COURT OF APPEALS
DECISION
DATED AND RELEASED

November 27, 1996

No. 96-2199-FT

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

VILLAGE OF JACKSON,

Plaintiff-Respondent,

v.

RICHARD P. HAMANN, JR.,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Washington County: RICHARD T. BECKER, Judge. *Affirmed*.

NETTESHEIM, J. Richard P. Hamann, Jr., appeals from a forfeiture judgment for operating a motor vehicle while intoxicated pursuant to § 346.63(1)(a), STATS. On appeal, Hamann renews his trial court argument that the arresting officer did not have probable cause to request Hamann to submit to a preliminary breath test (PBT). We uphold the trial court's ruling rejecting Hamann's argument. We affirm the judgment.

The relevant facts are not in dispute. About midnight on June 25, 1995, Officer Ronald Laabs of the Village of Jackson Police Department received a radio dispatch notifying him that a semi-truck driver had observed erratic driving by the operator of a red pickup truck eastbound on Highway 60. Laabs eventually saw the suspect truck and took up pursuit. While following the truck, Laabs saw the vehicle weave three times between the fog line and the center line.

Laabs decided to stop the truck. As the truck pulled to the shoulder, it veered to miss a mailbox, jumped the curb and came to a halt. Laabs then approached the truck and identified the driver as Hamann. Laabs observed that Hamann's speech was "slurred" or "thick tongued" and that his eyes were bloodshot. Laabs also detected the odor of urine coming from the vehicle. Later, when Hamann exited the vehicle, Laabs observed that Hamann's pants were damp and that his fly was open.

In response to questioning by Laabs, Hamann denied that he had been drinking. Laabs did not detect the odor of alcohol on Hamann. However, he testified that the absence of the odor of intoxicants did not negate his belief that Hamann was intoxicated because he knew that certain alcoholic beverages such as vodka or gin "have a very hard odor to pick up." Laabs then administered a PBT to Hamann and thereafter some field sobriety tests. Ultimately, Laabs issued Hamann a citation for OWI.

The matter first proceeded to trial in the municipal court where Hamann was found guilty. He appealed to the circuit court and sought and

received a trial de novo. In that forum, Hamann brought a motion to dismiss or, alternatively, to suppress the evidence garnered following the PBT test. Specifically, Hamann argued that Laabs did not have probable cause to request him to submit to the PBT pursuant to § 343.303, STATS. The circuit court denied the motion. Following a trial based on stipulated facts, the court found Hamann guilty. He appeals to us.

Before we address the issue on its merits, we note some troubling aspects of this case. On appeal, Hamann does not challenge the initial stop of his vehicle by Laabs. His only claim is that Laabs did not have probable cause to administer the PBT. However, even if we concluded that the trial court erred in its probable cause ruling, Hamann's appellate brief does not advise how the error has prejudiced him.

On appeal, Hamann pursues only the suppression—not the dismissal—aspect of his motion. He requests that we order suppressed all evidence garnered against him subsequent to the PBT. But Hamann does not advise us what such evidence is. If Hamann is referring to the field sobriety tests, he has not advised us as to the results of those tests, whether they constituted part of the stipulated facts for purposes of the trial, and what role, if any, that evidence played in the trial court's finding of guilt against him.[1]

Given these omissions in Hamann's brief, we have on our own initiative examined the appellate record to assure that Hamann was truly

[1] As to the PBT itself, again any error by the trial court would be harmless since evidence of such a test is not admissible at trial against the defendant. Section 343.303, STATS.

prejudiced by the trial court's ruling. However, this effort has proven futile because Hamann has also failed to include in the appellate record the stipulated facts, a transcript of the stipulated trial (if the proceeding was reported), or the trial court's bench or written decision adjudging him guilty.

Ordinarily, we will not address an issue on the merits unless the appellant has demonstrated that the claimed error was prejudicial, or, absent that showing, that it otherwise is apparent to us that prejudice has occurred. We have considered affirming the trial court's ruling on this basis. However, we note that the Village's brief does echo our concerns. From this, we cautiously (and perhaps erroneously) assume that the Village concedes that Hamann was prejudiced by the trial court's ruling. Thus, we choose to address Hamann's issue on its merits.

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. 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 (quoted source omitted), *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).

This case is somewhat different from other OWI cases because Laabs did not detect an odor of alcohol about Hamann and because he did not administer the field sobriety tests until after the PBT. Nonetheless, we agree with the trial court's conclusion that the evidence established probable cause. We so hold for the following reasons.

First, Laabs had received the radio dispatch reporting the erratic driving witnessed by the semi-truck driver. A citizen who witnesses an offense is deemed reliable and information provided by such a witness may contribute to probable cause. *See* ***State v. Welsh***, 108 Wis.2d 319, 330-31, 321 N.W.2d 245, 251-52 (1982), *vacated on other grounds*, 466 U.S. 740 (1984). Second, this report was corroborated by Laabs's own observations of Hamann's erratic weaving within his traffic lane. Third, as Hamann was pulling over to stop the truck, he veered to miss a mailbox and jumped the curb. We acknowledge that erratic driving can sometimes be attributed to factors other than intoxication. But it is

common knowledge that erratic driving is, more often than not, the product of intoxication.

Fourth, Laabs's later observations of Hamann heightened his suspicion that Hamann was intoxicated. He noted that Hamann's speech was slurred and thick-tongued, a classic symptom of intoxication. He also detected the order of urine and observed that Hamann's clothing was damp and his was fly open. This reasonably suggested that Hamann was unable to control certain bodily functions, also a condition which sometimes evinces a state of intoxication.

While the absence of an odor of alcohol is a factor in support of Hamann's argument, Laabs testified that the odor of certain alcoholic beverages can be difficult to detect. We do not conclude that this one fact in Hamann's favor trumps the other factors which strongly indicated that Hamann was probably intoxicated.

Both Hamann and the Village are able to cite to cases with facts which arguably support their competing positions. However, "[p]robable cause to arrest must be measured by the facts of the *particular* case." ***Welsh***, 108 Wis.2d at 330, 321 N.W.2d at 251 (quoted source omitted; emphasis added). We recall two principles of probable cause law which we deem the most compelling in this case: (1) probable cause deals with probabilities and with the factual and practical considerations of everyday life on which reasonable and prudent persons act, ***id.***; and (2) probable cause does not require that guilt is more likely than not. ***Babbitt***, 188 Wis.2d at 357, 525 N.W.2d at 104. In short, probable

cause simply asks what a reasonable police officer would logically conclude from a commonsense standpoint given the facts and information at hand.

We conclude that a reasonable police officer, confronted with the information and observations concerning Hamann revealed by this case, would logically conclude that Hamann was probably intoxicated. We agree with the trial court's ruling. Consequently, we affirm the judgment.

By the Court.—Judgment affirmed.

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