

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 27, 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. 01-1474-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KARLA R. MERKES,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Grant County:
MICHAEL T. KIRCHMAN, Judge. *Affirmed.*

¶1 VERGERONT, P.J.¹ Karla R. Merkes appeals a judgment of conviction for causing injury by operating a motor vehicle while under the influence of an intoxicant in violation of WIS. STAT. § 346.63(2)(a)1. She

¹ This appeal is decided by one judge 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.

contends the trial court erred in concluding that the officer had probable cause to arrest her. We conclude the officer did have probable cause, and therefore affirm.

BACKGROUND

¶2 The arresting officer, Deputy Chad M. Breuer, testified as follows at the hearing on Merkes' motion to suppress evidence. At approximately 10:30 p.m. on January 20, 2001, Deputy Breuer arrived on the scene of an accident between two vehicles. Officer Raymond Klaas, the first officer on the scene, told him that there were three individuals in one vehicle and one person in the other vehicle, Merkes, who was being extracted from the vehicle by EMTs. Officer Klaas also told him, Deputy Breuer testified, that he (Klaas) could smell an odor of intoxicants coming from Merkes. However, on cross-examination Deputy Breuer acknowledged that in his report of the accident he stated that Officer Klaas told him that Klaas could smell an "odor of intoxicants coming from the vehicle." An EMT at the scene also told Deputy Breuer that she could smell an odor of intoxicants. Deputy Breuer acknowledged that he did not smell any odors because he had a cold at the time. Deputy Breuer also spoke to the driver of the other vehicle. The other driver informed Deputy Breuer that Merkes' vehicle did not stop at the stop sign and ran into his vehicle.

¶3 After the EMTs removed Merkes from her vehicle but before transport to the hospital, Deputy Breuer arrested her. Deputy Breuer testified that

before arresting Merkes he tried to ask her if she had been drinking.² He did not, however, perform any field sobriety tests on Merkes and testified that the EMTs carried Merkes from her car to the rescue squad.

¶4 Officer Klaas also testified at the suppression hearing. He testified that he told Deputy Breuer he could smell an odor of intoxicants coming from Merkes.³

¶5 The trial court concluded that Deputy Breuer had probable cause to arrest Merkes because he had been told that the accident was caused by Merkes' failure to stop at a stop sign and that the smell of intoxicants came from Merkes.⁴ The trial court also found that the reason Deputy Breuer did not perform a field sobriety test was due to Merkes' condition at the time of the accident.

² Deputy Breuer testified that he tried to ask Merkes if she had been drinking but that she was just mumbling and that he could not understand her. The trial court made a finding that Merkes' speech was unintelligible and that this finding was consistent "with both being intoxicated and also being injured." The trial court stated that Merkes' inability to speak for "some reason" was a factor to probable cause. However, because the trial court did not make a finding as to the reason Merkes had difficulty speaking, whether because of intoxication or the accident, we do not consider this as a factor in our probable cause analysis.

³ Officer Klaas also testified that he told Deputy Breuer that there were beer cans in the car. Deputy Breuer did not testify that Officer Klaas had informed him of beer cans in the car. The trial court did not make a finding on this point and did not consider this testimony in making its ruling of probable cause. Since the court made no factual finding, we do not consider Officer Klaas's testimony on the beer cans in our analysis of probable cause.

⁴ The trial court discussed the conflicting evidence on whether Officer Klaas told Deputy Breuer he could smell the odor of intoxicants coming from Merkes or from the vehicle. We read the court's summary of the facts establishing probable cause as indicating that the court found that Officer Klaas told Deputy Breuer the smell of intoxicants was coming from Merkes. However, our analysis would not differ if the court found that Officer Klaas told Deputy Breuer that the smell of intoxicants was coming from her vehicle, since she was the only person in the vehicle.

DISCUSSION

¶6 Merkes contends that the trial court erred in concluding there was probable cause to arrest her. She argues that the only facts available to the officer were that the vehicle driven by Merkes attempted to stop at the intersection but slid through it and that there was an odor of intoxicants coming either from Merkes or from her vehicle, and these facts are insufficient for probable cause.

¶7 In determining whether probable cause exists, we look to the totality of the circumstances. *State v. Babbitt*, 188 Wis. 2d 349, 356, 525 N.W.2d 102 (Ct. App. 1994). The inquiry is whether the arresting officer's knowledge at the time of arrest would lead a reasonable police officer to believe that the defendant was operating a motor vehicle while under the influence of an intoxicant. *Id.* The State need not show evidence sufficient to prove guilt beyond a reasonable doubt, nor even to show that guilt is more probable than not. *State v. Truax*, 151 Wis. 2d 354, 360, 444 N.W.2d 432 (Ct. App. 1989). Rather, we look to the totality of the circumstances, *Babbitt*, 188 Wis. 2d at 356, to determine whether the objective facts would "lead a reasonable officer to believe that guilt is more than a possibility." *Truax*, 151 Wis. 2d at 360.

¶8 We accept the facts as found by the trial court unless clearly erroneous, *State v. Eckert*, 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996), but we decide de novo whether these facts meet the standard for probable cause. *Babbitt*, 188 Wis. 2d at 356.

¶9 We conclude that the facts within Deputy Breuer's knowledge at the time he placed Merkes under arrest were sufficient to lead a reasonable officer to believe that Merkes was driving under the influence of an intoxicant. Knowledge that an odor of intoxicants was coming from Merkes would lead a reasonable

officer to believe that Merkes had consumed alcohol. Knowledge that Merkes did not stop at the stop sign and ran into another vehicle would leave a reasonable officer to believe that Merkes had consumed enough alcohol to affect her ability to drive safely.⁵

¶10 Merkes also argues that the officer lacked probable cause because the officer failed to perform field sobriety tests before placing Merkes under arrest. Merkes cites as support *State v. Swanson*, 164 Wis. 2d 437, 454 n.6, 475 N.W.2d 148 (1991), which states that “[u]nexplained erratic driving, the odor of alcohol, and the coincidental time of the incident form the basis for a reasonable suspicion but should not, in the absence of a field sobriety test, constitute probable cause”

¶11 However, this court previously explained that field sobriety tests are not always necessary to establish probable cause for driving while intoxicated. *State v. Kasian*, 207 Wis. 2d 611, 622, 558 N.W.2d 687 (Ct. App. 1996). The question of probable cause is properly assessed on a case-by-case basis. *Id.* Such tests were not necessary in this case because, as we have already concluded, the circumstances within Deputy Breuer’s knowledge were sufficient to permit a reasonable officer to conclude there was probable cause.

By the Court.—Judgment affirmed.

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

⁵ WISCONSIN STAT. § 346.63(2)(a)1 prohibits driving “[u]nder the influence of an intoxicant ... to a degree which renders [one] incapable of safely driving.”

