

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 10, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

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.

No. 98-1199-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN A. GATT,

DEFENDANT-APPELLANT.

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

VERGERONT, J.¹ John Gatt appeals a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant, second offense, contrary to § 346.63(1)(a), STATS. He contends that the trial court erred

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

when it determined there was probable cause to arrest him and therefore erred in denying his motion to suppress evidence. We conclude that the trial court correctly determined there was probable cause to arrest and we therefore affirm.

Wisconsin State Patrol Trooper David Harvey was the only witness at the hearing on Gatt's motion to suppress evidence. He testified as follows. He was on duty in the early morning of April 30, 1997, on Interstate 90 in Rock County. He received a CB channel report of a vehicle "that was all over the road" traveling eastbound on the interstate. The caller described the vehicle as a blue pickup with a silver tailgate or a silver stripe. Trooper Harvey then saw a blue pickup truck with a silver stripe on the tailgate traveling eastbound on the interstate, and he began to follow it. As he did so, he received another report over the CB giving him the same description of a blue pickup truck and stating that it was driving erratically or weaving back and forth.

Trooper Harvey noticed that the speed of the pickup varied between fifty-five to sixty-five miles an hour and that, while traveling in the right lane of traffic, the right tires of the pickup went across the solid fog line on the far right of the lane twice, going onto the right shoulder two to three feet. He also saw the right tires drift onto the solid fog line three to four times. Trooper Harvey activated his emergency lights. Just after he did so, he observed the pickup, which was directly in front of him, drift to the right shoulder approximately three to four feet, then drift back into the right lane and continue eastbound. The vehicle did not take an exit for a rest area but traveled past it and came to a stop on the shoulder of the interstate.

Trooper Harvey went up to the driver. In answer to Trooper Harvey's questions, the driver identified himself as Gatt and said that he was

traveling to Edgerton from Madison. However, the vehicle had passed the last exit to Edgerton before Trooper Harvey first observed the vehicle. In speaking with Gatt, Trooper Harvey smelled an odor of intoxicants.

Trooper Harvey then performed field sobriety tests. He had received training at the State Patrol Academy on the administration of these tests. According to his training at the Academy, these tests indicate impairment due to a high level of alcohol. He had arrested approximately one hundred persons for being under the influence of intoxicants. Based on his observations of the persons he had arrested and his administration of the field sobriety tests to them, the tests were accurate indicators of whether someone was under the influence of an intoxicant.

Trooper Harvey first did the horizontal gaze nystagmus test (HGN), which involved having Gatt's eyes follow an object and checking each eye for a lack of smooth pursuit, a jerkiness at maximum deviation and jerkiness prior to forty-five degrees. Those clues indicate that the person is under the influence of an intoxicant. Gatt had five of the six clues. While Gatt was performing the test, his body was swaying.

Next, Trooper Harvey had Gatt perform the one-leg stand after demonstrating it to Gatt. This test involves lifting one foot approximately six inches off the ground, keeping hands at one's side and counting out loud until told to stop. Gatt put his foot down three times during the thirty second time span that he was to keep it raised, as well as lifting his hands from side to side to maintain his balance and swaying during the test. His performance on this test indicated to Trooper Harvey that he was impaired.

The third test was the walk-and-turn test, which Trooper Harvey demonstrated for Gatt. This test involves putting the right foot in front of the left, heel to toe, and taking nine heel-to-toe steps while counting out loud; and then turning and taking nine heel-to-toe steps back while counting out loud, with hands at one's side. Gatt could not stand heel-to-toe during the instruction phase, as he was directed. He left several inches between his heel and toe while he was walking. He did not do the turn as Trooper Harvey had demonstrated for him and he almost lost his balance during the turn. Gatt also took eleven return steps as opposed to nine on the return and then continued into a third set of steps rather than stopping after taking nine return steps as he had been instructed. When Trooper Harvey stopped Gatt, it appeared as though Gatt was going to continue on and do a fourth set of steps. The one-leg stand and the walk-and-turn tests assess the participant's ability to follow instructions and to divide one's attention. Gatt's performance on the walk-and-turn test indicated to Trooper Harvey that Gatt's divided attention skills were impaired.

Trooper Harvey then performed a preliminary breath test (PBT). The result was a .15. Trooper Harvey placed Gatt under arrest for operating under the influence of an intoxicant.

On cross-examination, Trooper Harvey acknowledged that things other than alcohol can cause nystagmus (jerkiness) of the eyes. He also acknowledged that the sample group of people that the field sobriety tests had been used on did not include persons who were fifty pounds or more overweight. On redirect he explained that this does not necessarily mean that the tests are invalid for such persons; it simply means that the sample subjects did not include them. Gatt was five foot nine inches tall and weighed 240 pounds. Trooper Harvey also conceded that the assumption of the walk-and-turn test and the one-

leg stand test is that a person can perform these tests when sober, and he did not know about Gatt's ability to balance when sober.

The trial court "received into the record" a height/weight table but declined to take judicial notice of it. The trial court determined that Trooper Harvey had reasonable suspicion to detain Gatt and there was probable cause to arrest him. The court specifically noted Trooper Harvey did not testify that the tests were invalid for persons fifty pounds overweight or more. The court concluded that Gatt's inability to adequately perform the tests established probable cause to arrest prior to giving the PBT.

The only issue on appeal is whether the trial court correctly determined there was probable cause to arrest Gatt. Gatt argues there was no probable cause before the administration of the PBT because the field sobriety tests were not relevant and not probative of alcohol impairment. Gatt contends that, because he is more than fifty pounds overweight according to the height/weight table, the tests were not valid: they did not show that he had poor balance due to alcohol impairment as opposed to poor balance due to being overweight.

Probable cause to arrest exists where the officer, at the time of arrest, has knowledge of facts and circumstances sufficient to warrant a person of reasonable prudence to believe that the arrestee is committing or has committed an offense. *County of Dane v. Sharpee*, 154 Wis.2d 515, 518, 453 N.W.2d 508, 510 (Ct. App. 1990). When the historical facts are undisputed, the question of whether there is probable cause to arrest is a question of law, which this court reviews de novo. See *Village of Elkhart Lake v. Borzyskowski*, 123 Wis.2d 185, 189, 366 N.W.2d 506, 508 (Ct. App. 1985).

We conclude that prior to administering the PTB, Trooper Harvey had probable cause to arrest Gatt, even without consideration of his loss of balance on the one-leg test and the walk-and-turn test. Trooper Harvey testified that the one-leg stand test and the walk-and-turn test also test the ability to follow instructions and to divide one's attention. Taking additional steps and continuing the walk-and-turn test for a third set of steps demonstrated an inability to follow instructions, which is unrelated to the difficulty Gatt may have had with his balance because of being overweight.

Gatt does not argue that being overweight has any impact on the results of the HGN test. There is no evidence that Gatt's weight would have caused him to sway or lose his balance while he was standing on two feet performing the HGN test. The fact that there may be causes for poor performance on the HGN test besides alcohol impairment is not relevant to our consideration in this case because there is no evidence that there was any reason for Gatt's poor performance on the HGN besides high alcohol level.

Probable cause is a common sense test and deals with probabilities that are not technical but are the factual and practical considerations of everyday life on which reasonable and prudent persons act. *See Sharpee*, 154 Wis.2d at 518, 453 N.W.2d at 510. Gatt's driving was erratic. He had passed the last exit to Edgerton even though that was where he said he was going. He smelled of intoxicants. He was swaying even when he was not performing the balance tests. He did not follow instructions for the walk-and-turn test, and he failed five out of six clues for the HGN test. These circumstances are sufficient to establish probable cause to believe that Gatt was driving while under the influence of alcohol.

By the Court.—Judgment affirmed.

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

