COURT OF APPEALS
DECISION
DATED AND FILED

November 12, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1884-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RONALD R. YAKES,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County: JOHN R. RACE, Judge. *Affirmed.*

ANDERSON, J. In this appeal from his fourth conviction for operating a motor vehicle while intoxicated, § 346.63(1)(a), STATS., Ronald R. Yakes challenges the trial court's denial of his motion to dismiss. We affirm the conviction because we agree with the trial court that the sheriff's deputy had reasonable suspicions that merited a ***Terry*** stop.[1] We also agree that under the

[1] *See* ***Terry v. Ohio***, 392 U.S. 1(1968).

totality of the circumstances there were objective facts which would lead a reasonable sheriff's deputy to believe that Yakes probably operated a motor vehicle while intoxicated.

Yakes' first objection is that the arresting officer did not have probable cause to stop him. He contends that the officer had nothing more than an inarticulable hunch that he was involved in criminal activity.

Because the issue raised requires application of constitutional principles of law, this court is presented with a question of law that is reviewed without deference to the trial court's determination. *See* ***State v. Goebel***, 103 Wis.2d 203, 209, 307 N.W.2d 915, 918 (1981). However, this court must accept the factual findings of the trial court unless they are clearly erroneous. *See* ***State v. Guzy***, 139 Wis.2d 663, 671, 407 N.W.2d 548, 552 (1987). Where the trial court has not expressly made a finding necessary to support its legal conclusion, this court can assume that the trial court made the finding in a way that supports its decision. *See* ***Sohns v. Jensen***, 11 Wis.2d 449, 453, 105 N.W.2d 818, 820 (1960).

The test for determining the constitutionality of an investigative stop is an objective test of reasonableness. *See* ***Guzy***, 139 Wis.2d at 675, 407 N.W.2d at 554. The reasonableness of an investigative stop depends upon the facts and circumstances that are present at the time of the stop. *See* ***id***. at 679, 407 N.W.2d at 555. "Given a triggering fact or facts of suspicion, law enforcement officers and reviewing courts may also consider the circumstances that were present in determining the weight to be given those facts in making the balance between the intrusion and the societal interest." ***Id***. As long as there exists a correct legal theory to justify the stop and articulable facts fitting a criminal violation, the stop

is a legal one. *See* ***State v. Baudhuin***, 141 Wis.2d 642, 651, 416 N.W.2d 60, 63 (1987).

The uncontroverted evidence is that Walworth County Deputy Sheriff Robert B. Carter was enroute to the city of Elkhorn when he received a radio call from city of Elkhorn Officers that "[he] was to watch for a male subject who might try to drive away with a Ford pickup truck which was located in the parking lot of the Subway restaurant." The Elkhorn officers told Carter that the male was intoxicated and they had ordered him not to drive the vehicle.[2] When Carter reached the area of the Subway restaurant he saw a male run across the street into the Subway parking lot, run to a green Ford truck, which was the only vehicle in the lot, and get into the truck. Carter pulled into the parking lot behind the Ford truck and activated his emergency lights. He saw that the truck's headlights, taillights and backup lights were on and the truck backed up five feet, stopped and then pulled forward five feet. The driver exited the truck, and as Carter approached, the subject said that he was not driving. Carter immediately arrested the male because he appeared very nervous and the officer thought the male would attempt to flee. The individual was later identified as Yakes.

Yakes argues that this evidence does not rise to the level of a reasonable suspicion that is needed to justify a ***Terry*** stop. He asserts that the request to Carter to be on the lookout for a white male in the vicinity of the Subway parking lot was too imprecise to justify a stop. Although the radio

[2] Officers from the City of Elkhorn Police Department had initial contact with Yakes because he was a passenger in the Ford pickup truck they had stopped. The officer who had contact with Yakes observed that he had bloodshot eyes, slurred speech and there was the ever-present odor of intoxicants in the vehicle. When Yakes exited the vehicle he had a very unsteady gait and he told the police officers that he was too intoxicated to drive the truck. At that point the officers told him not to drive.

transmission was not precise, it was sufficient to warrant Carter's actions. Before stopping Yakes, the deputy independently confirmed that there was a Ford pickup truck in the Subway parking lot; in fact, it was the only vehicle in the lot. He saw Yakes, a white male, run across the street and enter the truck on the driver's side. Finally, as he pulled behind the truck he saw Yakes operate the truck. Carter's personal verification of this critical identifying information would lead a reasonable person to logically conclude from a commonsense standpoint that Yakes was the intoxicated individual the city of Elkhorn police asked Carter to be on the alert for. "Suspicious activity justifying an investigative stop is, by its very nature, ambiguous. Unlawful behavior may be present or it may not. The behavior may be innocent. Still, officers have the right to temporarily freeze the situation so as to investigate further." ***State v. Krier***, 165 Wis.2d 673, 678, 478 N.W.2d 63, 65 (Ct. App. 1991) (citation omitted).

Yakes' second objection is that Carter lacked probable cause to arrest him. He focuses on Carter's testimony that he arrested Yakes "for the City of Elkhorn based on their traffic [sic] to me stating he was not to drive the vehicle. It was my assumption that their charge would probably be obstruction." Yakes' argument revolves around Carter's subjective intentions and the elements of the misdemeanor offense of obstructing an officer, § 946.41, STATS. He contends that Carter did not have personal knowledge that he had done anything to prevent or make more difficult the performance of the city of Elkhorn officers' duties. *See* WIS J I—CRIMINAL 1766.

Probable cause to arrest requires that, at the moment of arrest, the officer knew of facts and circumstances which were sufficient to warrant a prudent person to believe that the person arrested had committed or was committing an offense. *See* ***Village of Elkhart Lake v. Borzyskowski,*** 123 Wis.2d 185, 189, 366

N.W.2d 506, 508 (Ct. App. 1985). Where the historical facts are undisputed, the question of whether there was probable cause for arrest is a question of law which this court may subject to an independent review. *See* ***id.***

Yakes' argument misses the mark because it focuses on the subjective intent of the arresting officer and the legal significance of whether the evidence would support a charge of obstructing an officer.

> Probable cause … is neither a technical nor a legalistic concept; rather, it is a 'flexible, common-sense measure of the plausibility of particular conclusions about human behavior,' ***State v. Petrone,*** 161 Wis.2d 530, 547-48, 468 N.W.2d 676, 682, *cert. denied*, 502 U.S. 925 (1991)—conclusions that need not be unequivocally correct or even more likely correct than not. ***Texas v. Brown***, 460 U.S. 730, 742 (1983). It is enough if they are sufficiently probable that reasonable people—not legal technicians—would be justified in acting on them in the practical affairs of everyday life. ***State v. Wisumierski***, 106 Wis.2d 722, 739, 317 N.W.2d 484, 492 (1982).

State v. Pozo, 198 Wis.2d 705, 711, 544 N.W.2d 228, 231 (Ct. App. 1995).

Despite Yakes' attempt to invalidate the arrest because of Carter's subjective intentions, "we are not bound by the officers' subjective assessment or motivation." ***State v. Anderson***, 149 Wis.2d 663, 675, 439 N.W.2d 840, 845 (Ct. App. 1989). As the Wisconsin Supreme Court has noted:

> As long as there was a proper legal basis to justify the intrusion, the officer's subjective motivation does not require suppression of the evidence or dismissal. The officer's subjective intent does not alone render a search or seizure of an automobile or its occupants illegal, as long as there were objective facts that would have supported a correct legal theory to be applied and as long as there existed articulable facts fitting the traffic law violation.

Baudhuin, 141 Wis.2d at 651, 416 N.W.2d at 63.

In ***Baudhuin,*** an officer observed the defendant operating at a very slow speed and after following him for six or seven blocks, the officer "stopped

the slow moving car 'to see if the driver needed a hand if he had something mechanically wrong with his car.'" ***Id.*** at 645, 416 N.W.2d at 61. As soon as the defendant began to talk to the officer it became obvious that the defendant was highly intoxicated, and after he failed several field sobriety tests he was arrested. In the trial court, Baudhuin contended that the officer had no justification for making a public safety or Good Samaritan stop and sought dismissal of the drunk-driving charges. The supreme court declined "to define the factual limitations of a Good Samaritan or public safety stop which could legitimately serve as a basis for plain view observations of the contents of the automobile or condition of its occupants." ***Id.*** at 650, 416 N.W.2d at 63. Rather, the court concluded that the arresting officer had before him objective facts that would have justified a stop if his purpose were to issue a citation for a traffic violation. *See* ***id.***

The same is true in this case. It is not necessary for us to decide if Yakes' conduct prevented or made more difficult the performance of the city of Elkhorn officers' duties establishing probable cause to arrest him for obstructing an officer.[3] We conclude there were objective facts available to Carter demonstrating that Yakes was operating a motor vehicle while intoxicated.

[3] Yakes and the State debate whether Yakes' "promise" to the city of Elkhorn police officers that he would not attempt to drive the truck because he was too intoxicated and his ignoring the officers' "command" not to drive constitute obstructing an officer. This court has been unable to find any reported decisions that mere refusal to obey a police command constitutes obstruction of an officer. *See* ***State v. Werstein***, 60 Wis.2d 668, 676, 211 N.W.2d 437, 441 (1973).

Carter had been told that Yakes was too intoxicated to operate a motor vehicle.[4] He personally observed Yakes operate the truck after learning that he was intoxicated. Looking at the totality of the circumstances, we conclude that Carter'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). It is sufficient that a reasonable officer would conclude, based upon the objective facts that were in his or her possession, that the officer would have been justified in arresting Yakes for operating a motor vehicle while intoxicated. *See* ***Bauhuin***, 141 Wis.2d at 650, 416 N.W.2d at 63.

Yakes contends, however, that the administration of field sobriety tests is essential to probable cause to arrest. He relies on the following language from ***State v. Swanson***, 164 Wis.2d 437, 475 N.W.2d 148 (1991):

> Unexplained erratic driving, the odor of alcohol, and the coincidental time of the incident 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 while under the influence of intoxicants.

Id. at 454 n.6, 475 N.W.2d at 155. However, this language has since been qualified. "The ***Swanson*** footnote does not mean that under all circumstances the officer must first perform a field sobriety test, before deciding whether to arrest for operating a motor vehicle while under the influence of an intoxicant." ***State v.***

[4] Yakes argues that the communications from the Elkhorn police officers did not include any information that he had committed any crime and Carter could not rely upon the "collective knowledge" of police officers to establish probable cause for an arrest. This argument ignores Carter's personal observation that Yakes drove the truck; it was this observation coupled with his justifiable reliance on the "collective knowledge" that Yakes was intoxicated that coalesced into a reasonable belief that Yakes had probably committed a crime.

Wille, 185 Wis.2d 673, 684, 518 N.W.2d 325, 329 (Ct. App. 1994). Thus, the question of probable cause is properly assessed on a case-by-case basis. In some cases, the field sobriety tests may be necessary to establish probable cause; in other cases, they may not. This case, we conclude, falls into the latter category.

Carter's justifiable reliance upon the knowledge of the Elkhorn police officers, *see* ***State v. Cheers***, 102 Wis.2d 367, 388-89, 306 N.W.2d 676, 685-86 (1981), excuses the lack of a field sobriety test in the Subway lot. In good faith, Carter could assume that at the time he arrested Yakes a trained police officer had reached the reasonable conclusion that Yakes was intoxicated.[5] *See* ***Schaffer v. State,*** 75 Wis.2d 673, 676-77, 250 N.W.2d 326, 329 (1977). Nor do we agree that having Yakes perform the field sobriety tests at the police station, rather than at the scene of the arrest, means that probable cause for the arrest did not exist.

By the Court.—Judgment affirmed.

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

[5] Although the Elkhorn officers did not require Yakes to perform field sobriety tests when they first had contact with him, their observations that he was intoxicated were confirmed when he volunteered that he was too drunk to drive the truck.