COURT OF APPEALS
DECISION
DATED AND FILED

June 13, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-0130-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DWIGHT GUSTAFSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Piece County: ROBERT W. WING, Judge. *Affirmed.*

¶1 CANE, C.J.[1] Dwight Gustafson appeals his conviction for operating a motor vehicle while intoxicated, second offense. He argues that the trial court erred by denying his motion to suppress evidence gathered after an

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

initial investigatory stop and subsequent arrest for OWI. Essentially, Gustafson claims that the arresting officer made an unjustified investigatory stop when he parked his squad car on the street at the end of Gustafson's driveway and later made an OWI arrest without probable cause. This court rejects his contentions and affirms the conviction.

¶2 The underlying facts are undisputed. Ellsworth police officer Darrin Foss received a call from the Pierce County Sheriff's Department dispatcher that an off-duty deputy had called in information indicating that he had just observed a "possible intoxicated driver." The off-duty deputy told the dispatcher that the person was driving a Lincoln and identified its license number. He also indicated that the car was traveling northbound on North Grant Street in Ellsworth. The dispatcher determined that the license plate number belonged to Gustafson and relayed this information to Foss, indicating that Gustafson lived at Evergreen Estates trailer park. No information was relayed to Foss as to why the off-duty officer suspected Gustafson was intoxicated.

¶3 After receiving this information from the dispatcher, Foss saw the Lincoln and followed it to Gustafson's driveway. The parties agree that Foss did not observe any acts of bad driving to indicate the driver was possibly intoxicated. When Gustafson drove into his driveway, Foss stopped his squad car on the street at the end of the driveway and then continued to observe the Lincoln from a distance of about twenty feet. Up to this point, Foss had not made any attempt to stop the Lincoln. As Foss continued to observe the Lincoln, he saw Gustafson stumble and catch his balance as he exited the vehicle. When Gustafson saw Foss at the end of his driveway, he started to walk toward the squad car, but staggered and then leaned against the Lincoln.

¶4 After seeing this, Foss got out of his squad car and walked up to Gustafson. He explained to Gustafson the information he had received from the dispatcher. As they spoke, Foss noticed a strong smell of intoxicants. He also noted that Gustafson had trouble producing his driver's license, could not maintain his balance without leaning against his Lincoln, had slurred speech, admitted that he had been drinking and refused to perform field sobriety tests. Foss then arrested Gustafson for OWI.

¶5 Gustafson contends that when Foss parked his squad car on the street at the end of his driveway, the officer had made an unjustified investigatory stop based on a tip from an anonymous off-duty police officer. A seizure within the meaning of the Fourth Amendment occurs only if, in view of all the circumstances, a reasonable person would believe he is not free to leave. *See* ***United States v. Mendenhall***, 446 U.S. 544, 554 (1980). Contrary to Gustafson's contention, there was no stop while Foss observed Gustafson from his squad car parked on the street. Gustafson's liberty was not restrained in any manner.[2] As the trial court correctly noted, the investigatory stop did not occur until after Foss observed Gustafson stumble out of his car. It was only when Foss walked up to Gustafson that an investigatory stop occurred. Until then, Foss had not restricted Gustafson's freedom of movement in any fashion.

¶6 The next question becomes whether Foss may make an investigatory stop after observing Gustafson drive, stumble out of his car and support himself against his car. To be valid, an officer must reasonably suspect in light of his or

[2] Because this court agrees with the trial court that there was no stop until after the arresting officer observed Gustafson exit the vehicle in an unstable manner, it is not necessary to address Gustafson's argument that the stop was based on an anonymous tip.

her experience that some criminal activity has taken place or is taking place before stopping the individual. *See* ***State v. Gruen***, 218 Wis. 2d 581, 590, 582 N.W.2d 728 (Ct. App. 1998). If an officer has a suspicion of criminal activity, grounded in specific, articulable facts and reasonable inferences drawn from those facts, the officer may conduct a temporary detention of the individual in order to investigate further. *See* ***id.*** Although Foss did not observe any erratic driving, he did observe Gustafson have significant problems getting out of his car and maintaining his balance as he attempted to walk. It is not necessary to show that Gustafson's driving was bizarre or erratic. *See* ***Milwaukee v. Richards***, 269 Wis. 570, 576, 69 N.W.2d 445 (1955). Rather, the State need only show that the driver consumed a sufficient amount of alcohol to cause him or her to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle to be convicted of OWI. *See* WIS JI—CRIMINAL 2663, "OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF AN INTOXICANT." It is not required that impaired ability to operate be demonstrated by particular acts of unsafe driving. What is required is that the person's ability to safely control the vehicle be impaired. *See* WIS. STAT. § 346.63(1).[3]

¶7 Here, without repeating Foss's observations, this court is satisfied that Foss had sufficient articulable facts to support a reasonable inference that

[3] WISCONSIN STAT. § 346.63(1) provides in part:

> No person may drive or operate a motor vehicle while:
>
> (a) Under the influence of an intoxicant, a controlled substance, a controlled substance analog or any combination of an intoxicant, a controlled substance and a controlled substance analog, under the influence of any other drug to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving.

Gustafson may have been operating a motor vehicle while under the influence of an intoxicant. Accordingly, he made a valid investigatory stop after approaching Gustafson outside of his parked car.

¶8 The final issue is whether Foss had sufficient probable cause to arrest Gustafson. 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 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).

¶9 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. Here, it could be likely that Gustafson 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).

¶10 This court has little difficulty concluding, as did the trial court, that the arresting officer had probable cause to arrest Gustafson for OWI. Foss observed Gustafson stumble and catch his balance as he exited his vehicle. After Gustafson exited his vehicle, he staggered and had to lean against his vehicle for support. While performing an investigatory stop, Foss smelled the odor of intoxicants on Gustafson, his speech was slurred and he had to lean against his own vehicle in order to maintain his balance. When asked to produce his license, Gustafson presented not only his license, but also insurance cards. Finally, when asked to perform field sobriety tests, Gustafson refused.[4] Considering the totality of these circumstances, a reasonable officer would conclude that Gustafson had been operating a motor vehicle while under the influence of intoxicants. Therefore, these facts are sufficient to support a probable cause determination.

By the Court.—Judgment affirmed.

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

[4] A defendant's refusal to perform field sobriety tests may be used as evidence of probable cause. *See* ***State v. Babbitt***, 188 Wis. 2d 349, 359-60, 525 N.W.2d 102 (Ct. App. 1994).