COURT OF APPEALS
DECISION
DATED AND RELEASED

January 16, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-1576

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

THOMAS R. KINNAMAN,

Defendant-Appellant.

APPEAL from an order of the circuit court for Grant County: JOHN R. WAGNER, Judge. *Affirmed*.

DYKMAN, P.J. This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS. Thomas R. Kinnaman appeals from an order revoking his operating privileges for one year because he refused to submit to a chemical breath test as required by § 343.305, STATS. Kinnaman argues that the police officer that arrested him did not have probable cause to do so, and therefore he did not violate the implied consent law by refusing to submit to testing. We reject Kinnaman's argument and affirm.

BACKGROUND

On March 31, 1996 at approximately 2:09 a.m., Officer Reginald Ihm of the University of Wisconsin-Platteville Police Department stopped Kinnaman's vehicle to inform him that his taillight was out. Kinnaman explained that his taillight had malfunctioned before and that all he had to do was tap on it and it would come back on.

Ihm asked Kinnaman for his driver's license and Kinnaman said he did not have it. Ihm called to verify that Kinnaman's driver's license was valid. Officer Marquardt of the Platteville Police Department then contacted Ihm and asked him if Kinnaman was driving. Ihm said he was. Marquardt advised Ihm that he had talked to Kinnaman earlier and told him not to drive his vehicle because he felt that Kinnaman was too intoxicated to drive.

Ihm asked Kinnaman to exit his vehicle, which he did. Ihm asked Kinnaman if he had talked to Office Marquardt about not driving his vehicle, and Kinnaman said, "Well, we talked or we spoke." Ihm observed that Kinnaman's eyes were glassy and could smell a strong odor of intoxicants on his breath. Kinnaman admitted to drinking a few beers and consented to taking a field sobriety test.

Ihm first asked Kinnaman to perform the finger-to-nose test, which he performed adequately. Ihm then asked Kinnaman to perform the heel-to-toe test. Kinnaman walked approximately seven steps, then stumbled to the left as he turned. Kinnaman stumbled to the left a second time, and Ihm stopped the test. Finally, Ihm asked Kinnaman to perform a balance test. Kinnaman complied and wobbled slightly while standing. Kinnaman refused to take a preliminary breath test. Ihm concluded that Kinnaman was under the influence of intoxicants, arrested him and transported him to the Platteville Police Department.

After Kinnaman was issued a notice of intent to revoke operating privileges, he demanded a refusal hearing. At the refusal hearing, the court concluded that Kinnaman's arrest was supported by probable cause and revoked his operating privileges for one year. Kinnaman appeals.

DISCUSSION

Kinnaman argues that he properly refused to submit to chemical breath testing because his arrest was not supported by probable cause. Whether undisputed facts constitute probable cause is a question of law we review *de novo*. ***State v. Drogsvold***, 104 Wis.2d 247, 262, 311 N.W.2d 243, 250 (Ct. App. 1981).

In ***State v. Babbitt***, 188 Wis.2d 349, 356-57, 525 N.W.2d 102, 104 (Ct. App. 1994), we set forth the test for determining probable cause in a refusal hearing:

> 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." Probable cause to arrest does not require "proof beyond a reasonable doubt or even that guilt is more likely than not." 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]."

(Citations omitted; alterations in original.)

Viewing the totality of the circumstances, we conclude that Officer Ihm had probable cause to arrest Kinnaman. Ihm noticed that Kinnaman's eyes were glassy and that Kinnaman's breath smelled of intoxicants. Kinnaman admitted to drinking a few beers. He stumbled twice during the heel-to-toe test and wobbled slightly during the balance test. This information was sufficient for Ihm to conclude that Kinnaman was probably driving while intoxicated.

Kinnaman argues that we should not consider the field sobriety tests in our probable cause determination because the State did not show that

these tests are to be done in any particular manner or that the tests have any particular passing or failing point. We disagree. Probable cause is "judged by the factual and practical considerations of everyday life on which reasonable and prudent persons, not legal technicians, act." ***State v. Truax***, 151 Wis.2d 354, 360, 444 N.W.2d 432, 435 (Ct. App. 1989). It is common knowledge that intoxication impairs one's ability to balance. A reasonable and prudent person would know that a person who stumbles twice while walking heel-to-toe and wobbles slightly while balancing is more likely to be under the influence of intoxicants than a person who does not stumble or wobble during these tests. Therefore, the State did not need to prove the scientific validity of these tests in order for them to be used in a probable cause determination.

Kinnaman also makes much of the fact that he was driving his vehicle safely, pulled over immediately after the officer activated his lights and exhibited good balance during the officer's routine contact with him. All of Kinnaman's behaviors did not need to evince intoxication, however, for Officer Ihm to believe that he was driving while under the influence of intoxicants. As we have already stated, Kinnaman's glassy eyes, the odor of intoxicants on his breath, his admission that he had drank a few beers, and his performance during field sobriety tests gave Ihm probable cause to believe that he was driving while under the influence of intoxicants.

Finally, Kinnaman argues that Officer Marquardt's opinion that Kinnaman was too intoxicated to drive may not be considered in the probable cause determination. Kinnaman argues that any facts known by Officer Marquardt were not established at the probable cause hearing and, therefore, cannot be said to be known by Officer Ihm at the time of arrest. Because we have already concluded that the other facts known by Ihm were sufficient to constitute probable cause, we need not address this argument. *See* ***Sweet v. Berge***, 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983).

By the Court.—Order affirmed.

Not recommended for publication in the official reports. *See* RULE 809.23(1)(b)4, STATS.