COURT OF APPEALS
DECISION
DATED AND RELEASED

November 20, 1996

No. 96-1259-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GEMMA L. KITZMAN,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Waukesha County: LEE S. DREYFUS, JR., Judge. *Affirmed*.

NETTESHEIM, J. Gemma L. Kitzman appeals from a judgment of conviction for operating a motor vehicle with a prohibited blood alcohol concentration pursuant to § 346.63(1)(b), STATS. Kitzman challenges the trial court's denial of her motion to dismiss or suppress. Specifically, Kitzman argues that the arresting officer did not have probable cause to arrest her. We uphold the trial court's ruling and affirm the judgment of conviction.

BACKGROUND

On August 16, 1995, at approximately 2:00 a.m., Officer David Reid observed a vehicle enter East Summit Avenue from South Silver Lake Road in the city of Oconomowoc. During the turn, the rear of the vehicle slid and struck the curb. While traveling on East Summit Avenue, the vehicle twice swerved and crossed the centerline into the oncoming westbound lane of traffic. The second time the vehicle crossed the centerline, it continued to travel in the westbound lane.

Reid then activated the emergency lights and siren on his squad. The vehicle proceeded for two blocks before pulling over. When the vehicle stopped, a white male jumped from the passenger side of the vehicle and ran from the scene. At the time, there was a heavy downpour of rain.

As Reid approached the vehicle, the female driver, eventually identified as Kitzman, opened the driver's side door and stared straight ahead. Reid asked Kitzman for her driver's license. After several minutes of searching her purse for identification, Kitzman handed Reid a pile of cards in which he located her driver's license. Reid observed that Kitzman's eyes were completely bloodshot, that she emitted a very strong odor of intoxicants and that her speech was slurred. Reid asked Kitzman if she had been drinking to which she replied that she had a couple of beers. Reid then asked Kitzman if she knew the alphabet and to recite it. Kitzman recited, "A, B, C, F" and then stopped.

Reid asked Kitzman to exit the vehicle and informed her that she was under arrest for operating while intoxicated. He also advised Kitzman that

he would transport her to the police department where she would be requested to perform additional sobriety tests to confirm his suspicion that she was intoxicated. Reid explained that he chose not to have Kitzman perform the tests at the scene of the arrest because of the heavy rains.

At the police station, Kitzman was asked to perform a horizontal gaze nystagmus test, a walk and turn test and a one-leg stand test. Kitzman was unable to perform any of these tests satisfactorily. Kitzman then submitted to a blood-alcohol test which indicated a BAC of .20%.

Kitzman was charged with operating while intoxicated and operating with a prohibited BAC concentration. She filed a motion to dismiss the complaint, contending that Reid lacked probable cause to arrest her. Alternatively, she sought to suppress the BAC evidence on the same grounds. Following a hearing, the trial court denied the motion. Following this ruling, Kitzman pled no contest to the BAC charge. She appeals the trial court's ruling denying her dismissal and suppression motion.

DISCUSSION

Whether probable cause to arrest exists based on the facts of a given case is a question of law which we review independently of the trial court. ***State v. Truax***, 151 Wis.2d 354, 360, 444 N.W.2d 432, 435 (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, 104 (Ct. App. 1994) (quoted source omitted). "Probable cause to arrest does not require proof beyond a reasonable doubt or even that guilt is more likely than not." ***Id.*** at 357, 525 N.W.2d at 104 (quoted source omitted). It is sufficient that a reasonable officer would conclude, based upon the information in the officer's possession, that the "defendant probably committed [the offense]." ***State v. Koch***, 175 Wis.2d 684, 701, 499 N.W.2d 152, 161, *cert. denied,* 510 U.S. 880 (1993). Furthermore, this court is not bound by the officer's subjective assessment or motivation. ***State v. Anderson***, 149 Wis.2d 663, 675, 439 N.W.2d 840, 845 (Ct. App. 1989), *rev'd on other grounds*, 155 Wis.2d 77, 454 N.W.2d 763 (1990); *see also* ***Terry v. Ohio***, 392 U.S. 1, 21-22 (1968).

Kitzman argues that Reid did not have probable cause to arrest her. Instead, she claims that Reid merely harbored a suspicion that she might be intoxicated and that these suspicions were not confirmed and did not rise to the level of probable cause until her unsuccessful performance of the remaining field sobriety tests at the police station. Kitzman further reasons that if Reid had probable cause to arrest her at the scene, the additional tests at the police station would have been unnecessary.

We disagree with Kitzman's argument. The facts confronting Reid established unusual and erratic driving by Kitzman. She struck the curb as she

made her turn onto East Summit Avenue and she twice crossed the centerline, remaining in an oncoming lane of traffic after the second crossing. After stopping the vehicle, Reid detected the odor of alcohol emanating from Kitzman's car, noticed that Kitzman's eyes were bloodshot, and observed that she was unable to correctly recite the alphabet beyond the first three letters. In addition, Kitzman could not produce her license from amongst the other cards in her purse and admitted that she had been drinking.

We hold that these facts were sufficient to allow a reasonable officer in Reid's position to conclude that Kitzman was probably operating her vehicle while under the influence of an intoxicant.

Kitzman contends, however, that the administration of field sobriety tests is essential to probable cause to arrest. She relies on the following language from ***State v. Swanson***, 164 Wis.2d 437, 475 N.W.2d 148 (1991):

> 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, 475 N.W.2d at 155. However, this language has since been qualified. "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, 329 (Ct. App. 1994). 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. This case, we conclude, falls into the latter category.

Moreover, unlike ***Swanson***, this case involves more than erratic driving and the odor of intoxicants. Kitzman could not locate her driver's license, her speech was slurred, she admitted that she had been drinking, and she could not correctly recite beyond the first three letters of the alphabet. Reid had numerous objective grounds to reasonably conclude that Kitzman was intoxicated despite the lack of field sobriety tests.

Nor do we agree that Reid's decision to have Kitzman perform the field sobriety tests at the police station, rather than at the scene of the arrest, means that probable cause for the arrest did not exist. We acknowledge that in most instances, field sobriety tests are administered at the scene of the arrest. Here, however, the inclement weather rendered that exercise impractical, and, arguably, unfair to Kitzman.

Regardless of the later field sobriety tests, we measure probable cause by the facts and circumstances which produced the arrest—not by later accumulated evidence which supports or detracts from the validity of the arrest.

CONCLUSION

We conclude that Reid had probable cause to arrest Kitzman. The trial court properly denied Kitzman's motion to dismiss or suppress. We affirm the judgment of conviction.

By the Court.—Judgment affirmed.

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