COURT OF APPEALS
DECISION
DATED AND RELEASED

December 19, 1996

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. 96-1881

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL C. CURRAN,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Dane County: Michael B. Torphy, Judge. *Affirmed*.

ROGGENSACK, J. Michael C. Curran appeals his conviction based on the denial of his motions to dismiss charges of operating a motor vehicle while under the influence of an intoxicant (OMVWI) and with a prohibited alcohol concentration (PAC) and to suppress the results of an intoxilyzer breath test taken after his arrest. Curran contends that (1) the initiation of a criminal OMVWI/PAC prosecution subsequent to the imposition of an administrative suspension of his driving privileges violated the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution; (2) the trial court based its probable cause finding on an erroneous evaluation of

the evidence; and (3) the police lacked probable cause to arrest him because the field sobriety tests administered were not sufficiently reliable. Curran's double jeopardy argument is contrary to controlling precedent; evaluating the weight to be given evidence is not the role of this court; and the probable cause determination was proper under the totality of the circumstances. Accordingly, the decision of the trial court is affirmed.[1]

BACKGROUND

On November 23, 1995, at approximately 2:15 a.m., Deputy Catherina P. Nooyen of the Dane County Sheriff's office observed Curran's car driving over the center line. When Nooyen pulled Curran over and spoke with him, she observed that his eyes were bloodshot and glassy, that his speech was slightly thick-tongued, and that he had an odor of intoxicants on his breath. After Curran admitted that he had consumed three or four beers that evening, Nooyen asked him to exit his vehicle to perform field sobriety tests.

She administered the walk-and-turn and one-leg stand tests, which are described in the National Highway Traffic Safety Administration (NHTSA) manual, and also a finger dexterity test which is not mentioned in that manual. Nooyen had been trained in the administration of all three tests at the Department's Academy and at another three-day course, and had spent eight weeks on patrol training with other officers as they conducted field sobriety tests. Her training did not include use of the standardized criteria described in the NHTSA manual. She was taught to look for difficulty following directions and problems with balance and coordination, as indications of a suspect's probable intoxication. She had made 20 to 30 prior OMVWI arrests, the vast majority of which resulted in intoxilyzer readings in excess of .10.

As she administered the tests, Nooyen observed that Curran stepped out of line, couldn't remember which way to turn, put his hands in his pockets and had to raise his arms to maintain his balance. Additionally, he was unable to touch his ring finger and pinkie fingers separately. Based on her

[1] This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

experience, she believed Curran's performance indicated that he was under the influence of intoxicants. She arrested him for OMVWI, and transported him for testing. When Curran failed the test for a prohibited alcohol concentration with a reading of .12,[2] he was also cited for PAC and served with a Notice of Intent to Suspend his operating privileges. His driver's license was administratively suspended pursuant to § 343.305, STATS. Subsequently, Curran was charged in a criminal complaint with violations of §§ 346.63(1)(a) and (b), STATS. Curran filed a motion to dismiss on double jeopardy grounds, and two motions to suppress evidence based on an unlawful arrest and non-probative field sobriety tests, all of which the trial court denied. Curran then agreed to a stipulated trial to the court; the court adjudged him guilty on the OMVWI count, and imposed an appropriate sentence. Curran appeals, based on the double jeopardy and probable cause issues.

DISCUSSION

Scope of Review.

Curran argues that the administrative suspension of his operating privileges is a "punishment," and therefore, prosecution for OMVWI/PAC constitutes placing him twice in jeopardy of punishment for the same offense, in violation of the Double Jeopardy Clause. His contention requires analysis of the Fifth Amendment of the United States Constitution[3], in light of Wisconsin's Implied Consent Law, § 343.305, STATS. Because the question involves the application of constitutional principles to undisputed facts, we will review the trial court's decision *de novo*. ***State v. Pheil***, 152 Wis.2d 523, 529, 449 N.W.2d 858, 861 (Ct. App. 1989).

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[2] Curran also requested a blood test, which indicated a blood alcohol concentration of .137.

[3] Article I, sec. 8 of the Wisconsin Constitution also provides that "no person for the same offense may be put twice in jeopardy of punishment." However, Wisconsin interprets its double jeopardy clause in accordance with the rulings of the United States Supreme Court, ***State v. Kurzawa***, 180 Wis.2d 502, 522, 509 N.W.2d, 712, 721, *cert. denied* 114 S. Ct. 2712 (1994), and because the defendant does not raise the Wisconsin constitutional issue, this analysis is limited to the federal clause.

It is not the role of this court to evaluate the weight which is given evidence. ***Wisconsin Central Ltd. v. Public Service Comm'n***, 170 Wis.2d 558, 573, 490 N.W.2d 27, 31 (Ct. App. 1992). And, whether Curran's arrest was based upon probable cause presents a mixed question of fact and law. The trial court's findings on disputed factual issues will be upheld unless clearly erroneous. Section 805.17(2), STATS. Whether those facts establish probable cause is a question of law to be reviewed *de novo*. ***State v. Babbitt***, 188 Wis.2d 349, 356, 525 N.W.2d 102, 104 (Ct. App. 1994).

Double Jeopardy.

The Fifth Amendment of the United States Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." The Double Jeopardy Clause includes three distinct constitutional guarantees: (1) protection against a second prosecution for the same offense after an acquittal; (2) protection against a second prosecution for the same offense after a conviction; and (3) protection against multiple punishments for the same offense. ***State v. Kurzawa***, 180 Wis.2d 502, 515, 509 N.W.2d 712, 717, *cert. denied*, 114 S. Ct. 2712 (1994). Curran argues that he was subjected to multiple punishments for the same offense, contrary to the third prong of double jeopardy analysis.

A civil penalty may constitute "punishment" when the penalty serves the goals of punishment, such as retribution or deterrence. ***United States v. Halper***, 490 U.S. 435, 448 (1989). However, the supreme court has already determined that § 343.305, STATS., is remedial in nature because it was enacted to keep drunken drivers off the road. ***State v. McMaster***, No. 95-1159-CR, *slip op.* at 13-16 (Wis. Dec. 13, 1996). In other words, the primary purpose of the implied consent law is to protect innocent drivers and pedestrians, rather than to punish drunken drivers. ***Id.*** ***McMaster*** represents the current State of Wisconsin law, and is binding precedent. Therefore, Curran's criminal prosecution for operating a motor vehicle while intoxicated, after the administrative suspension of his operating privileges, did not constitute multiple punishments, and did not violate the Double Jeopardy Clause.

Probable Cause.

An officer has probable cause to arrest when, at the time of the arrest, she "has knowledge of facts and circumstances sufficient to warrant a person of reasonable prudence to believe that the [person arrested] is committing or has committed an offense." ***County of Dane v. Sharpee***, 154 Wis.2d 515, 518, 453 N.W.2d 508, (Ct. App. 1989). The totality of the circumstances determines whether the officer's belief was reasonable, taking into account inferences drawn in light of the officer's knowledge, training, and prior personal and professional experience. *See* ***State v. DeSmidt***, 155 Wis.2d 119, 134-35, 454 N.W.2d 780, 787 (1990). The Wisconsin Supreme Court has explained the place of field sobriety tests under the totality of the circumstances test as follows:

> Unexplained erratic driving, the odor of alcohol, and the coincidental time of the incident [with bar closing] 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 under the influence of intoxicants. A field sobriety test could be as simple as a finger-to-nose or walk-a-straight-line test. 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.

State v. Swanson, 164 Wis.2d 437, 453-54 n.6, 475 N.W.2d 148, 155 (1991). However, this ***Swanson*** footnote has not been interpreted to require a field sobriety test before arrest in all cases. *See* ***State v. Wille***, 185 Wis.2d 673, 518 N.W.2d 325 (Ct. App. 1994) (holding officer had probable cause to arrest suspect who hit rear end of car parked along highway, smelled of intoxicants, and stated in his hospital room that he had "to quit doing this"). Nor has this court required any particular tests be performed. *See* ***Sharpee***, 154 Wis.2d at 517, 453 N.W.2d at 509 (holding officer had probable cause to arrest suspect who smelled of intoxicants, had bloodshot eyes and slurred speech, admitted to consuming two or three drinks, could not accurately recite the alphabet, and failed the horizontal gaze test).

Curran claims that the finger dexterity test is not a scientifically valid field sobriety test, and that the walk-and-turn and one-leg-stand tests

were administered in a manner which makes them invalid, according to the NHTSA manual.[4] Therefore, Curran contends that the trial court lacked both a factual and legal basis for its probable cause conclusion.

Curran's argument misconstrues the law in Wisconsin. Although the NHTSA manual explains that a three test battery consisting of the walk-and-turn test, the one-leg-stand test, and the horizontal-gaze test is highly reliable in identifying persons whose blood alcohol concentration is over .10, when the tests are administered in a standardized manner and assessed on the basis of standardized criteria, this does not mean that other combinations of sobriety tests not researched in the NHTSA study are not reliable as well. Even ***Swanson***, upon which Curran relies for the proposition that an officer must perform field sobriety tests before making an arrest for OMVWI, suggests that a single finger-to-nose or walk-a-straight-line test may be sufficient. While the standardization of certain field sobriety tests may add weight to their results, it does not render all other tests non-probative. And, as we have said, it is not the province of this court to determine what weight to give evidence.

The totality of the circumstances allowed Nooyen to reasonably believe that Curran had been driving under the influence of intoxicants. Nooyen observed Curran's erratic driving, his bloodshot eyes and slurred speech. She smelled intoxicants on his breath. Curran admitted to the officer that he had been drinking, and demonstrated difficulty with balance and coordination in a series of divided attention tasks. Moreover, Nooyen's experience allowed her to compare the results of her previous OMVWI arrests with subsequent intoxilyzer tests. Probable cause existed.

CONCLUSION

[4] The trial court took judicial notice of the contents of Chapter A from the Student Study Guide for the *Basic Training Program for Breath Examiner Specialist*, and Chapter VIII of the NHTSA manual, subject to the understanding that "certainty must conform to the letter of the law but it may not have to conform to the letter of the manual." A judicially noticed fact is one not subject to reasonable dispute in that it is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Section 902.01(2), STATS. Because the state did not object, we do not consider whether judicial notice of the manual was appropriate.

The initiation of criminal OMVWI/PAC prosecution subsequent to the imposition of an administrative suspension of driving privileges does not violate the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution. In addition, the validity and probative value of field sobriety tests fall within the totality of the circumstances to be considered by a court when determining whether probable cause to arrest existed. We conclude the trial court properly determined that probable cause existed, and therefore, we affirm the denial of Curran's motions to suppress evidence and to dismiss.

By the Court. – Judgment affirmed.

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