COURT OF APPEALS
DECISION
DATED AND FILED

July 18, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-0232-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RICHARD T. PEFFER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: RUSSELL W. STAMPER, Judge. *Affirmed.*

¶1 SCHUDSON, J.[1] Richard T. Peffer appeals from the judgment of conviction, following his no contest plea, for operating a motor vehicle while having a prohibited blood alcohol concentration. He argues that the police did not

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f), (3) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

have probable cause to arrest him and, therefore, that the trial court erred in denying his motion to suppress statements and evidence. This court affirms.

¶2 The facts relevant to resolution of this appeal are undisputed. Testimony at the suppression hearing established that on December 19, 1998, at about 3:00 A.M., City of Milwaukee Police Officer Roberto Colon arrived at the scene of an accident where he observed fire department personnel attending to a woman lying on the ground in front of a pickup truck. Peffer was kneeling next to her. Within the next five to ten minutes, additional facts became clear to Officer Colon, leading him to arrest Peffer for causing injury by intoxicated use of a motor vehicle. The facts, as summarized in the trial court's written decision denying Peffer's suppression motion, are:

> 1) There had been a personal injury accident. 2) The defendant said he did not know what happened at first. Then the defendant said he had been parking his truck and the woman crossed in front of the auto and he did not observe her until his vehicle made contact with her. 3) The defendant was coming from a tavern with the victim. 4) The defendant staggered as he walked with the officer—he swayed to one side a little bit and kind of dragged his feet. 5) The officer could smell alcohol from the defendant's breath. 6) The defendant's eyes were pretty bloodshot and watery. 7) When asked if he had been drinking, the defendant stated "yes" and got angry. 8) The defendant refused to do a field sobriety test and he got angrier—he was swearing, throwing up his arms in the air and wouldn't cooperate.

¶3 Peffer does not challenge any of these factual findings. He argues, nonetheless, that "the information known to Officer Colon at the time of the arrest would not have lead [sic] a reasonable police officer to believe that it was more than a mere possibility that Mr. Peffer had caused his girlfriend's injuries" and, as a result, that Officer Colon did not have probable cause to arrest him. Peffer's argument has no merit.

¶4 As Peffer acknowledges, the supreme court has explained that "'[p]robable cause to arrest refers to that quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed a crime.'" ***State v. Koch***, 175 Wis. 2d 684, 701, 499 N.W.2d 152 (1993) (quoting ***State v. Paszek***, 50 Wis. 2d 619, 624, 184 N.W.2d 836 (1971)). "The information available to the officer must lead a reasonable police officer to believe that 'guilt is more than a possibility.'" ***State v. Richardson***, 156 Wis. 2d 128, 148, 456 N.W.2d 830 (1990) (quoting ***Paszek***, 50 Wis. 2d at 625). In determining whether probable cause to arrest exists, this court looks at the totality of the circumstances. *See* ***State v. Nordness***, 128 Wis. 2d 15, 35, 381 N.W.2d 300 (1986). Whether undisputed facts establish probable cause to arrest is an issue of law subject to this court's *de novo* review. *See* ***State v. Babbitt*****,** 188 Wis. 2d 349, 356, 525 N.W.2d 102 (Ct. App. 1994).

¶5 Peffer, relying on footnote six in ***State v. Swanson***, 164 Wis. 2d 437, 475 N.W.2d 148 (1991), emphasizes that he did not perform a field sobriety test, the results of which could have provided the basis for determining probable cause. Peffer, however, refused to perform the test Officer Colon requested. His refusal, reasonably considered by the trial court as one of the factors establishing probable cause, cannot help him here. *See* ***State v. Windom***, 169 Wis. 2d 341, 353 n.3, 485 N.W.2d 832 (Ct. App. 1992) (Fine, J., concurring) ("The Yiddish word chutzpah is colorfully defined by the classic example of the gall displayed by the young man who, after he is convicted of murdering his parents, seeks leniency because he is an orphan."). Moreover, as the trial court noted in its decision denying Peffer's motion, any possible confusion created by the ***Swanson*** footnote has been put to rest by this court's subsequent decisions in ***State v. Wille***, 185 Wis. 2d 673, 518 N.W.2d 325 (Ct. App. 1994), and ***State v. Kasian***, 207 Wis. 2d 611, 558 N.W.2d

687 (Ct. App. 1996). A field sobriety test is not a prerequisite to establish probable cause to arrest. *See* ***Wille***, 185 Wis. 2d at 684; ***Kasian***, 207 Wis. 2d at 622.

¶6 Peffer simply stresses what more could have been known, what additional specific information Officer Colon could have recounted (such as the specific field sobriety test Peffer declined to perform), or what innocent factors could have explained the circumstances Officer Colon encountered. Such additional factors and possibilities, however, while perhaps relevant to a potential defense, do not vitiate the strength of the overwhelming evidence that established probable cause to arrest Peffer for causing injury by intoxicated use of a motor vehicle.

¶7 Here, even the most cursory review of the factors *Peffer acknowledges* in his brief to this court establishes that Officer Colon had probable cause to arrest Peffer for causing injury by intoxicated use of a motor vehicle. In his brief, Peffer refers to testimony at the suppression hearing establishing the personal injury accident, his angry reaction to Officer Colon's attempt to remove him from his girlfriend's side, his staggering, swaying, and dragging his feet, his swearing, his inconsistent answers to Officer Colon's inquiries about what had happened, his drinking, his driving and parking of the vehicle, his bloodshot and watery eyes, the odor of alcohol on his breath, and his refusal to perform a field sobriety test. By any commonsense assessment, these factors established far more than a mere possibility that Peffer had committed injury by intoxicated use of a motor vehicle. Any failure to arrest Peffer for that offense would have been wholly irresponsible; probable cause was clear.

By the Court.—Judgment affirmed.

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