

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 16, 2014

Diane M. Fremgen
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. 2014AP823-CR

Cir. Ct. No. 2013CT371

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JESSICA ANN STOFFLET,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sauk County:
PATRICK J. TAGGART, Judge. *Affirmed.*

¶1 LUNDSTEN, J.¹ Jessica Stofflet appeals the circuit court's judgment convicting her of operating a motor vehicle while intoxicated, as a

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version, the version in effect at all relevant times here.

second offense. Stofflet argues that the circuit court erred in denying her suppression motion because the officer who administered her preliminary breath test lacked the level of probable cause necessary for the test. I reject this and other arguments Stofflet makes, and affirm.

Background

¶2 The only witness who testified at the suppression hearing was the state patrol trooper who administered the preliminary breath test (PBT). The facts come from his testimony.

¶3 At around 4:30 a.m., while on patrol on Interstate 90/94, the officer observed a vehicle in the right-hand lane swerving over the white fog line and onto the shoulder of the roadway. The officer then saw the vehicle deviate within its lane and repeatedly cross over either the fog line or the white “dotted” line separating the right lane from the left lane. In addition, the officer observed the vehicle vary its speed, sometimes slowing down and sometimes speeding up. Immediately before the officer stopped the vehicle, the vehicle swerved into the left lane, engaged in hard braking, and slowed down to about 35 miles per hour in a 65-mile-per-hour zone. The officer characterized the manner in which the vehicle was being operated as unsafe.

¶4 The officer stopped the vehicle and made contact with the driver and sole occupant, identifying her as Stofflet. He detected a moderate odor of intoxicants coming from inside the vehicle and perceived that Stofflet’s speech was a little slow or slurred. In addition, the officer noticed that Stofflet’s right eye was bloodshot and glassy.

¶5 Stofflet told the officer that the officer had scared her because someone had recently been stalking or following her. She admitted that she was coming from a bar and had consumed “a couple” of drinks earlier that night, but said that her last drink was at 11:00. According to the officer, Stofflet also said that a can of beer had come open or blown up in or on her bag that evening.

¶6 Because it was raining, the officer asked Stofflet to submit to a PBT instead of field sobriety tests, viewing this as a courtesy. Stofflet submitted to the PBT, which registered a result of 0.18. After obtaining the PBT result, the officer told Stofflet that field sobriety tests would be necessary. Stofflet’s performance on the field sobriety tests and additional investigation led to Stofflet’s arrest.

¶7 In addition to hearing the officer’s testimony, the circuit court viewed and received into evidence a portion of a video that the officer recorded of the stop. The circuit court denied Stofflet’s suppression motion, concluding that there was probable cause for the PBT.

Discussion

¶8 Stofflet argues that the officer lacked the level of probable cause needed for a PBT. The standards that apply to this argument are summarized in *State v. Felton*, 2012 WI App 114, 344 Wis. 2d 483, 824 N.W.2d 871, *review denied*, 2013 WI 22, 346 Wis. 2d 284, 827 N.W.2d 374:

[WISCONSIN. STAT. § 343.303] does not require that the officer have probable cause to arrest a driver for drunk driving before giving that driver a preliminary-breath test. Rather, the statute’s phrase “probable cause to believe” refers to a quantum of proof greater than the reasonable suspicion necessary to justify an investigative stop ... but less than the level of proof required to establish probable cause for arrest.” Thus, a preliminary-breath test “may be requested when an officer has a basis to justify an investigative stop but has not established probable cause to

justify an arrest.[”] Whether [the officer] had probable cause to give [the defendant] a preliminary-breath test is a legal issue that we decide *de novo*, accepting the trial court’s findings of fact unless they are clearly erroneous....

....

... “The question of probable cause must be assessed on a case-by-case basis, looking at the totality of the circumstances. Probable cause is a ‘flexible, common-sense measure of the plausibility of particular conclusions about human behavior.’”

Id., ¶¶8-9 (quoted sources and citations omitted).

¶9 Here, I agree with the circuit court that the circumstances support a conclusion that, at the time the officer requested the PBT, there was “probable cause to believe” that Stofflet was operating a motor vehicle while intoxicated. *See* WIS. STAT. § 343.303. Those circumstances include that:

- The time was around 4:30 a.m.
- Stofflet engaged in a series of poor driving behaviors indicative of intoxicated driving: deviating within her lane; repeatedly swerving over the fog line or the “dotted” line between her lane and the left lane; varying her speed, sometimes slowing down and sometimes speeding up; swerving into the left lane, engaging in hard braking, and slowing down to about 35 miles per hour in a 65 mile-per-hour zone.
- Stofflet was the sole occupant of the vehicle, and the officer detected a moderate odor of intoxicants coming from inside the vehicle.
- Stofflet’s speech was a little slow or slurred.
- Stofflet’s right eye was bloodshot and glassy.
- Stofflet stated that the officer had scared her because someone had been stalking or following her recently.
- Stofflet admitted that she was coming from a bar and that she had consumed “a couple” of drinks earlier that night, although she claimed that she had not consumed a drink since 11:00.

- Stofflet claimed that a can of beer had come open or blown up in or on one of her bags that evening.

¶10 I agree with the circuit court that Stofflet’s series of poor driving behaviors, combined with other suspicious circumstances, were enough to provide probable cause for the PBT. Stofflet’s driving behaviors were highly indicative of intoxicated driving, and, when considered with the other indicators of intoxication, are sufficient.

¶11 Stofflet argues that her assertion about being stalked or followed, along with the fact that she told the officer she worked as a dancer at a bar, provided an innocent explanation for her driving behaviors.² She argues: “The fact that one with that profession was fearful when she witnessed an unknown car tailing her, after she had left work for the night, while driving on a semi-rural road in the early hours of the morning ... goes a long way toward explaining allegedly erratic driving” I disagree. In my view, her explanation adds to, rather than subtracts from, probable cause. Certainly it is possible that Stofflet’s assertions about being stalked might explain some of her driving behaviors. But the explanation does not explain all of Stofflet’s poor driving behaviors. For example, it is not a likely explanation for why she engaged in hard braking and slowed down to an excessively slow speed. While it might be reasonable to slow down a bit to see if a following vehicle will pass, Stofflet’s hard braking and excessively slow speed were likely indicative of intoxicated driving. That is to say, a reasonable officer could view Stofflet’s statement about a stalker as a quickly

² Stofflet makes reference to the video as support for an assertion that she told the officer that she is a dancer at the bar she was coming from. Although it is difficult to hear everything Stofflet says on the video, I assume that Stofflet informed the officer that she was a dancer at the bar.

made-up and poor excuse for obviously suspicious driving behavior. And, of course, if the facts support a reasonable inference of unlawful conduct, the officer is entitled to draw that inference “notwithstanding the existence of other innocent inferences that could be drawn.” See *State v. Anderson*, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990).

¶12 Similarly, Stofflet’s claim about an open or exploded beer can, while theoretically providing an innocent explanation for the odor of intoxicants coming from Stofflet’s vehicle, was an unlikely explanation for the odor and more likely an attempt to mislead the officer. Thus, Stofflet’s claim about the beer can is most reasonably viewed as adding to, rather than subtracting from, the facts supporting probable cause for the PBT.

¶13 Stofflet asserts that she has located no case in which poor driving behaviors alone were sufficient to provide probable cause for a PBT. That assertion goes nowhere because, although Stofflet’s series of poor driving behaviors is highly significant, those behaviors are not the only incriminating circumstances present.

¶14 Similarly, Stofflet appears to rely on the fact that she was not involved in an accident or “egregiously drunk.” But Stofflet provides no authority, and I know of none, requiring the presence of either of those circumstances to support probable cause for a PBT. Although Stofflet points to no case with circumstances similar to hers, one case that seems worth comparing is *Felton*, 344 Wis. 2d 483. In *Felton*, we concluded that there was probable cause for a PBT based on the following circumstances:

- [1] Felton’s eyes were glassy and bloodshot.
- [2] Felton smelled of alcohol.

- [3] Felton admitted to drinking three beers, two hours before [the officer] stopped him.
- [4] As the trial court found, [the officer] saw Felton “staying too long at one stop sign and then completely blowing another.”
- [5] [The officer] knew before he asked Felton to take the preliminary-breath test that Felton had other drunk-driving convictions

Id., ¶9. Here, I am satisfied that the pertinent circumstances are, on the whole, as incriminating as the facts relied on in *Felton*.

¶15 Stofflet may be arguing that the circuit court disregarded portions of the officer’s testimony about her driving behaviors because some of those behaviors were not clearly shown on the video. If that is her argument, I reject it. The circuit court’s decision makes plain that the court found that the officer would have been able to observe details that were not apparent on the video. The circuit court also found, based on the officer’s testimony, that some of Stofflet’s driving behaviors occurred before the officer started the video recording. Stofflet does not make a serious attempt to challenge these findings under the applicable standard of review. *See id.*, ¶8 (court of appeals accepts circuit court’s findings of fact unless those findings are clearly erroneous).

¶16 Stofflet may also be arguing that the circuit court made the finding that her speech was not slurred based on the court’s review of the video, in which slurred speech is not apparent. If so, I reject this argument. A more reasonable reading of the circuit court’s decision is that the court found that, although slurring may not have been noticeable on the video, the video did not undercut the officer’s in-person observation that Stofflet’s speech was a little slurred.

¶17 Stofflet seems to rely on the officer’s subjective belief about whether he had probable cause for a PBT or on the officer’s asserted motivation to request the PBT because it was raining. However, an officer’s subjective belief or motivation does not determine whether the officer had probable cause for the PBT. *See State v. Kutz*, 2003 WI App 205, ¶12, 267 Wis. 2d 531, 671 N.W.2d 660 (court applies objective standard to probable cause determination and is “not bound by the officer’s subjective assessment or motivation”).

¶18 Stofflet makes what she calls an “alternative” argument in a separate but short section of her briefing. Specifically she argues that “the [PBT] evidence should be suppressed as it was derived from an unreasonable extension of an otherwise lawful ‘investigative detention.’” This alternative argument is not well developed and it is unclear what, if anything, Stofflet means to add to the arguments already discussed. Accordingly, I address the argument no further. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals need not consider inadequately developed arguments).

¶19 Finally, Stofflet may be arguing that a PBT is a search requiring a warrant and that no exception to the warrant requirement applies here. Stofflet did not raise this issue in the circuit court. She has therefore forfeited the issue, and I do not address it. *See Schill v. Wisconsin Rapids Sch. Dist.*, 2010 WI 86, ¶45 & n.1, 327 Wis. 2d 572, 786 N.W.2d 177 (issues not raised in the circuit court are forfeited).

Conclusion

¶20 For the reasons stated above, I affirm the judgment of conviction.

By the Court.—Judgment affirmed.

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

