

¶11 Second, Sanders improperly dismisses the other factors noted by Bagley, such as Sanders stopping his vehicle substantially into the intersection, his swaying while balancing on one leg, and his failure to stop his countdown at fifty-two as instructed. Sanders discounts those factors on the basis that they could have been caused by his mere inattentiveness. However, "otherwise innocent conduct can supply the required link in the chain to establish probable cause that a crime has or is about to be committed." ***State v. Schaefer***, 2003 WI App 164, ¶17, 266 Wis. 2d 719, 668 N.W.2d 760 (citation omitted). As the circuit court observed, the other errors may have been "minor" in isolation, but they nevertheless were relevant under the totality of the circumstances.

¶12 Taken together, we conclude the facts create a common-sense inference that Sanders was probably intoxicated and thus could not drive safely. First, Sanders failed to stop his vehicle where required prior to entering an intersection and had difficulty dividing his attention between Bagley's questioning and retrieving his insurance information. Second, Bagley smelled a strong odor of intoxicants in Sanders' vehicle and continued to smell the odor on Sanders after he stepped out of it. Third, the time of arrest was 2:30 a.m., and a bar was near the intersection. *See* ***Lange***, 317 Wis. 2d 383, ¶32 (time of night is relevant to probable cause to arrest for OWI); WIS. STAT. § 125.32(3). Fourth, Sanders exhibited clues of intoxication during the field sobriety tests and had an "argumentative" demeanor throughout the encounter. In addition, Bagley had nearly five years of experience as an OWI investigator. While Bagley's conclusion that Sanders was intoxicated is not determinative, it is relevant to determining whether probable cause existed. *See* ***State v. Wille***, 185 Wis. 2d 673, 683, 518 N.W.2d 325 (Ct. App. 1994).

¶13 Sanders cites ***County of Jefferson v. Renz***, 222 Wis. 2d 424, 588 N.W.2d 267 (Ct. App. 1998), *rev'd on other grounds*, 231 Wis. 2d 293, 603 N.W.2d 541 (1999), in arguing probable cause did not exist. In ***Renz***, the defendant was stopped solely because of his vehicle's defective exhaust system and thereafter arrested for OWI after performing field sobriety tests. *See* ***Renz***, 222 Wis. 2d at 428-29. This court concluded a strong odor of intoxicants, the defendant's admission to drinking that evening, and evidence of "minimal" significance garnered from the field sobriety tests were insufficient to establish probable cause. *See* ***id.*** at 444-47.

¶14 The facts of ***Renz*** are materially distinguishable from this case. Sanders exhibited unusual driving behavior by not properly stopping at the stop

sign. Unlike the "minimal" factors in ***Renz***, Bagley testified that Sanders could not follow directions and remain attentive, which affects the ability to drive. *See* ***id.*** at 445. Finally, in ***Renz***, the defendant's performance of a horizontal gaze nystagmus test was excluded at the suppression hearing and was not considered on appeal. *See* ***id.*** at 430 n.2, 446. By contrast, Sanders exhibited six of six clues on that test, and Bagley explained that the presence of four of six clues correlated with impairment.

By the Court.—Judgment affirmed.

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