COURT OF APPEALS
DECISION
DATED AND FILED

February 27, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2561-CR **Cir. Ct. No. 00-CT-290**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DOUGLAS G. SKENANDORE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Ozaukee County: JOSEPH D. MC CORMACK, Judge. *Affirmed.*

¶1 ANDERSON, J.[1] Douglas G. Skenandore appeals from a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant (OWI), third offense, pursuant to WIS. STAT. §§ 346.63(1)(a) and

[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.

346.65(2)(c). On appeal, Skenandore argues that the trial court erred in denying a pretrial motion to suppress the results of a blood test performed on him following his arrest. The motion alleged that the officer lacked probable cause to arrest Skenandore for operating a motor vehicle while under the influence of an intoxicant and therefore the draw of Skenandore's blood was illegal. We conclude, based on the totality of the circumstances, that probable cause existed to support an arrest, and the trial court properly denied Skenandore's motion to suppress the results of the blood test. We therefore affirm the judgment.

¶2 On June 6, 2000, at approximately 9:30 p.m., Ozaukee County Sheriff's Deputy Elizabeth Vargo was dispatched to the scene of a motorcycle accident. When Vargo arrived at the scene, she observed a motorcycle approximately thirty feet off the roadway in a farm field. There appeared to be no other vehicles involved and the motorcycle was damaged in the accident. It appeared to Vargo that the motorcycle driver had been traveling on County Highway Y when he failed to negotiate a curve and drove into the field.

¶3 Vargo found Skenandore at a nearby home being attended to by ambulance personnel. At that point, Vargo was unable to obtain any information beyond name and date of birth, or perform any field sobriety tests on Skenandore. Vargo proceeded to the hospital to which Skenandore was transported.

¶4 At the hospital, Vargo was able to speak to Skenandore and he acknowledged that he was the only person on the motorcycle. Hospital personnel continued to treat Skenandore throughout Vargo's questioning. During this exchange, Vargo smelled an odor of intoxicants on Skenandore's breath. Furthermore, while at the hospital, Vargo heard Skenandore say that he was on his way from one bar to another bar when the accident occurred. Based on this

information, Vargo issued Skenandore a citation for operating a motor vehicle while under the influence of an intoxicant and, upon Vargo's request, Skenandore consented to a blood draw.

¶5 Skenandore filed a pretrial motion to suppress the results of the blood test conducted on him. The motion was based on Skenandore's allegation that Vargo lacked probable cause to arrest him for operating a motor vehicle while under the influence of an intoxicant and, consequently, the blood test was illegal under the Implied Consent Law. After a hearing was conducted, the trial court denied Skenandore's motion to suppress, concluding that probable cause did exist. Skenandore then changed his plea to guilty. The court found him guilty and sentenced him accordingly.

¶6 The facts in this case are undisputed; however, as the State points out, the record does disclose factually that Vargo heard Skenandore state that he was en route from one bar to another bar in Jackson. Whether undisputed facts constitute probable cause is a question of law that is reviewed without deference to the trial court. ***State v. Babbitt***, 188 Wis. 2d 349, 356, 525 N.W.2d 102 (Ct. App. 1994); *see also* ***State v. Drogsvold***, 104 Wis. 2d 247, 256, 311 N.W.2d 243 (Ct. App. 1981).

¶7 While probable cause for an arrest without a warrant requires that an officer have more than a mere suspicion, he or she does not need the same quantum of evidence necessary for conviction but only information which would lead a reasonable officer to believe that guilt is more than a possibility; this information can be based in part on hearsay. ***State v. DiMaggio***, 49 Wis. 2d 565, 572-73, 182 N.W.2d 466 (1971). *See also* WIS. STAT. § 968.07(1)(d).

¶8 We must look to the "totality of the circumstances within the arresting officer's knowledge at the time of the arrest." ***State v. Koch***, 175 Wis. 2d 684, 701, 499 N.W.2d 152 (1993). Probable cause is judged by the factual and practical considerations of everyday life in 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). Additionally, "[t]he quantum of information which constitutes probable cause to arrest must be measured by the facts of the particular case." ***State v. Wilks***, 117 Wis. 2d 495, 502, 345 N.W.2d 498 (Ct. App. 1984), *aff'd*, 121 Wis. 2d 93, 358 N.W.2d 273 (1984).

¶9 Skenandore argues that the odor of alcohol in conjunction with the circumstances of the motorcycle accident were insufficient to establish probable cause to believe that he was operating while under the influence of an intoxicant. Skenandore relies on ***State v. Swanson***, 164 Wis. 2d 437, 453-54 n.6, 475 N.W.2d 148 (1991), to argue that absent a field sobriety test, the odor of alcohol coupled with the accident only gives rise to a reasonable suspicion. The ***Swanson*** court explained:

> Unexplained 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 to arrest someone for driving while under the influence of intoxicants.

Id.

¶10 However, in this case, Vargo was unable to further her investigation through a field sobriety test due to the severity of Skenandore's injuries. Furthermore, in ***State v. Wille***, 185 Wis. 2d 673, 684, 518 N.W.2d 325 (Ct. App. 1994), the court stated:

> The ***Swanson*** footnote does not mean that under all circumstances the officer must first perform a field sobriety test, before deciding whether to arrest for operating a motor vehicle while under the influence of an intoxicant.

Therefore, the lack of a field sobriety test is not fatal in this case.

¶11 Skenandore also argues that in ***State v. Seibel***, 163 Wis. 2d 164, 180-83, 471 N.W.2d 226 (1991), where 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. However, what the ***Seibel*** court said was, "[w]hile none of these indicia alone would give rise to a reasonable suspicion that the defendant's driving was impaired by alcohol, taken together they gave the police reason to suspect that the defendant's driving was impaired by alcohol." ***Id.*** at 183. The ***Seibel*** court did not apply these indicia to a probable cause analysis and, therefore, Skenandore's argument is misguided.

¶12 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. *See* ***County of Dane v. Sharpee***, 154 Wis. 2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990). In this case, Vargo was faced with a one-vehicle accident, an odor of intoxicants on Skenandore's breath, an inability to perform a field sobriety test along with trying to question a patient during treatment, and a statement by Skenandore saying he was en route from one bar to another bar. Based on the totality of the circumstances, in this particular case, a reasonable officer in Vargo's position would believe that Skenandore's guilt was more than a possibility. Therefore, we conclude that probable cause existed to

support an arrest and the trial court properly denied Skenandore's motion to suppress the results of the blood test.

By the Court.—Judgment affirmed.

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