COURT OF APPEALS
DECISION
DATED AND FILED

January 23, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-2070-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DONALD J. DOCKRY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Menomonie County: WILLIAM C. STEWART, Judge. *Reversed.*

¶1 HOOVER, P.J.[1] Donald Dockry appeals a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant, contrary

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

to WIS. STAT. § 346.63(1)(a).[2] Dockry argues that the trial court erred by concluding that the arresting officer had sufficient probable cause to arrest. This court agrees and therefore reverses the judgment of conviction and the order denying Dockry's motion to suppress.

¶2 The material facts are brief and undisputed. Dockry was involved in a motor vehicle accident. State trooper James Fetherston responded to the scene and was told by a witness to the accident that Dockry "smelled … drunk."[3] Dockry was airlifted to a hospital. Fetherston left the scene to interview Dockry without conducting any further investigation. When Fetherston was eventually permitted to speak with Dockry, the latter was wearing an oxygen mask and did not "appear to be in any condition to be getting off the gurney." Fetherston testified that he noticed a very strong odor of an intoxicant each time Dockry pulled the mask away to talk to him. Based on these facts, Fetherston determined that Dockry had operated his vehicle while under the influence of an intoxicant.

¶3 The trial court repeatedly acknowledged that the issue was a "close call." It ultimately concluded, however, that there was probable cause to arrest

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

> No person may drive or operate a motor vehicle while:
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> (a) Under the influence of an intoxicant, a controlled substance, a controlled substance analog or a 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 ….

[3] On cross-examination by the State, Fetherston for the first time also testified that "this vehicle allegedly had run into the back of [a] semi prior to rolling over …." Fetherston's source for this information is unknown. The trial court did not specifically refer to this as a basis for finding probable cause.

Dockry based upon "[t]he allegation that the defendant was drunk[4] plus the unexplained serious accident plus the odor of an intoxicant, which the trooper eventually was able to determine …." Based upon this determination, the trial court denied Dockry's motion to suppress.

¶4 The sole issue is whether Fetherston had probable cause to arrest Dockry. The State contends that Fetherston had sufficient probable cause based on the odor of intoxicants on (1) the witness's statement that Dockry smelled drunk, (2) the unexplained erratic driving that caused a serious accident and (3) Fetherston's perception of the odor of an intoxicant on Dockry's breath in the hospital.

¶5 The State, citing ***State v. Mitchell***, 167 Wis. 2d 672, 681-81, 482 N.W.2d 364 (1992), acknowledges that the evidence demonstrating probable cause for arrest must show more than a mere possibility or suspicion that an individual has committed a crime. Probable cause refers to that quantum of evidence that would warrant a reasonable police officer to conclude that a suspect had probably committed a crime. ***State v. Nordness***, 128 Wis. 2d 15, 35, 381 N.W.2d 300 (1986). "Probable cause exists where the totality of the circumstances within the arresting officer's knowledge at the time of the arrest would lead a reasonable police officer to believe ... that the defendant was operating a motor vehicle while under the influence …. " ***Id.*** Where historical facts are undisputed, probable cause to arrest is a question of law that is subject to independent review without deference to the trial court's decision. ***Village of Elkhart Lake v. Borzyskowski***, 123 Wis. 2d 185, 189, 366 N.W.2d 506 (Ct. App. 1985).

[4] As indicated above, Fetherston testified that a witness told him that Dockry "smelled like he was drunk."

¶6 In ***State v. Swanson***, 164 Wis. 2d 437, 453-54 n.6, 475 N.W.2d 148 (1991), the supreme court concluded that unexplained erratic driving, the odor of intoxicants on the defendant's breath, an accident that occurred after the bars had closed, taken together gave a police officer reasonable suspicion, but not probable cause, that a person was driving while intoxicated.[5] Similarly, in ***State v. Seibel***, 163 Wis. 2d 164, 180-83, 471 N.W.2d 226 (1991), the court determined that erratic driving that caused an accident, a strong odor of intoxicants coming from the driver's companions, an odor of intoxicants on the driver, and the driver's belligerent conduct at a hospital, together provided the police with reasonable suspicion, but not probable cause, that the driver was operating a motor vehicle while intoxicated.

¶7 This court is bound by the decisions of the supreme court. ***State v. Clark***, 179 Wis. 2d 484, 493, 507 N.W.2d 172 (Ct. App. 1993). Here there are fewer indicia of intoxication than in ***Swanson*** or ***Seibel***. Under the dictates of these cases, the facts cited by the State do not establish probable cause to believe Dockry was under the influence. Fetherston detected a strong odor of intoxicants on Dockry's breath. This establishes only that Dockry had consumed an unknown quantity of alcoholic beverages before the accident. Absent other corroborating evidence, this fact does not permit the inference that Dockry's ability to operate a motor vehicle had been impaired by the consumption of alcohol. Fetherston offered no testimony that Dockry was acting abnormally or belligerently. He did not indicate that he perceived slurred speech or glassy eyes. Fetherston did not

[5] The State characterizes the statement in ***Swanson*** as dicta. Dockry provides a comprehensive analysis of why the ***Swanson*** footnote is an authoritative pronouncement. This court is persuaded by Dockry's argument. The statement is plainly germane to a primary issue. *See* ***State v. Kruse***, 101 Wis. 2d 387, 392, 305 N.W.2d 85 (1981). Moreover, the supreme court has not modified its language despite the criticism it has drawn.

testify as to any difficulty communicating effectively with Dockry. The record is devoid of any evidence that Dockry's conduct was anything other than normal.

¶8 The additional fact that Dockry was involved in an accident does not indicate that he was under the influence. Contrary to the State's conclusory contention, there is no evidence that suggests Dockry operated his vehicle in an erratic or improper manner or that his driving was a cause of the accident. There was insufficient probable cause to believe Dockry was under the influence based solely upon the fact that there was an accident and that Dockry had previously imbibed an unknown amount of alcohol. With nothing further, the officer was without probable cause to arrest.

By the Court.—Judgment and order reversed.

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