

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 9, 2002

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.

**Appeal No. 01-2834-CR
STATE OF WISCONSIN**

Cir. Ct. No. 00-CT-1726

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NICOLE LOPEZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
STUART A. SCHWARTZ, Judge. *Affirmed.*

¶1 DYKMAN, J.¹ Nicole Lopez appeals from a judgment convicting her of operating a motor vehicle while intoxicated, second offense. She contends

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

that no probable cause existed to arrest her and therefore the circuit court erred when it denied her motion to suppress. Because we conclude that the officer had probable cause to arrest Lopez, we affirm.

BACKGROUND

¶2 On June 30, 2000, at approximately 1:13 a.m., Officer Deanna Reilly of the City of Madison Police received a dispatch call regarding a possibly impaired driver. The dispatcher informed Reilly that a driver with a cellular phone was following a white jeep traveling at least fifteen miles over the posted speed limit, going across lanes and honking the horn. The dispatcher informed Reilly that the callers had followed the jeep to 129 North Fifth Street, the address where the jeep was registered.

¶3 Upon arriving at the scene, Reilly learned from the callers that the female who had been driving the jeep had exited the jeep and entered the residence. While talking with Reilly, the callers saw Lopez walk by the living room window. The window was illuminated well enough from inside so that one of the callers identified Lopez as the driver of the jeep. Lopez opened the window, leaned her elbows on the window ledge, and watched Reilly and the callers as they continued their conversation outside. Reilly called to Lopez through the open window. When Reilly asked if Lopez knew the callers or if there had been a confrontation between them, she responded that “everything was fine” and that she had not been driving that night. During this conversation, Reilly noticed that Lopez exhibited slurred speech, lack of motor control, and a somewhat unsteady stance. Lopez at first refused to come outside or allow Reilly inside. However, after further urging by Reilly, Lopez allowed Reilly to enter the residence.

¶4 Once inside, Reilly detected an odor of intoxicants on Lopez's breath. Lopez told Reilly that she had been on her couch sleeping. When Reilly asked Lopez why she smelled like alcohol if she had been sleeping, Lopez had no response. When Reilly asked Lopez to perform field sobriety tests, Lopez initially refused and asked Reilly to leave. Reilly concluded that Lopez had been operating a motor vehicle while under the influence of an intoxicant and told Lopez that she was going to place her under arrest. Lopez acquiesced to field sobriety tests, and was then arrested.

¶5 Lopez filed a motion to suppress all evidence obtained by Reilly after Lopez asked Reilly to leave. The trial court found that Reilly had probable cause to arrest, and denied the motion. On June 4, 2001, Lopez pleaded no contest and was convicted of operating a motor vehicle while intoxicated, second offense. She appeals.

ANALYSIS

¶6 Lopez does not argue on appeal that she did not give her voluntary consent to Reilly to enter the residence. The sole issue is whether Reilly had probable cause to arrest Lopez when Lopez asked Reilly to leave. Whether probable cause to arrest exists based on the facts of a given case is a question of law that we review independently of the trial court. *See State v. Truax*, 151 Wis. 2d 354, 360, 444 N.W.2d 432 (Ct. App. 1989). In determining whether probable cause exists, we must look to the totality of the circumstances to determine whether 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 of an intoxicant. *State v. Babbitt*, 188 Wis. 2d 349, 356, 525 N.W.2d 102 (Ct. App. 1994). The conclusion must be

based on more than a suspicion that the defendant committed a crime, but the evidence need not 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).

¶7 Reilly based her belief that Lopez was operating a motor vehicle while under the influence of an intoxicant upon five factors: (1) observations by the callers that Lopez was driving erratically; (2) Lopez’s slurred speech; (3) Lopez’s lack of motor control; (4) the odor of intoxicants on Lopez; and (5) Lopez’s refusal to perform field sobriety tests.² We conclude that these factors could lead a reasonable police officer to believe that Lopez was operating a motor vehicle while under the influence of an intoxicant and therefore were sufficient to establish probable cause to arrest Lopez.

¶8 Lopez argues that *State v. Swanson*, 164 Wis. 2d 437, 475 N.W.2d 148 (1991), supports her contention that the officer did not have probable cause to arrest her. She first relies on a frequently cited *Swanson* footnote, and argues that probable cause does not exist without the administration of a field sobriety test. *Swanson*’s footnote six states in relevant part: “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.* at 454 n.6.

² *State v. Babbitt*, 189 Wis. 2d 349, 525 N.W.2d 102 (Ct. App. 1994), held that because a defendant’s refusal to perform a field sobriety test is not protected by the Fifth Amendment privilege against self-incrimination, and it presents some evidence of consciousness of guilt, it should be admissible for the purpose of establishing probable cause to arrest. 188 Wis. 2d at 359-60. Lopez’s refusal to submit to the field sobriety test is a proper factor to consider in determining whether Reilly had probable cause to arrest her.

¶9 We have previously explained that this footnote’s language is not as broad as Lopez contends. “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.” *State v. Wille*, 185 Wis. 2d 673, 684, 518 N.W.2d 325 (Ct. App. 1994). “In some cases, the field sobriety tests may be necessary to establish probable cause; in other cases, they may not.” *State v. Kasian*, 207 Wis. 2d 611, 622, 558 N.W.2d 687 (Ct. App. 1996).

¶10 Lopez exhibited more indicia of intoxication than did Swanson. Unlike Swanson, Lopez displayed slurred speech and lack of motor skills. Swanson’s driving was erratic; Lopez’s driving was also erratic, including speeding at least fifteen miles above the speed limit and crossing lanes of traffic while honking her car’s horn. Regardless of whether Lopez’s erratic driving rises to the same level as Swanson’s, Lopez’s erratic driving, coupled with the other factors surrounding her arrest, gave Reilly probable cause to arrest her. Thus, we reject Lopez’s contention that the circumstances surrounding her arrest amount only to reasonable suspicion and not probable cause.

¶11 *Kasian* and *Wille* support this conclusion. In *Kasian*, we concluded there was probable cause to arrest when the defendant was involved in a one-car accident, exhibited slurred speech and had an odor of intoxicants. 207 Wis. 2d at 622. In *Wille*, we concluded there was probable cause to arrest when the defendant rear-ended a parked car, had an odor of intoxicants and made a statement that he “had to quit doing this.” 185 Wis. 2d at 683. Lopez exhibited both slurred speech and an odor of intoxicants. Although Lopez was not involved in an accident and did not make a statement indicating a consciousness of guilt, her erratic driving, lack of motor control, slurred speech and refusal to perform the

requested field sobriety test together with the odor of intoxicants about her give a more convincing picture than the one in *Swanson*.

¶12 Lopez's case is more akin to *Kasian* and *Wille* than to *Swanson*. Accordingly, we conclude that Reilly had probable cause to arrest Lopez. The trial court correctly denied her motion to suppress the evidence Reilly obtained.

By the Court.—Judgment affirmed.

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

