

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 24, 2001

Cornelia G. Clark
Clerk of Court of Appeals

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. 01-1334

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

CITY OF OCONOMOWOC,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER E. VERBURGT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: MICHAEL O. BOHREN, Judge. *Affirmed.*

¶1 ANDERSON, J.¹ In this appeal, Christopher E. Verburt raises several challenges to his conviction for drunk driving. First, he asserts that the videotape of the traffic stop does not demonstrate an observable basis for the suspicion that he was under the influence of alcohol and that the arresting officer's

¹ This is a one-judge appeal pursuant to WIS. STAT. § 752.31(2)(c) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

conclusion that there was probable cause is faulty. Second, he asserts that there was no probable cause to request a preliminary breath test (PBT).² Third, he challenges the constitutionality of WIS. STAT. § 343.303. Because we hold that there was sufficient probable cause to support an arrest without the PBT results, we do not reach the other issues raised by Verburgt.³

¶2 At 2:28 a.m. on March 5, 2000, Verburgt was stopped by Officer Steven Grabowski for operating his truck with a left taillight burned out. The majority of the stop was recorded on the squad car's video camera. During the stop, Verburgt stated that he was coming home from a bar in Oconomowoc. Grabowski testified that in his opinion, Verburgt had watery, glassy eyes, there was a noticeable odor of intoxicants, and his speech was slurred.

¶3 Based on those observations, Grabowski requested that Verburgt exit his vehicle and perform a series of field sobriety tests: finger-to-nose, walk-and-turn, and horizontal gaze nystagmus (HGN). Verburgt performed satisfactorily on the finger-to-nose, marginally on the walk-and-turn, and failed the HGN when Officer Adam Skereish, who was also present on the scene, detected six of six clues for intoxication during the test. Grabowski administered a PBT, which

² In *County of Jefferson v. Renz*, 231 Wis. 2d 293, 304, 603 N.W.2d 541 (1999), the supreme court concluded that the “probable cause” to request a PBT in WIS. STAT. § 343.303 was a lesser standard than the probable cause needed to arrest. Because we conclude that the officer’s observations of Verburgt and his failure to properly perform the field sobriety tests produced enough evidence to establish probable cause for arrest, it is not necessary to decide if there was a lesser degree of probable cause needed to request Verburgt to provide a breath sample for a PBT test. See *Renz*, 231 Wis. 2d at 310. In other words, we have concluded that the PBT results were not necessary to establish probable cause for arrest for OWI.

³ The circuit court held that Verburgt did not consent to a PBT under WIS. STAT. § 343.303; therefore, he does not have standing to bring a challenge to the constitutionality of the statute because he was not aggrieved by the circuit court’s decision. See *Koller v. Liberty Mut. Ins. Co.*, 190 Wis. 2d 263, 266, 526 N.W.2d 799 (Ct. App. 1994).

Verburgt performed and failed. He was subsequently placed under arrest for OWI. Verburgt later submitted to a chemical blood test, which revealed a .196% blood alcohol concentration, and he was charged with having a prohibited BAC.

¶4 Verburgt's Motion to Suppress Statements and Evidence Due to Unlawful Seizure, Detention, and Arrest was heard by the municipal court on July 14, 2000. The municipal court found that Verburgt performed the finger-to-nose and walk-and-turn tests satisfactorily, but that the officer's observations and the results of the HGN and PBT tests furnished the requisite probable cause to sustain the arrest. The municipal court also found that Verburgt consented to the PBT.

¶5 Verburgt appealed the municipal court decision to the circuit court pursuant to WIS. STAT. § 800.14(1).⁴ On review, the circuit court examined the transcript to determine whether evidence supported the municipal court decision, and noted that the findings of fact cannot be set aside unless clearly erroneous. The circuit court found that there was insufficient evidence to conclude that Verburgt consented to the PBT, but that there remained sufficient evidence to establish probable cause for the arrest without the PBT.

¶6 Verburgt appeals the circuit court decision. He concedes that the officer had reasonable grounds to execute the initial stop for the burned out taillight. However, he contends that the City of Oconomowoc did not meet its burden of establishing probable cause for the arrest. On appeal, we review the

⁴ WISCONSIN STAT. § 800.14(1) states in pertinent part: "Appeals from judgments of municipal courts may be taken by either party to the circuit court of the county where the offense occurred."

decision of the municipal court and not the circuit court. *See Village of Williams Bay v. Metzl*, 124 Wis. 2d 356, 360-61, 369 N.W.2d 186 (Ct. App. 1985). Like the circuit court, our review is limited to determining whether evidence supports the municipal court's determination. *Id.* at 361. We will not reverse a factual determination unless the facts found were clearly erroneous. *Id.*

¶7 In a hearing on a motion to suppress, the municipal court takes evidence in support of suppression and against it, and chooses between conflicting versions of the facts. *See State v. Wille*, 185 Wis. 2d 673, 682, 518 N.W.2d 325 (Ct. App. 1994). It necessarily determines the credibility of the witnesses, *id.*, and we give deference to that determination because of the court's superior opportunity to gauge the persuasiveness of their testimony. *Estate of Dejmál v. Merta*, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980).

¶8 The facts relative to the question of probable cause are not disputed. "Whether undisputed facts constitute probable cause is a question of law that we review without deference to the trial court." *State v. Babbitt*, 188 Wis. 2d 349, 356, 525 N.W.2d 102 (Ct. App. 1994). In conducting this review, we look to the totality of the circumstances to determine if the arresting officer's knowledge at the time of the arrest would lead a reasonable officer to believe that the defendant was operating a motor vehicle while under the influence of an intoxicant. *State v. Nordness*, 128 Wis. 2d 15, 36-37, 381 N.W.2d 300 (1986). Probable cause to arrest is to be judged by "the factual and practical considerations of everyday life on which reasonable and prudent persons, not legal technicians, act." *State v. Truax*, 151 Wis. 2d 354, 360, 444 N.W.2d 432 (Ct. App. 1989). The standard for probable cause is low. The conclusion must be based on more than a suspicion that the defendant committed a crime, but the evidence need not even reach the

level that guilt is more likely than not. *State v. Mitchell*, 167 Wis. 2d 672, 681-82, 482 N.W.2d 364 (1992).

¶9 Probable cause hinges on the question of whether the facts and circumstances would allow a reasonable officer to believe that guilt is more than a possibility. Probable cause cannot be determined by a checklist of requirements. Probable cause involves an officer's evaluation of the entire situation at hand and a determination based upon that evaluation of the probability that an offense was committed. *Babbitt*, 188 Wis. 2d at 356-57. Looking at the totality of the circumstances, this court believes as a matter of law that a reasonable officer in Grabowski's position, even without the results of the PBT, could have reasonably concluded that Verburgt was committing an OWI/BAC offense.

¶10 The municipal court fulfilled its obligations at the suppression hearing. It took evidence in support of suppression and against it, and chose between conflicting versions of the facts. It determined the credibility of the officers and other witnesses. Finally, the court found historical facts and determined that probable cause existed based on those facts. The court reached this conclusion by applying the factual and practical considerations of everyday life on which reasonable and prudent persons, not legal technicians, act. We are not finders of fact; upon review of the record, we find that the municipal court's findings are supported by evidence and are not clearly erroneous. We will uphold its findings of fact.

¶11 Since we find sufficient probable cause to sustain an arrest in the facts presented notwithstanding the PBT results, we do not reach the remainder of Verburgt's issues. "An appellate court is not a performing bear, required to dance

to each and every tune played on an appeal.” *State v. Waste Mgmt. of Wis., Inc.*,
81 Wis. 2d 555, 564, 261 N.W.2d 147 (1977).

By the Court.—Judgment and order affirmed.

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

