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DISTRICT II

August 10, 2022

To:

Hon. LaKeisha Haase
Circuit Court Judge
Electronic Notice

John M. Carroll
Electronic Notice

Tara Berry
Clerk of Circuit Court
Winnebago County Courthouse
Electronic Notice

Michael C. Sanders
Electronic Notice

You are hereby notified that the Court has entered the following opinion and order:

2021AP1208-CR

State of Wisconsin v. Joey J. Wilke (L.C. #2020CF78)

Before Gundrum, P.J., Neubauer and Grogan, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Joey J. Wilke appeals from a judgment entered after he pled no contest to operating a motor vehicle under the influence of an intoxicant or other drug, fifth or sixth offense (OWI). He argues the police officer lacked probable cause to arrest him for OWI, and therefore the circuit court should have granted his suppression motion and dismissed the charges against him. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).¹ We affirm.

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

In May 2020, a citizen witness² driving southbound on Highway 41 in Winnebago County called the police to report a red Saturn SUV driving recklessly. According to police, the witness stated she noticed the SUV “coming up behind her at a high rate of speed,” which caused her to change lanes and let the SUV pass out of concern for her safety. The witness reported she next saw the SUV “driving at a low rate of speed,” and she passed it only to then see the SUV “flying up behind her[.]” She also observed the SUV “swerving in and out of its lane as well as almost crashing into [a] concrete barrier.” As the SUV passed her a second time, she observed the driver—later identified as Wilke—“scratching at his neck area or itching his neck area” and “moving abruptly inside” of the SUV.

After passing the witness the second time, Wilke crashed his SUV, causing it to roll over and eject him “over the concrete side wall and between the concrete wall and the fence which divides the interstate and Washburn Avenue in the City of Oshkosh.” The witness did not see the crash, but she identified the crashed SUV as the one she had seen driving recklessly. The paramedics who transported Wilke to the hospital told police Wilke admitted to consuming alcohol before the crash. Winnebago County Sheriff Deputy Jesse Simmons spoke with Wilke while he was in the emergency room at the hospital. When Simmons asked Wilke if he had consumed alcohol before the crash, Wilke did not answer, and when Simmons told Wilke the paramedics said Wilke confessed to consuming alcohol during the transport to the hospital, Wilke again remained silent. Based on all of the information Simmons had, he decided “[t]o pursue the OWI investigation” and read Wilke the Informing the Accused form. Wilke then

² The citizen witness did not testify at the suppression hearing; rather, Deputy Simmons, who did testify, recounted his conversation with the witness.

consented to a blood test. The blood test did not show the presence of ethanol in Wilke's blood, but it did show the presence of several controlled substances.³

The State charged Wilke with two counts: (1) operating a motor vehicle while under the influence as a fifth or sixth offense contrary to WIS. STAT. §§ 346.63(1)(a), 939.50(3)(g), and 346.65(2)(am)5; and (2) operating with a detectable amount of a restricted controlled substance in his blood as a fifth or sixth offense contrary to §§ 346.63(1)(am), 939.50(3)(g), and 346.65(2)(am)5. After the circuit court denied Wilke's motion to suppress, Wilke agreed to plead no contest to one count with the other count being dismissed and read in.⁴ The circuit court withheld sentence and placed Wilke on two years' probation with six months' conditional jail time.⁵ Wilke now appeals.⁶

Wilke argues that Deputy Simmons lacked probable cause to arrest him for OWI because the information Simmons had at the time of arrest was insufficient to conclude Wilke probably committed the offense. The State counters that under the totality of the circumstances, the information Simmons had "was easily sufficient for probable cause that Wilke violated" WIS. STAT. § 346.63(1). The circuit court found that the paramedics' report of Wilke's admission to

³ The test showed the presence of oxycodone, clonazepam, D-9 THC, Fentanyl, and Norfentanyl.

⁴ The judgment does not indicate that the other charge was dismissed and read in.

⁵ The circuit court granted Wilke's motion to stay the conditional jail time pending appeal.

⁶ Having reviewed Wilke's appellate briefs, it is clear that Wilke's counsel quoted portions of the suppression hearing transcripts without properly utilizing quotation marks or otherwise attributing the quoted language. We remind counsel of the importance of accurately representing materials utilized, quoted, cited, and relied upon in appellate briefs.

drinking, the report about Wilke's reckless driving, and the accident were sufficient "to form a basis for probable cause[.]" We agree.

Police have "probable cause to arrest 'when the totality of the circumstances within that officer's knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant probably committed a crime.... The objective facts before the police officer need only lead to the conclusion that guilt is more than a possibility.'" *State v. Sykes*, 2005 WI 48, ¶18, 279 Wis. 2d 742, 695 N.W.2d 277 (omission in original; citation omitted). We will not disturb the circuit court's findings of fact unless they are clearly erroneous; however, we review the circuit court's probable cause determination independently. *Id.*, ¶12.

The gist of Wilke's challenge is that without any of the ordinary indicators for OWI such as odor of alcohol, slurred speech, bloodshot eyes, or field sobriety tests, Simmons lacked probable cause to arrest for OWI. Additionally, Wilke criticizes Simmons' reliance on the paramedics' statement that Wilke admitted to consuming alcohol without any other supporting information⁷ and a citizen witness's observation of reckless driving.

Even absent the ordinary OWI indicators, the record demonstrates that Simmons had sufficient information to satisfy the probable cause standard. This is not a case where Wilke was arrested for OWI based only on his unsafe driving. Rather, Simmons had information beyond Wilke's unsafe driving which gave him reason to believe Wilke was probably driving under the influence of an intoxicant. First, Simmons knew Wilke had confessed to the paramedics during

⁷ During the suppression hearing, Wilke testified that he did not recall having been asked about alcohol consumption. Whether he recalled having been asked, however, does not inherently mean that he was not asked, and Deputy Simmons testified that Wilke did not respond when Simmons told him about the paramedics' statement or when he asked Wilke if he had been drinking.

transport to the hospital that he had consumed alcohol before the crash, and an admission to drinking is a factor that supports probable cause. *See State v. Lange*, 2009 WI 49, ¶37, 317 Wis. 2d 383, 766 N.W.2d 551 (admission of drinking “strengthens the existence of probable cause”). Moreover, Wilke did not deny consuming alcohol when asked by Simmons; rather, he simply remained silent both when Simmons asked if he had been drinking and when Simmons told Wilke the paramedics reported Wilke’s admission of drinking.

Second, Simmons had the report from a credible and reliable citizen witness that Wilke had been driving recklessly at erratic speeds, was swerving between lanes, almost hit a concrete barrier, and made abrupt movements inside his vehicle.⁸ This supports probable cause. *See State v. Bentley*, 92 Wis. 2d 860, 864, 286 N.W.2d 153 (Ct. App. 1979) (recognizing “information from a witness who had observed [defendant’s] vehicle travelling in an erratic manner, crossing the centerline and going onto the shoulder of the road just prior to the accident” as a probable cause factor).

Third, Simmons knew Wilke crashed his SUV, rolled it, and was ejected from it without any other explanation for the accident besides impairment. The accident occurred in daylight with clear skies and a dry, straight, and level road. A crash under such circumstances supports probable cause. *See id.* (relying on an accident with serious injury as a factor supporting probable cause); *State v. Kasian*, 207 Wis. 2d 611, 622, 558 N.W.2d 687 (Ct. App. 1996) (using one-vehicle accident as a factor supporting probable cause).

⁸ Wilke asserts the citizen witness was not reliable or credible but provides nothing to convince us of his assertion. The circuit court implicitly found both the citizen witness and the paramedics to be credible by rendering a decision based on their statements. We see no reason to disturb the circuit court’s assessment.

The factors Simmons relied on establish probable cause to believe Wilke was driving under the influence.⁹ These objective facts lead to a reasonable conclusion that Wilke’s guilt was more than a possibility. *See State v. Blatterman*, 2015 WI 46, ¶35, 362 Wis. 2d 138, 864 N.W.2d 26 (“The probable cause requirement ‘deals with probabilities’ and must be sufficient ‘to lead a reasonable officer to believe that guilt is more than a possibility.’” (citation omitted)).

Wilke makes much of the fact that Simmons used the word “possibly” instead of “probably” at one point during his suppression hearing testimony. The testimony came in response to a question about whether Simmons was “investigating anything” at the time he went to the hospital to make contact with Wilke. Simmons testified: “At that point after speaking to the reporting party [the citizen witness] and the fact that the individual had crashed and rolled over his vehicle there was an inclination that possibly he was an impaired driver.” As is evident from the transcript, this was a distinct point in time before Simmons knew Wilke told the paramedics he had been drinking. After learning that information and confronting Wilke—who did not deny drinking or confessing he had been drinking to the paramedics—Simmons had sufficient information to conclude that Wilke probably drove his SUV while under the influence.

⁹ The State also points to Simmons’ knowledge that Wilke had four prior OWI-related convictions, which made him subject to the .02 blood alcohol concentration restriction as factors to establish probable cause. *See* WIS. STAT. § 340.01(46m)(c). Wilke argues in his Reply brief that the only place in the Record this information appears is the Complaint, which was filed seven months after the incident. It is unclear from the Record as to whether Simmons had this information at the time of the arrest, and we therefore do not rely on it.

Therefore,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals