COURT OF APPEALS
DECISION
DATED AND RELEASED

August 21, 1997

NOTICE

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.

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

No. 97-0527

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

COUNTY OF DANE,

PLAINTIFF-RESPONDENT,

V.

KELLIE ANN DIXON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: DANIEL R. MOESER, Judge. *Affirmed.*

DEININGER, J.[1] Kellie Dixon appeals from a judgment convicting her of operating a motor vehicle while under the influence of an intoxicant (OMVWI), contrary to § 346.63(1)(a), STATS., as a first offense. Dixon claims the trial court erred in denying her motion to suppress evidence. We conclude there

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

was probable cause to arrest Dixon for OMVWI and that the trial court did not err in denying the suppression motion. Accordingly, we affirm the judgment of conviction.

BACKGROUND

The Dane County Sheriff's Department dispatched Deputy Ron Dorn to the Riley Tavern at approximately 2:56 a.m. on December 10, 1995, to investigate a hit and run accident. Deputy Dorn observed a damaged vehicle in the parking lot and parts of a second vehicle in the roadway. These parts were white on the front and came from the wheel well area of the suspected hit and run vehicle.

Deputy Dorn went looking for the suspect vehicle, and at around 4:00 a.m., observed a white Dodge Intrepid in a ditch. It appeared from the tire marks that the Dodge had slid through a stop sign and into the ditch. The car then had apparently traveled in reverse approximately forty feet, while still in the ditch, until striking a telephone pole.

The car was still running in the reverse gear when Dorn approached and observed Kellie Dixon sitting in the front passenger seat. Dorn checked the car closely and noticed that, in addition to damage on the driver's side from hitting the telephone pole, there was also damage on the Dodge consistent with the vehicle parts found near the Riley Tavern. When questioned by Dorn about what had happened, Dixon cried hysterically and replied that she did not know. When asked whether she had been to the Riley Tavern, Dixon was able to compose herself enough to state that she had not been there, a statement she changed after her arrest.

Due to the extremely cold temperature outside (a wind chill of -54 degrees F.) and Dixon's emotional state, Dorn elected not to conduct a field sobriety test. However, Dorn did ask Dixon to accompany him to his squad car so that he could observe her walking and so that he could talk to her about the incident earlier that evening at the Riley Tavern. When Dixon got out of the car, Dorn noticed a "very strong" odor of intoxicants. Dorn assisted Dixon as she walked back to his squad car because he noticed her "staggering back and forth quite a bit" as she attempted to walk. Dorn then asked Dixon whether she had anything to drink that evening, and Dixon replied that she had two drinks. While observing Dixon in the squad car Deputy Dorn noticed slurred speech, a strong odor of intoxicants and repeated crying each time she was asked a question. Dorn then administered a preliminary breath test (PBT) which registered a result of .19. Dorn placed Dixon under arrest for OMVWI, transported her to a police station, and administered an Intoxilyzer test of her breath for alcohol concentration.

Dixon moved to suppress the Intoxilyzer test results, arguing that Deputy Dorn did not have probable cause to arrest her. After hearing the testimony of Deputy Dorn, the trial court denied Dixon's motion to suppress. The parties stipulated to a bench trial based solely on the testimony given at the suppression hearing, the Intoxilyzer test result and Deputy Dorn's written reports. The court found Dixon guilty of OMVWI. Related charges of operating with a prohibited alcohol concentration and hit and run were dismissed.

ANALYSIS

Dixon argues that "[p]robable cause requires an objective view of the complete factual matrix" and that by taking such a view here we must conclude that probable cause for Dixon's arrest is lacking. Dixon rests her

argument on the following passage from ***State v. Riddle,*** 192 Wis.2d 470, 476, 531 N.W.2d 408, 410 (Ct. App. 1995):

> While the circumstances within the arresting officer's knowledge need not be sufficient to make the defendant's guilt more probable than not, the defendant's guilt must be more than a mere possibility for the arrest to be constitutional. Further, in determining whether probable cause existed, we do not look to the officer's subjective beliefs, but apply an objective standard based upon the circumstances as they were at the time of the arrest.

Id. (citations omitted). We agree with Dixon's statement of the law, but disagree that its application to the present facts requires us to reverse the trial court.

Whether undisputed facts show probable cause to arrest is a question of law which we review de novo, owing no deference to the trial court's analysis. ***State v. Babbitt***, 188 Wis.2d 349, 356, 525 N.W.2d 102, 104 (Ct. App. 1994). The State need not show evidence sufficient to prove guilt beyond a reasonable doubt, nor even to show that guilt is more probable than not. ***State v. Truax***, 151 Wis.2d 354, 360, 444 N.W.2d 432, 435 (Ct. App. 1989). Rather, we look to the totality of the circumstances, ***Babbitt***, 188 Wis.2d at 356, 525 N.W.2d at 104, to determine whether the objective facts would "lead a reasonable officer to believe that guilt is more than a possibility." ***Truax***, 151 Wis.2d at 360, 444 N.W.2d at 435 (citation omitted).

Probable cause is a determination based on the factual and practical considerations of everyday life on which reasonable and prudent persons, rather than legal technicians, act. ***Id.*** at 360, 444 N.W.2d at 435. It is a common sense test that looks to the totality of the circumstances facing the officer at the time of the arrest to determine whether the officer could have reasonably believed that the defendant had committed, or was committing, an offense. ***County of Dane v.***

Sharpee, 154 Wis.2d 515, 518, 453 N.W.2d 508, 510 (Ct. App. 1990). Because Deputy Dorn has made "over 200 arrests for people operating under the influence" we should give deference to the "reasonable inferences drawn by [him] at the accident scene in light of [his] experience." ***State v. Seibel,*** 163 Wis.2d 164, 183, 471 N.W.2d 226, 235 (citation omitted), *cert. denied,* 502 U.S. 986 (1991); *See also* ***State v. DeSmidt,*** 155 Wis.2d 119, 134-35, 454 N.W.2d 780, 787 (1990) (officer's experience-based conclusions may be considered in determining whether probable cause exists).

With these considerations in mind, we conclude that under the totality of the circumstances, viewed objectively, Deputy Dorn had probable cause to arrest Dixon for OMVWI. As the trial court noted, "we have a lot beyond unexplained erratic driving, the odor of alcohol and coincidental time of incident with bar closing." *See* ***State v. Swanson,*** 164 Wis.2d 437, 453-54 n.6, 475 N.W.2d 148, 155 (1991). We have held that the footnote in ***Swanson*** does not require that under all circumstances an officer must first perform a field sobriety test before deciding whether to arrest an individual for operating a motor vehicle while under the influence of intoxicants. ***State v. Wille***, 185 Wis.2d 673, 684, 518 N.W.2d 325, 329 (Ct. App. 1994). In this case, the arresting officer relied on numerous facts and observations in determining Dixon should be arrested for OMVWI: erratic driving (being involved in at least one accident and being a suspect in another); the time of the accident; Dixon's hysterical crying; a "very strong" odor of intoxicants; slurred speech, staggering and lack of balance when walking; and an admission of drinking.

We conclude that Deputy Dorn had probable cause to arrest Dixon for OMVWI even before administering the PBT. As the trial court observed, the .19 PBT result, almost twice the legal limit, simply provided Dorn with

"additional information for probable cause prior to arrest." Accordingly, we affirm.

By the Court.—Judgment affirmed.

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