COURT OF APPEALS DECISION DATED AND FILED

December 22, 2004

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. 04-2129-CR

Cir. Ct. No. 02CT000489

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN H. ELLINGER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Fond du Lac County: STEVEN W. WEINKE, Judge. *Affirmed*.

¶1 NETTESHEIM, J.[1] John H. Ellinger appeals from a judgment of conviction for operating a motor vehicle while intoxicated (OWI) pursuant to WIS.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version.

STAT. § 346.63(1)(a).[2] Ellinger pled no contest to the charge following the denial of his motion to suppress the results of a chemical test of his blood based upon his claim that probable cause did not support his arrest. On appeal, Ellinger renews his claim that his arrest was invalid. We affirm the judgment.

BACKGROUND

¶2 The State does not dispute Ellinger's recital of the relevant facts. During the early morning hours of July 5, 2002, Patrolman Raymond Olig was dispatched to a motor vehicle accident scene involving two motorcycles in the Town of Lamartine, Fond du Lac County. Upon arrival, Olig observed an individual, later identified as Ellinger, lying in the roadway unconscious. Olig also observed another person, later identified as Lawrence Prost, sitting on the shoulder of the roadway.

¶3 Olig immediately checked Ellinger, observing that he had a severe head injury and was bleeding from the ears. Olig also detected an odor of intoxicants emanating from Ellinger. Olig then obtained Ellinger's driver's license and learned his identity. By this time the paramedics were on the scene, and they transported Ellinger to a local hospital by flight. Olig estimated that he was in Ellinger's presence for "a couple of minutes."

¶4 Olig then asked Prost what had happened. Prost responded that he couldn't say exactly what had happened. Olig also detected an odor of intoxicants emanating from Prost during this conversation. Olig then asked Prost if "they"

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[2] Ellinger was sentenced as a third-time offender pursuant to WIS. STAT. § 346.65(2)(c).

had been drinking, and Prost responded "yes." Prost was also transported to a hospital for medical treatment.

¶5 Olig's inspection of the accident scene revealed skid and gouge marks in the pavement leading to the location of one of the downed motorcycles. From his investigation, Olig concluded that Prost and Ellinger had been traveling in the same direction at the time of the accident.

¶6 At Olig's request, other police at the hospital to which Ellinger had been transported obtained a sample of Ellinger's blood pursuant to the implied consent law. Later testing established a blood alcohol concentration of .098% by weight of alcohol.

¶7 The State charged Ellinger with OWI and with operating a motor vehicle with a prohibited blood alcohol content (BAC).[3] Ellinger responded with a motion to suppress, claiming that his arrest was not supported by probable cause. In support, Ellinger relied principally on the supreme court's footnoted statement in ***State v. Swanson***, 164 Wis. 2d 437, 453, n.6, 475 N.W.2d 148 (1991), that absent field sobriety tests confirming a suspicion of intoxication, unexplained erratic driving and the odor of alcohol do not constitute probable cause to support an arrest for OWI.

¶8 In a terse bench ruling, the trial court denied Ellinger's argument stating, "It flies so much in the face of common sense and what the law is as far as implied consent is concerned." The court did not specifically address Ellinger's

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[3] WISCONSIN STAT. § 885.235(1g)(cd) states that a blood alcohol concentration of 0.08% or more is prima facie evidence of intoxication of a person with two prior OWI or BAC convictions.

argument under ***Swanson***. Following the court's ruling, Ellinger pled no contest to OWI and the State dismissed the BAC charge. Ellinger appeals, challenging the trial court's denial of his motion to suppress.

DISCUSSION

¶9 We begin by addressing ***Swanson***. There the supreme court stated:

> 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…. Without such a test, the police officers could not evaluate whether the suspect's physical capacities were sufficiently impaired by the consumption of intoxicants to warrant an arrest.

Id. Since he was unable to perform any field sobriety tests, Ellinger argues that Olig did not have probable cause to arrest him and therefore the trial court was duty bound to suppress the blood test result.

¶10 We acknowledge that the supreme court's language in ***Swanson*** facially supports Ellinger's probable cause challenge. However, this language has been clarified by later cases. In ***State v. Wille***, 185 Wis. 2d 673, 684, 518 N.W.2d 325 (Ct. App. 1994), the court of appeals said:

> 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.

Still later, the court of appeals said, "Thus, the question of probable cause is properly assessed on a case-by-case basis. 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). Thus, we

reject Ellinger's threshold argument that the absence of field sobriety tests in this case rendered his arrest illegal as a matter of law.[4]

¶11 With ***Swanson*** placed in its proper perspective, we now move to Ellinger's probable cause challenge. We begin with our standard of review. The question of whether a given set of facts constitutes probable to arrest presents a question of law which we review independently of the trial court. ***Kasian***, 207 Wis. 2d at 621.

¶12 Next, we address the test for probable cause. In making a probable cause determination, we ask whether the totality of the circumstances would lead a reasonable police officer to believe that the defendant was operating a motor vehicle while intoxicated. ***Id***. In applying this test, we must bear in mind that probable cause is a flexible, commonsense measure of the plausibility of particular conclusions about human behavior—conclusions that need not be unequivocally correct or even more likely correct than not. ***State v. Pozo***, 198 Wis. 2d 705, 711, 544 N.W.2d 228 (Ct. App. 1995). Probable cause is measured from the standpoint of the reasonable police officer, including his or her experience, not from the perspective of a legal technician. ***Id***. at 712 ("The evidence … must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." (citation omitted)).

¶13 Finally, we observe that a probable cause determination does not include weighing the State's and the defendant's competing evidence. *See* **State v.**

[4] For the same reasons, we reject Ellinger's reliance on ***State v. Seibel***, 163 Wis. 2d 164, 471 N.W.2d 226 (1991), a case which preceded ***State v. Swanson***, 164 Wis. 2d 437, 475 N.W.2d 148 (1991). Both cases must be read in light of subsequent appellate decisions.

Nordness, 128 Wis. 2d 15, 36, 381 N.W.2d 300 (1986). Thus, the court does not choose between reasonable inferences if one of those inferences supports a basis for probable cause. *See* ***State ex rel. McCaffrey v. Shanks***, 124 Wis. 2d 216, 236, 369 N.W.2d 743 (Ct. App. 1985). As the United States Supreme Court has said:

> "innocent behavior will frequently provide the basis for a showing of probable cause," and that "[i] n making a determination of probable cause the relevant inquiry is not whether the particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts."

United States v. Sokolow, 490 U.S. 1, 10 (1989) (citation omitted).

¶14 The elements of OWI are: (1) the defendant's operation of a motor vehicle; and (2) at the time of such operation, the defendant was under the influence of an intoxicant. WIS JI—CRIMINAL 2668. Here, Olig had clear probable cause to believe that Ellinger had operated a motor vehicle and Ellinger does not contend otherwise. Rather, Ellinger contends Olig did not have probable cause to believe that he was intoxicated at the time of such operation.

¶15 In particular, Ellinger points to Olig's question to Prost inquiring whether "they" had been drinking and Prost's "yes" response. Ellinger argues that Olig failed to unambiguously establish that his reference to "they" included Ellinger. Ellinger argues that this pronoun "could refer either to [Ellinger], unknown drinking companions, or a misuse of the first person by the officer." However, this argument represents a hyper-technical analysis of the exchange between Olig and Prost. Instead, we apply a commonsense meaning to the exchange between Olig and Prost. Given the setting—only two persons on the scene during the early morning hours, both having driven motorcycles involved in a singular accident, and both giving off the odor of intoxicants—it strains logic

and common sense to conclude that Prost would have construed Olig's question about "they" as referring to any persons other than he and Ellinger. In short, Ellinger is engaging in the "library analysis by scholars" rejected by the law. *See* ***Pozo***, 198 Wis. 2d at 712.

¶16 Ellinger also complains that Olig did not investigate the possibility that other factors, such as a mechanical defect, may have caused the accident. We disagree for two reasons. First, we question the practicality of such an approach under the facts of this case. Olig was confronted with a serious accident scene during the hours of darkness. He presumably had a variety of duties—traffic control, tending to the injured, and investigating a possible OWI incident. To require a meaningful and informed examination of the vehicles *before* making an arrest overlooks the exigencies of the moment.

¶17 Second, Ellinger's argument runs afoul of the principle noted earlier that a probable cause analysis does not require or permit a court to weigh the defendant's competing evidence on the probable cause question. *See* **Sokolow**, 490 U.S. at 10; ***Nordness***, 128 Wis. 2d at 36. At best, the presence of a mechanical failure would serve to raise a competing reasonable inference on the question of probable cause, but it does not bar the officer from choosing the probable cause version that supports the arrest. Instead, the "mechanical failure" defense is best left to the prosecutor in the charging decision or to the fact-finder at trial.

¶18 As to the ultimate question of probable cause, we uphold the trial court's determination that probable cause supported Ellinger's arrest. Olig was dispatched to an accident scene involving Prost and Ellinger. His investigation revealed that that the two had collided with each other while operating their

motorcycles in the same direction during the early morning hours. He detected the odor of intoxicants on each, and Prost admitted that they had been drinking. While this is a close case because Ellinger was unable to perform any field sobriety tests, it is the fact of the accident that tips the scales in favor of probable cause. It is common knowledge that a person's ability to operate a motor vehicle is impaired by drinking. The standard jury instruction says as much: "What must be established is that the person has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle." WIS JI—CRIMINAL 2668. Here, the totality of the circumstances would establish a reasonable inference in the mind of a reasonable police officer that Ellinger's ability to safely operate his motorcycle was impaired by his drinking.

CONCLUSION

¶19 We uphold the trial court's ruling that Olig had probable cause to arrest Ellinger. Therefore, the court correctly denied Ellinger's motion to suppress. We affirm the judgment of conviction.

By the Court.—Judgment affirmed.

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