

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 13, 2008

David R. Schanker
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. 2008AP6-CR

Cir. Ct. No. 2006CT6455

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHARLENE A. MOON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: GLENN H. YAMAHIRO, Judge. *Affirmed.*

¶1 FINE, J. Charlene A. Moon appeals a judgment convicting her on her guilty plea of operating a car under the influence of an intoxicant as a second offense. See WIS. STAT. §§ 346.63(1)(a); 346.65(2)(am)2; 343.307(1)(a). She

claims that the deputy sheriffs who arrested her lacked probable cause for the arrest.¹ We affirm.

I.

¶2 The only persons who testified at the suppression hearing were the two deputy sheriffs who stopped and arrested Moon. Their testimony tracked one another's and established the following.

¶3 At around 8 p.m. in September of 2006, Moon was driving north on Highway 45 in Milwaukee County when she passed the deputy sheriffs, who were driving in the left lane. As one of them told the trial court, Moon passed the deputies' squad car "faster than the speed limit," and that this "perked my attention."

The defendant's vehicle was going from the center lane to the right lane, abruptly changing lanes, going from lane two, exiting directly off the freeway on the Silver Spring off ramp. I went to follow the vehicle off the off ramp. Subject vehicle didn't stop at the stoplight. All this behavior was excessive risk taking, associated with impaired driving.

During this time, Moon never used her turn signals. The stoplight at the end of the off ramp was red and although Moon slowed down she rolled through it. The deputies then stopped her.

¶4 When one of them spoke to her through her open driver-side window, he smelled "an intoxicating beverage coming from her" and he saw that

¹ A defendant may appeal the denial of a motion to suppress evidence even though he or she has pled guilty. *See* WIS. STAT. § 971.31(10). Both parties agree that this preserves Moon's objection to the lawfulness of her arrest, and we assume without deciding that it does.

her eyes were “bloodshot.” Further, “her speech was slightly slurred.” The other deputy confirmed this, describing the odor as “strong” and her eyes as “glassy, bloodshot.” He also told the trial court that when Moon got out of her car, “[s]he was unsteady on her feet.”

¶5 Moon told the deputies that she had trouble walking because of a bunion, for which she was taking medicine, the narcotic OxyContin, an open bottle of which she had with her, and, also that she had pins in her back from a recent surgery.² She also told them that she had four beers at a party from which she was coming, and that, as related by one of the deputies, she “should not have taken her medication while drinking.”³ She also said, as quoted by one of the deputies: “I didn’t realize that I had run the red light without stopping before I turned.”

¶6 Although, as testified to by the deputies and as found by the trial court, Moon’s bunion and recent back surgery prevented her from taking any of the physical field-sobriety tests as they were supposed to be given, she passed the sobriety test where the subject is asked to recite the alphabet.

¶7 The deputies arrested Moon for operating a car while under the influence of an intoxicant. The trial court found that the deputies had probable

² According to the United States Drug Enforcement Administration, “OxyContin® is the brand name of a time-release formula of the analgesic chemical oxycodone.” <http://www.usdoj.gov/dea/concern/oxycodone.html>. Oxycodone is a controlled substance. *See* WIS. STAT. § 961.16(2)(a)11. There is nothing in the Record that indicates that Moon did not lawfully have the drug in her possession.

³ According to the United States Food and Drug Administration, “Oxycodone may be expected to have additive effects when used in conjunction with alcohol, other opioids, or illicit drugs that cause central nervous system depression.” <http://www.fda.gov/cder/foi/label/2001/20553s022lbl.htm>.

cause to make the arrest “based upon the observations of the deputies with respect to the odor of intoxicants, the issues regarding balance and, more importantly, the admission regarding the use of alcohol in conjunction with the prescription narcotic medication.”

II.

¶8 The only issue on this appeal is whether the deputies had probable cause to arrest Moon.

There is 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, 753–754, 695 N.W.2d 277, 283 (ellipses in original, quoted source omitted). A trial court’s findings of fact are binding on us unless they are “clearly erroneous.” *Id.*, 2005 WI 48, ¶12, 279 Wis. 2d at 750, 695 N.W.2d at 282. Our review of the trial court’s probable-cause determination is, however, *de novo*. *Id.*, 2005 WI 48, ¶12, 279 Wis. 2d at 751, 695 N.W.2d at 282.

¶9 The crux of Moon’s argument is that she passed the recite-the-alphabet sobriety test and although she could not do the finger-tip-to-nose test as it was supposed to be done—with her feet together—she was able to touch her nose with at least part of her finger. Thus, she contends, she had to be let go and not arrested. This contention ignores all the indications that she *was* impaired: her slurred speech; her unsteadiness; her not realizing, as she admitted to one of the deputies, that she had rolled through the red light, rather than coming to a full stop; her admission that she had had four beers before getting into her car; and her

expression of regret that she had taken her medication while drinking (thus, acknowledging that doing so had at least the potential to impair her ability to drive a car safely). Although, as Moon points out, field-sobriety tests are usually the best indication of whether a person has crossed the threshold of impairment to warrant an arrest for drunk driving, see *State v. Swanson*, 164 Wis. 2d 437, 453–454 n.6, 475 N.W.2d 148, 155 n.6 (1991), *overruled on other grounds*, *Sykes*, 2005 WI 48, ¶27, 279 Wis. 2d at 758–759, 695 N.W.2d at 285–286; *State v. Wille*, 185 Wis. 2d 673, 684, 518 N.W.2d 325, 329 (Ct. App. 1994), here Moon’s ability to take field-sobriety tests other than the recite-the-alphabet test was either impossible or severely limited given her physical impairments. *Swanson* opined that the following circumstances in the absence of a failed field-sobriety test did not give officers probable cause to make an arrest:

The first indicia [*sic*] of criminal conduct included Swanson’s *unexplained* erratic driving. The second indicia [*sic*] included the odor of intoxicants emanating from Swanson as he spoke. The third indicia [*sic*] included the approximate time of the incident, which occurred at about the time that bars close in the state of Wisconsin.

Swanson, 164 Wis. 2d at 453 n.6, 475 N.W.2d at 155 n.6 (emphasis added). Contrary to the situation in *Swanson*, Moon’s erratic driving was *not* unexplained—as we have seen and as the trial court perceptively noted, Moon admitted that she had been drinking and taking a controlled-substance medication that she knew would or could impair her ability to drive safely. Significantly, WIS. STAT. § 346.63(1)(a) makes it unlawful for any person to drive a car “[u]nder the influence of an intoxicant, a controlled substance ... or any combination of an intoxicant, a controlled substance ... to a degree which renders him or her incapable of safely driving.”

¶10 As the trial court found, the totality of the circumstances when the deputies arrested Moon for drunk driving was sufficient to give them probable cause to do so. Accordingly, we affirm.

By the Court.—Judgment affirmed.

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

