

**COURT OF APPEALS
DECISION
DATED AND FILED**

SEPTEMBER 1, 1999

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. 99-0131-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NICHOLAS R. SIMONET,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County:
JAMES L. CARLSON, Judge. *Affirmed.*

ANDERSON, J.¹ Nicholas R. Simonet challenges the probable cause to support his arrest for a third offense driving while intoxicated and the sufficiency of the evidence to support the jury's verdict finding him guilty of that charge. Our commonsense view of the totality of the circumstances convinces us that that there was probable cause for his arrest, and when the

¹ One judge, pursuant to § 752.31(2), STATS., decides this appeal.

evidence is viewed most favorably to support the verdict, we are also convinced that the jury properly found Simonet guilty beyond a reasonable doubt. Therefore, we affirm.

After an accident in which he was seriously injured, Simonet was charged with his third offense operating an automobile while intoxicated (OAWI) in violation of §§ 346.63(1)(a) and 346.65(2)(c), STATS., and his third offense operating with a prohibited blood alcohol concentration (PBAC) in violation of §§ 346.63(1)(b), 346.65(2)(c) and 340.01(46m), STATS.

The facts relevant to this appeal are not in dispute and were developed at the hearing on Simonet's motion to dismiss and the jury trial. At approximately 6:45 p.m. on October 12, 1997, Officer Paul Schmidt of the Town of East Troy Police Department responded to the report of a motorcycle and automobile accident at the intersection of State Highway 20 and County Highway ES. When he arrived at the scene he saw Simonet on the ground being attended to by two members of an ambulance squad. He noticed an odor of intoxicants but did not know if the odor was coming from Simonet. After securing the accident scene, Schmidt interviewed Julieann Clausing, who had been a passenger on Simonet's motorcycle. Clausing stated that the accident happened when the motorcycle lost all electrical power and Simonet was walking the cycle to the shoulder of the road. Approximately twenty seconds later, Simonet was struck by an automobile southbound on State Highway 20. During this interview, Clausing told Schmidt that Simonet had approximately two beers during dinner.

Earlier in the day, Simonet and Clausing watched a Packers game. They testified that Simonet did not consume any alcoholic beverages during the game. After the Packers beat Detroit, they decided to take a scenic ride in the

country on Simonet's motorcycle. After riding for approximately two hours, they stopped to have dinner at Hog's Alley tavern. At the tavern Simonet had a steak sandwich and two twelve-ounce mugs of beer. They left the tavern shortly after 5:00 p.m. and rode along back country roads in the Kettle Moraine Forest area. The accident happened in Walworth county as Simonet and Clausing were going to visit his sister.

After Simonet was transported to a local hospital, Schmidt went to the East Troy Firehouse to complete the paperwork on the accident. Schmidt went to the hospital at approximately 9:00 p.m. with the express purpose of obtaining a blood test of Simonet. When he arrived at the hospital he was told by a female security guard, who was also a trained law enforcement officer, that she had administered a preliminary breath test (PBT) to Simonet and the result was 0.12% blood alcohol concentration (BAC). Schmidt testified that Simonet was combative at the hospital, telling the staff that he did not want to be treated by anyone. When Schmidt contacted Simonet in the emergency room (ER), Schmidt "did detect an odor of intoxicants about his person; [and] noticed that his eyes were blood shot." Because he noticed the odor of intoxicants in the hospital, Schmidt determined that Simonet was the source of the odor of intoxicants at the accident scene. Simonet was alert in the ER and understood the questions that Schmidt asked him. Schmidt did not perform any field sobriety tests because of Simonet's broken leg. Schmidt testified that he concluded Simonet was operating under the influence because of the accident, information from Clausing that Simonet had approximately two beers at dinner, the odor of intoxicants and the results of the PBT administered by the hospital security guard.

Prior to trial, Simonet moved to dismiss the complaint, asserting that the arresting officer lacked probable cause. The circuit court denied his motion to

dismiss, reasoning that the accident Simonet was involved in, the results of a PBT administered by a hospital security guard and the odor of intoxicants coming from Simonet were enough to establish probable cause for Simonet's arrest for drunk driving. After the jury found Simonet guilty of OAWI and acquitted him of PBAC, he moved for a directed verdict of acquittal on the OAWI charge. The circuit court denied his motion and entered judgment on the verdict.

Simonet appeals the circuit court's finding of probable cause and the jury's finding of guilty on the OAWI charge. He contends that at the time of his arrest the police officer needed more than the fact that he was involved in an accident, his passenger's statement that Simonet had several drinks before the accident and the odor of an intoxicant to establish probable cause for arrest. He challenges the jury verdict with the argument that his acquittal on the PBAC charge establishes that the jury concluded he did not have a prohibited blood alcohol concentration and the other evidence of his impaired driving was not sufficient to support the guilty verdict.

As we previously noted, the facts relative to the question of probable cause are not disputed. Whether undisputed facts constitute probable cause to arrest is a question of law which we review without deference to the trial court.² See *State v. Babbitt*, 188 Wis.2d 349, 356, 525 N.W.2d 102, 104 (Ct. App. 1994). In conducting this review, we look to the totality of the circumstances to determine if the arresting officer's knowledge at the time of the arrest would lead a reasonable officer to believe that the defendant was operating a motor vehicle

² We are not limited to the facts as presented at the hearing on the motion to dismiss and may examine pertinent trial evidence as well. See *State v. Griffin*, 126 Wis.2d 183, 198, 376 N.W.2d 62, 69 (Ct. App. 1985), *aff'd*, 131 Wis.2d 41, 388 N.W.2d 535 (1986), *aff'd*, 483 U.S. 868 (1987).

while under the influence of an intoxicant. *See State v. Nordness*, 128 Wis.2d 15, 37, 381 N.W.2d 300, 309 (1986). Probable cause to arrest is to be judged by “the factual and practical considerations of everyday life on which reasonable and prudent persons, not legal technicians, act.” *State v. Truax*, 151 Wis.2d 354, 360, 444 N.W.2d 432, 435 (Ct. App. 1989).

Schmidt had probable cause to arrest Simonet for driving while intoxicated. The following evidence reasonably indicated to Schmidt that Simonet was impaired: he was walking his motorcycle on the side of the road when struck by an automobile, Clausen told the officer that Simonet had approximately two beers before the accident, Schmidt noticed a moderate odor of alcohol at the accident scene and again in the hospital ER, Simonet’s eyes were bloodshot in the ER, Simonet was combative in the ER and the results of the PBT administered by the hospital security guard demonstrated that he had alcohol in his system.

Simonet suggests that the lack of field sobriety tests deprived Schmidt of sufficient knowledge to support a conclusion that he was driving while impaired. Whether probable cause exists is assessed on a case-by-case basis; field sobriety tests are not always necessary to establish probable cause. *See State v. Kasian*, 207 Wis.2d 611, 622, 558 N.W.2d 687, 692 (Ct. App. 1996). Such tests were not necessary in this case because, as we have already concluded, the circumstances within Schmidt’s knowledge were sufficient to permit a reasonable officer to conclude there was probable cause.

Simonet also faults Schmidt for his reliance on the results of the PBT administered by the hospital security guard. However, an officer’s beliefs may be partially predicated on hearsay information. *See State v. Cheers*, 102 Wis.2d 367, 386, 306 N.W.2d 676, 684 (1981). Schmidt had more than sixteen

years of experience and had attended numerous in-service schools where he was taught to detect signs of intoxication and handle intoxicated drivers. In determining whether probable cause existed, Schmidt's conclusions based on his investigative experience may be considered. See *State v. Wille*, 185 Wis.2d 673, 683, 518 N.W.2d 325, 329 (Ct. App. 1994). In conclusion, we are satisfied the circumstances within Schmidt's knowledge would lead a reasonable officer to believe Simonet was driving under the influence of an intoxicant. See *Kasian*, 207 Wis.2d at 621, 558 N.W.2d at 691.

We now turn our attention to Simonet's challenge to the sufficiency of the evidence. Our review of the sufficiency of the evidence is to determine whether the evidence, viewed most favorably to the State and the conviction, "is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *State v. Ray*, 166 Wis.2d 855, 861, 481 N.W.2d 288, 291 (Ct. App. 1992) (quoted source omitted). We will affirm a conviction if we conclude that the trier of fact, acting reasonably, could be convinced beyond a reasonable doubt by evidence it is entitled to accept as true. See *State v. Teynor*, 141 Wis.2d 187, 204, 414 N.W.2d 76, 82 (Ct. App. 1987). We will not substitute our judgment for that of the trier of fact, unless "the evidence supporting the jury's verdict conflicts with nature or the fully established facts, or unless the testimony supporting and essential to the verdict is inherently and patently incredible." *State v. Sharp*, 180 Wis.2d 640, 659, 511 N.W.2d 316, 324 (Ct. App. 1993).

Simonet's primary argument is that in acquitting him of the PBAC charge the jury obviously concluded that his blood alcohol concentration did not exceed the legal limit of 0.10%. Simonet ignores an obvious truth concerning juries: they "may acquit a defendant in a criminal case on the basis of extraneous

considerations, even when the defendant may be objectively guilty in light of the facts of the case and the court's instructions." *State v. Bjerkaas*, 163 Wis.2d 949, 960, 472 N.W.2d 615, 619 (Ct. App. 1991). To argue that the reason for the acquittal is that the jurors concluded that Simonet's blood alcohol concentration did not exceed the legal limit would be to engage in speculation.

Even assuming the jury concluded that Simonet's blood alcohol concentration results were below 0.10%, it does not follow that this would be sufficient to require a directed verdict of acquittal on the OAWI charge. Unlike a charge of operating with a prohibited blood alcohol concentration, a charge of operating while under the influence of an intoxicant can be proven without a blood alcohol concentration result. In this case there was ample other evidence of Simonet's operating while intoxicated. The evidence we previously held supported Schmidt's probable cause determination to arrest Simonet can also be considered by the jury to establish guilt beyond a reasonable doubt.

By the Court.—Judgment affirmed.

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