

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 24, 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. 00-0510-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MOLLI A. HULING N/K/A MOLLI A. WHITE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sauk County:
VIRGINIA WOLFE, Judge. *Affirmed.*

¶1 DYKMAN, P.J.¹ Molli Huling appeals from a judgment convicting her of operating a motor vehicle while under the influence of an intoxicant

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f)(1997-98).

(OMVWI) pursuant to WIS. STAT. § 346.63(1)(a) (1997-98).² She was convicted after the trial court denied her motion to suppress the results of a blood alcohol test and other evidence. She argues that without a field sobriety test or preliminary breath test (PBT), the arresting officer lacked probable cause to arrest her. We conclude that the officer had probable cause to arrest Huling, and therefore affirm.

BACKGROUND

¶2 In the early morning of December 13, 1998, Huling and her companion were involved in a one-vehicle traffic accident. Deputy Sheriff James Hodges responded to the scene of the accident at approximately 5:13 a.m. Huling's car had hit a tree and there were a few skid marks on the road. Hodges concluded that the accident was probably due to inattentive driving.

¶3 After the accident, Huling and her companion had left the accident scene and encountered a Lake Delton police officer. Emergency Medical Technicians took Huling and her companion by ambulance to a hospital. Hodges went to the hospital, and the EMT's informed him that they had smelled a strong odor of intoxicants coming from both Huling and her companion. They also told

² All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted. WISCONSIN STAT. § 346.63(1)(a) states:

(1) 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

Hodges that Huling informed them that she had consumed approximately two drinks per hour over a period of five hours. Hodges spoke to Huling at the hospital but was unable to smell any alcohol because he had a head cold. Huling informed Hodges that she had been drinking since 11:00 p.m. the previous night and had consumed six drinks. Hodges did not perform any field sobriety tests because Huling was immobilized on a longboard. Hodges subsequently advised Huling that she was under arrest for operating a motor vehicle under the influence of intoxicants. He requested that the lab technician perform a blood draw which showed an alcohol content of .129 percent, above Wisconsin's legal limit of .10 percent. *See* WIS. STAT. § 340.01(46m)(a).

¶4 Huling moved to suppress the blood test results and other evidence. The trial court found that Hodges had probable cause to arrest Huling and denied the motion. Huling was subsequently convicted of operating a vehicle while under the influence of intoxicants. She appeals.

DISCUSSION

¶5 Huling contends that the arresting officer did not have probable cause to arrest her for OMVWI. She asserts that the officer only suspected that she had operated a motor vehicle while intoxicated, which did not justify her arrest, and that the officer should first have used a PBT. *See County of Jefferson v. Renz*, 231 Wis. 2d 293, 310, 603 N.W.2d 541 (1999). She contends that the officer never saw any signs of intoxication nor did he have any information from other sources that her driving was impaired.

¶6 Whether the facts of a given case constitute probable cause to arrest is a question of law that we decide without deference to the trial court. *See State v. Kasian*, 207 Wis. 2d 611, 621, 558 N.W.2d 687 (Ct. App. 1996). “Probable

cause is a common-sense determination. It is judged by the factual and practical considerations of everyday life on which reasonable people, not legal technicians, act.” *State v. Griffin*, 220 Wis. 2d 371, 386, 584 N.W.2d 127 (Ct. App. 1998). Probable cause to arrest refers to the quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed a crime. *See State v. Paszek*, 50 Wis. 2d 619, 624, 184 N.W.2d 836 (1971). Proof beyond a reasonable doubt need not be established nor does it need to be more likely than not that the defendant committed a crime. *See State v. Mitchell*, 167 Wis. 2d 672, 682, 482 N.W.2d 364 (1992). All that is required is reasonably trustworthy information that is sufficient to warrant a person of reasonable caution in the belief that a crime has been committed. *See Paszek*, 50 Wis. 2d at 625. In determining probable cause, courts will look at the totality of the facts and circumstances faced by the officer at the time of the arrest to determine whether the officer reasonably believed that the defendant committed an offense. *See County of Dane v. Sharpee*, 154 Wis. 2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990).

¶7 Huling relies upon *Renz* to argue that Hodges did not have probable cause to arrest her, and should have used a PBT to establish probable cause. *Renz* sets out the standard, enhanced reasonable suspicion, which is necessary before an officer can request a PBT. 231 Wis. 2d at 316. Thus, an officer does not need probable cause for an arrest in order to request a PBT. *See id.* That an officer *may* request a PBT upon something less than probable cause to arrest does not mean that the officer *must* request a PBT to make a lawful arrest. While a PBT may be helpful in establishing probable cause to arrest, *see id.* at 317, *Renz* does not hold that a PBT is required before an officer can arrest for OMVWI.

¶8 The facts Hodges knew were sufficient to establish probable cause that Huling was probably operating while intoxicated. He saw that Huling's car had been involved in a one-vehicle accident and that there were limited skid marks on the roadway, suggesting that the driver was not aware that the car was leaving the roadway until the last minute. He was informed that Huling smelled strongly of intoxicants and that she had admitted to consuming ten drinks over five hours. Comparing this case to *State v. Seibel*, 163 Wis. 2d 164, 183, 471 N.W.2d 226 (1991), a case concerning the standard of reasonable suspicion, it appears that Hodges had more than reasonable suspicion when he arrested Huling. *Seibel* involved four indicia of intoxication: unexplained erratic driving, a strong odor of intoxicants emanating from the defendant's companions, an odor of intoxicants on the defendant, and the defendant's belligerent conduct at a hospital. *Id.* at 181-83. The court concluded that none of these factors alone would rise to the level of reasonable suspicion, but together they would give the police reason to suspect the defendant's driving was impaired by alcohol. *See id.* at 183. Officer Hodges had some of these indicia as well as the significant fact the Huling admitted to consuming ten drinks in five hours.

¶9 If we were only to consider the nature of the accident and the odor of intoxicants about Huling, Hodges would not have had probable cause to arrest without further investigation. The most important factor that distinguishes this case from *Seibel* is Huling's admission of the amount of alcohol she consumed. While there is no definitive answer to what constitutes probable cause in OMVWI cases, the factors present in *Seibel* only give a guideline as to what does not.

¶10 An average person eliminates one drink per hour.³ Huling had ten drinks in five hours. She therefore would have had approximately five drinks remaining in her system when she had her accident, and would be considered to be over the legal alcohol concentration limit.⁴ A reasonably prudent officer with Hodges' experience would be justified in concluding that a 160-pound woman who consumed ten drinks in a five-hour period would be alcohol impaired. That reasonable belief would provide probable cause to arrest.

¶11 Huling's admission that she consumed six to ten drinks is similar to the defendant's statement in *State v. Wille*, 185 Wis. 2d 673, 683, 518 N.W.2d 325 (Ct. App. 1994). There, the defendant hit a parked car, the officer smelled intoxicants, and the defendant stated that he had "to quit doing this." *Id.* The court interpreted the defendant's statement as evidence of his consciousness of guilt. *See id.* at 684. Similarly, while Huling's admission of consumption of alcohol is not an admission of guilt, it, together with the one-car accident and the strong odor of intoxicants, made it probable that Huling was driving impaired.

CONCLUSION

¶12 Based on Hodges' reasonable belief that Huling was driving while impaired, we conclude he had probable cause to arrest her. At the time of arrest, Hodges knew that: (1) Huling's car hit a tree in a one-vehicle accident; (2) she

³ *See infra* note 4.

⁴ Huling is a 160-pound woman. According to the blood alcohol chart used by the Wisconsin Department of Transportation, a 160-pound woman who has consumed five drinks would have a blood alcohol content of 0.117 percent. *See State v. Hinz*, 121 Wis. 2d 282, 284 n.2, 360 N.W.2d 56 (Ct. App. 1984). Assuming that the blood alcohol chart has been a part of the training of traffic officers since 1984, it is reasonable to conclude that a reasonable police officer would be aware of the blood alcohol elimination rate chart, and based on that could reasonably believe that Huling was intoxicated.

smelled strongly of alcohol; and (3) she admitted consuming ten drinks in a five-hour span prior to the accident. A reasonable officer with Hodges' experience would have probable cause to arrest Huling.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4 (1997-98).

