COURT OF APPEALS
DECISION
DATED AND RELEASED

November 27, 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. 96-2070-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RICHARD J. SIZE,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Marquette County: RICHARD O. WRIGHT, Judge. *Affirmed*.

DYKMAN, P.J. This is a single-judge appeal decided pursuant to § 752.31(2)(c), STATS. Richard J. Size appeals from a judgment of conviction for operating a motor vehicle while intoxicated, contrary to § 346.63(1)(a), STATS. The issues are: (1) whether information the police obtained from Size should be suppressed because he was arrested without probable cause, and (2) whether this prosecution should be barred under the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. We conclude that a police officer had probable cause to arrest Size and that ***State v. McMaster***, 198 Wis.2d

542, 543 N.W.2d 499 (Ct. App. 1995), *petition for review granted*, 546 N.W.2d 468 (1996), is dispositive as to Size's double jeopardy claim. Accordingly, we affirm.

While taking a person home a little after 1:00 a.m. on December 14, 1995, Officer Les Crandall of the Marquette County Sheriff's Department observed a truck in the ditch on a county highway. Road conditions were extremely icy and hazardous. Crandall stopped to see if help was needed. The driver of the truck, Richard Size, exited the truck and walked toward Crandall, who recognized him from previous contact. Crandall smelled an odor of intoxicants about Size and observed that his eyes were bloodshot and glassy and that his speech was slow and slurred. Crandall believed that Size was possibly under the influence of an intoxicant, so he decided to do field sobriety tests. The first of these was a horizontal gaze nystagmus (HGN) test, which consisted of checking Size's eyes for lack of smooth pursuit, distinction at maximum deviation, and nystagmus prior to forty-five degrees. Crandall referred to these factors as "clues" and testified that Size exhibited all three clues in both eyes.

Because of the icy conditions, Crandall did not want to do the remaining field sobriety tests at the scene and asked Size if he could finish the tests at Crandall's office. Size asked Crandall if he had to do so. Crandall replied that he would like Size to finish the test for him and that he could not do so at the scene. He also told Size that he was still doing the investigation and that Size was not under arrest. Size agreed to go with Crandall. We do not know what occurred at Crandall's office because at this point in Crandall's testimony, Size and the State stipulated that after the remaining field sobriety tests, Crandall had probable cause to arrest Size.

Size's first issue, though divided into three parts, is that Crandall did not have probable cause to arrest him and that any information he obtained as a result of his unlawful arrest should be suppressed. We will address this issue shortly, but we first address counsel's characterization of the facts.

Supreme Court Rule 20:3.3 (Lawyers Coop. 1996) requires an attorney to exercise candor toward a tribunal. We contrast counsel's characterization of the facts with the testimony of the only witness, Crandall. The second sentence of counsel's argument provides: "There is nothing in the

testimony to show that defendant-appellant consented to go to the police station." The testimony of Crandall was as follows:

Q:So then you asked him [Size] to come back to the Sheriff's Department with you?

A: Right.

Q: What was his response?

A:At first, he asked me if he had to. I stated I would like him to finish the test for me, and I couldn't ask him to do them here.

....

Q:What did you then indicate?

A:I indicated that I would like him to do the field sobriety tests somewhere, where I could observe him, where it wouldn't be so icy.

Q: And what was Mr. Size's response?

A: He agreed.

There is a dramatic difference between the sentence in Size's brief and the record. It goes considerably beyond the advocate's duty to present a client's case with persuasive force found in SCR 20:3.3 cmt. (Lawyers Coop. 1996). This is not the first time that courts have commented on the brief writing methods of members of counsel's firm. *See* ***State v. Reiter***, No. 95-1926-CR, order denying petition for review (Wis. Sup. Ct. Apr. 16, 1996), and ***State v. Przybilla***, No. 95-1589, unpublished slip op. (Wis. Ct. App. Feb. 1, 1996). At a minimum, counsel has violated a maxim of effective appellate legal writing, which is to present all the pertinent facts a court will need to render a decision. At a maximum, this sentence may have violated SCR 20:3.3. We recognize that on cross-examination, Crandall testified that he told Size: "I told him if he didn't do the field sobriety tests I would be placing him under arrest at this point." Size's brief, however, never addresses the issue of whether Crandall's statement

rendered Size's consent involuntary. All that is found is the statement we previously quoted. We anticipate that in the future, counsel will carefully compare the record with his briefs.

We return to the issue of whether Size was legally arrested. The supreme court explained what is required by the term "probable cause" in ***State v. Mitchell,*** 167 Wis.2d 672, 681-82, 482 N.W.2d 364, 367-68 (1992):

> Probable cause is the *sine qua non* of a lawful arrest. Probable cause refers to the quantum of evidence which would lead a reasonable police officer to believe that defendant committed a crime. There must be more than a possibility or suspicion that defendant committed an offense, but the evidence need not reach the level of proof beyond a reasonable doubt or even that guilt is more likely than not. The information which constitutes probable cause is measured by the facts of the particular case.

This is not a high standard. An inference of guilt need not even be more likely than not. Slightly more than a possibility of guilt or a suspicion of guilt is all that is necessary. The purpose of the concept of probable cause is not to have a mini-trial, but to separate out those against whom the evidence suggesting guilt is so insignificant that further prosecution would be worthless.

Size cites ***State v. Seibel***, 163 Wis.2d 164, 471 N.W.2d 226, *cert. denied*, 502 U.S. 986 (1991), and ***State v. Swanson***, 164 Wis.2d 437, 475 N.W.2d 148 (1991), in which the supreme court determined whether the evidence was sufficient to constitute probable cause to believe a defendant was intoxicated. In ***Swanson***, the court noted that the evidence of a crime included unexplained erratic driving, an odor of intoxicants emanating from the defendant as he spoke and the fact that the incident occurred at about the time that bars close in Wisconsin. ***Swanson***, 164 Wis.2d at 455 n.6, 475 N.W.2d at 155. The factors in ***Seibel*** were the nature and cause of an accident, a strong odor of intoxicants emanating from the defendant's companions, a police chief's belief that he smelled an intoxicant on the defendant and the defendant's conduct at a hospital. ***Seibel***, 163 Wis.2d at 181-83, 471 N.W.2d at 234.

In ***Swanson***, the court held that these factors constituted a reasonable suspicion that the defendant had committed a crime. However, the factors arguably failed to show probable cause in ***Seibel*** and failed to show probable cause in ***Swanson***. *See* ***Swanson***, 164 Wis.2d at 453-54 n.6, 475 N.W.2d at 155.

Probable cause is a common-sense concept. It 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). As a result, it is not possible to compare cases with dissimilar facts and draw a conclusion as to whether probable cause exists. Probable cause cases are therefore limited to their facts. We agree that should the facts of ***Swanson*** and ***Seibel*** repeat themselves, those cases would dictate a particular result. But when a case has dissimilar facts, ***Swanson*** and ***Seibel*** are not helpful.

That is the case here. The factors relied upon by officer Crandall were an odor of intoxicants, bloodshot and glassy eyes, slow and slurred speech and all three clues in each eye in the HGN test. The only factor in common with the factors of ***Swanson*** and ***Seibel*** is the odor of intoxicants about the defendant.

When the facts are undisputed, the question of whether probable cause for arrest exists is a question of law. ***Truax***, 151 Wis.2d at 360, 444 N.W.2d at 435. We therefore are not bound by the trial court's conclusion. Nor are we bound by the officer's opinion as to whether probable cause existed. But we agree with the trial court's conclusion that Officer Crandall had probable cause to arrest Size. The four factors upon which we rely are the odor of intoxicants, Size's bloodshot and glassy eyes, his slow and slurred speech and the result of the HGN test.

Size makes much of the fact that he was wearing contact lenses, had just been involved in an accident, and that the officer who performed the HGN test was never checked to see if he was doing the test correctly. First of all, Size's counsel has again misrepresented the facts of record. While Officer Crandall testified that he asked Size if he was wearing contacts, he did not testify as to Size's answer. Nor is there evidence as to whether the HGN test is rendered invalid by a previous accident in which there is no evidence of injury. Finally, there is no evidence that a person giving an HGN test must be checked

to see if he is performing the test correctly. We will not presume the test's invalidity. Size's argument is one which should be made to a jury or a trial court. Here, we are concerned only with probable cause. The result of the HGN test and the other three factors the officer noted are more than enough for us to conclude that Size was probably operating his motor vehicle while intoxicated. We concede that one could hypothesize explanations for all four factors we have considered which might lead to a conclusion of innocence. But that is far from the test we are to use. Using the proper test, we conclude that the information available gave Officer Crandall probable cause to arrest Size.

Finally, Size asserts that his prosecution and sentence are barred by the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. He recognizes that this issue is foreclosed by ***State v. McMaster***, 198 Wis.2d 542, 543 N.W.2d 499 (Ct. App. 1995), but notes that the supreme court has granted a petition for review in that case. We are bound by ***McMaster***, and therefore conclude that Size's prosecution and sentence are not barred by the Double Jeopardy Clause.

By the Court.—Judgment affirmed.

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