COURT OF APPEALS
DECISION
DATED AND FILED

October 30, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0772 & 97-0773

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

CITY OF MONROE,

PLAINTIFF-RESPONDENT,

v.

ROBERT A. PATTERSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Green County: JAMES R. BEER, Judge. *Affirmed.*

EICH, C.J.[1] Robert Patterson appeals from a judgment finding him guilty of operating a motor vehicle while intoxicated and operating with a prohibited blood alcohol level. He raises a single issue: whether the arresting officer had probable cause to arrest him. Specifically, he claims that both the trial

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

court and the officer "wrongfully considered" his inability to perform some field sobriety tests as evidence of intoxication (even though he informed the officer that he had had brain surgery a week earlier) and that the officer lacked probable cause to arrest him without this evidence.

We are satisfied that the officer had probable cause to arrest Patterson even without consideration of his performance of the "balance" tests. We therefore affirm the judgment without reaching the "brain surgery" issue.

At the suppression hearing, the arresting officer, City of Monroe Police Officer Patrick Green, testified that he observed Patterson's truck speeding and clocked him with radar and that Patterson was accelerating rapidly from stop signs, sometimes "jerk[ing] with acceleration," to reach levels "well beyond the speed limit." When Green stopped the truck in what apparently was the driveway of Patterson's home, he noticed Patterson "lean[] to the right and toss[] something out of the passenger side window" over a six-foot fence on the lot line. At the time, Green could not see what it was, but he heard it "jingle" and strike a "hard object" on the other side of the fence. Green later found Patterson's keys on top of an above-ground swimming pool on the other side of the fence. He also testified that Patterson told him that he "couldn't prove he was driving because he did not have a set of keys." Green asked Patterson for his driver's license, and "he appeared to have difficulty" producing it. Green noticed that Patterson's eyes were "red and watery" and, in talking with him, noticed "a strong odor of alcoholic beverage[s]" about his person. When Green asked Patterson how much alcohol he had consumed that night, Patterson replied only that he "didn't think he was drunk."

According to Green, Patterson also had difficulty with his balance as he got out of the truck, so he decided to administer some field sobriety tests. He stated that when he demonstrated the "walk and turn" test Patterson told him that he had "had brain surgery a week prior to the ... stop and that he was prescribed codeine by a doctor." Green stated that Patterson could not maintain his balance during that test or the "one leg stand" test.

On cross-examination, Green stated that Patterson "seemed to understand" the conversation Green was having with him, and that he did notice that Patterson had a scar on his head.

Whether the facts constitute probable cause is a question of law which we review independently on appeal, examining "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, 356-57, 525 N.W.2d 102, 104 (Ct. App.1994) (quoting ***State v. Nordness***, 128 Wis.2d 15, 35, 381 N.W.2d 300, 308 (1986)). Proof beyond a reasonable doubt is not required to establish probable cause; even evidence that guilt is more likely than innocence is not required. ***Id***. at 357, 525 N.W.2d at 104. It is sufficient that a reasonable officer would conclude, based upon the information in his or her possession, that the defendant "probably committed the offense." ***Id***. (citation omitted).

In this case, even if we were to discount Patterson's performance on the two field sobriety tests, his loss of balance upon getting out of his car, and his fumbling with his driver's license as arguably related to his purported brain surgery, we think enough other evidence exists to establish probable cause. This

evidence includes: (1) he was speeding and accelerating in an unusual manner between stop signs; (2) he leaned over and tossed the keys of his truck over a six-foot fence when stopped in his driveway;[2] (3) he told Green that he "couldn't prove he was driving" because he did not have the keys; (4) he had a "strong odor" of alcoholic beverages and his eyes were "red and watery"; and (5) when asked how much he had had to drink that night he replied that he "didn't think he was drunk."

In ***Babbitt***, we held that erratic driving, an odor of alcohol in the car, glassy and bloodshot eyes, a "slow and deliberate" walk and an uncooperative attitude were sufficient to give the officer probable cause to arrest for driving under the influence—even without accompanying field sobriety tests. ***Id***. While Patterson was perhaps not driving erratically, he was speeding and accelerating from stop signs in an erratic manner; and while he was not uncooperative, he did, after being stopped, throw his keys over a fence and tell the officer he couldn't prove he was driving. We think the differences are a wash, and that Green had probable cause to arrest Patterson even without the other field test evidence.

By the Court.—Judgment affirmed.

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

[2] Patterson argues that the trial court was unable to find that the keys were thrown over the fence. He bases that assertion on the following remark of the court: "[Green] then saw something being thrown out of the vehicle, whether that would be a can of soda … or keys is not real germane. Something was tossed." We don't see the trial court as ruling one way or the other on the point. The court simply did not think the identity of the thrown object was important. The record is uncontradicted that Patterson threw something that "jingled" over the fence, that he told Green immediately thereafter he did not have any car keys and thus it could not be proved that he was driving–even though he had just turned off the ignition–and that Green later found the keys on the other side of the fence. The inference from these undisputed facts is inescapable: Patterson threw his keys over the fence as the officer approached.