COURT OF APPEALS DECISION DATED AND FILED

September 16, 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. 99-0664

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

TOWN OF DUNN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL L. WOODMAN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: ANGELA B. BARTELL, Judge. *Affirmed.*

DYKMAN, P.J.[1] Michael L. Woodman appeals from an order of the Dane County Circuit Court affirming his conviction in the Town of Dunn Municipal Court for operating a motor vehicle while under the influence of an intoxicant and speeding. Woodman argues that his arrest was not based on

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

probable cause because the Town did not demonstrate that the field sobriety tests he performed were probative of whether he had been driving while intoxicated. We disagree and affirm.

I. Background

A few minutes after midnight on September 27, 1998, Town of Dunn Police Deputy Jeffrey R. Thiel observed a car travelling fifty-five miles per hour on a road with a thirty-five mile per hour speed limit. Thiel followed the car and saw it swerve across the road three or four times. Thiel pulled the car over and observed two people inside. He informed the driver, Woodman, that he had been speeding. As Thiel spoke with Woodman, he smelled alcohol on Woodman's breath and noticed that his eyes were red. Woodman said that he had consumed about twelve beers roughly twelve hours earlier. Thiel asked Woodman to step out of the car and perform several field sobriety tests.

Thiel administered three sobriety tests: the horizontal gaze nystagmus test (HGN), the walk-and-turn test and the one-leg stand test. During the HGN, in which Thiel checked whether Woodman's eyes could track smoothly, Woodman did not stand still, instead swaying back and forth. Thiel then administered the walk-and-turn test, in which Woodman was to listen to the instructions, and then count out loud as he took nine heel-to-toe steps out and nine steps back. Woodman began before the instructions were finished, repeated the number four while counting, and stopped at seven steps on the way out and at five steps on the way back. For the one-leg stand test, Thiel told Woodman to stand on one leg, with his other leg in front of him, six inches off the ground, and to count out loud from 1001 to 1030. Woodman stood with his right foot one inch off the ground and counted to 1007. He then put his foot down, picked it up again,

counted from nine to twelve, put his foot down again, and picked it up one more time, counting from thirteen to fifteen.

After administering a preliminary breath test, Thiel placed Woodman under arrest. After a trial, the Town of Dunn Municipal Court convicted Woodman of operating a motor vehicle while under the influence of an intoxicant, contrary to Town of Dunn Ordinance No. 19.01, which adopts § 346.63(1)(a), STATS., and speeding, contrary to § 346.57(4)(g), STATS. Woodman appealed to the Dane County Circuit Court. The circuit court affirmed the judgment of the municipal court, concluding that Thiel had probable cause to arrest Woodman and that there was sufficient evidence to sustain the conviction. Woodman appeals.

II. Analysis

Woodman argues that the trial court erred by concluding that Thiel had probable cause to arrest him for operating a motor vehicle while under the influence of an intoxicant. Woodman claims that the field sobriety tests Thiel administered cannot be part of the probable cause analysis because the Town of Dunn did not establish that the tests were probative of whether his ability to drive was impaired by alcohol consumption. Without the sobriety tests, Woodman asserts, Thiel did not have probable cause.

Whether undisputed facts constitute probable cause to arrest is a question of law that we review de novo. *See* ***State v. Babbitt***, 188 Wis.2d 349, 356, 525 N.W.2d 102, 104 (Ct. App. 1994). We examine the totality of the circumstances facing the arresting officer at the time to determine whether a reasonable officer, under the same circumstances, would believe that the defendant committed a crime or violated a traffic statute. *See* ***id.*** The circumstances do not

have to demonstrate proof beyond a reasonable doubt or that guilt is more likely than not, but merely that a reasonable officer would conclude that the defendant probably operated a motor vehicle while under the influence of an intoxicant. ***See id.*** at 357, 525 N.W.2d at 104.

We conclude that Thiel had probable cause to arrest Woodman. Before making the arrest, Thiel observed seven indications that Woodman had been driving while intoxicated: (1) Woodman was driving twenty miles an hour over the speed limit and swerved across the road three to four times; (2) Woodman's breath smelled of alcohol; (3) his eyes were red; (4) during the HGN test, Woodman swayed back and forth; (5) Woodman began the walk-and-turn test before Thiel finished the instructions; (6) during the one-leg stand test, Woodman raised his foot only one inch off the ground and put it down twice; and (7) during both the walk-and-turn and one-leg stand tests, he miscounted. There may be innocent explanations for some of these observations, but, as a whole, they are sufficient to permit a reasonable police officer to conclude that Woodman had probably been driving while under the influence of alcohol.

We do not agree that the Town of Dunn had to demonstrate that the sobriety tests were probative of whether Woodman's ability to drive was impaired by intoxication before the tests could be used in a probable cause analysis. Although Wisconsin's appellate courts have not directly addressed the issue, the decisions of other states' courts are instructive.

In ***Illinois v. Sides***, 556 N.E.2d 778 (Ill. App. Ct. 1990), the Illinois Court of Appeals considered whether scientific evidence must be submitted to determine the validity of field sobriety tests. The Illinois court explained that

because evidence of intoxication can be understood by lay people, expert testimony is not needed:

> [I]t is entirely appropriate for the jury to consider the defendant's ability to perform the simple physical tasks which comprise the field-sobriety tests. The jury's inference that a defendant who had difficulty performing some of these tasks may have been similarly impaired in his ability to think and act with ordinary care when in operation of an automobile is entirely justified and one which the law permits the jury to draw.
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> Certainly in our modern society, a juror's common observations and experiences in life would include not only the driving of an automobile, but a familiarity with the degree of physical and mental acuity required to do so. No expert testimony is needed nor is a showing of scientific principles required before a jury can be permitted to conclude that a person who performs badly on the field-sobriety tests may have his mental or physical faculties "so impaired as to reduce his ability to think and act with ordinary care."

Id. at 779-80 (quoting Illinois Pattern Jury Instruction, Criminal, No. 23.05 (2d ed. Supp. 1989)).

In ***Florida v. Meador***, the District Court of Appeals of Florida held that a police officer's lay observations of a person's performance in field sobriety tests were admissible in evidence.[2] ***Florida v. Meador***, 674 So. 2d 826, 831-32 (Fla. Dist. Ct. App. 1996). The court explained that sobriety tests contain objective components that can be easily understood without special expertise. *See* ***id.*** at 831. As a result, the court concluded:

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[2] The court excluded HGN tests from its analysis, later holding that an HGN test was scientific evidence and the results from such a test were not admissible as lay observations. *See* ***Florida v. Meador***, 674 So. 2d 826, 831 and 834 (Fla. Dist. Ct. App. 1996). In Woodman's case, however, Thiel's testimony regarding the results of the HGN test is not a factor in our probable cause analysis. We consider only the fact that during the HGN test, Woodman swayed back and forth–a common lay observation.

> The mere fact that the NHTSA studies attempted to quantify the reliability of the field sobriety tests in predicting unlawful BAC's does not convert all of the observations of a person's performance into scientific evidence. The police officer's observations of the field sobriety exercises, other than the HGN test, should be placed in the same category as other commonly understood signs of impairment, such as glassy or bloodshot eyes, slurred speech, staggering, flushed face, labile emotions, odor of alcohol or driving patterns.

Id. at 831-32.

We agree with the reasoning of the Illinois and Florida courts. Wisconsin courts have long held that a lay witness may give an opinion as to whether a person was intoxicated at a particular time. *See* ***State v. Burkman***, 96 Wis.2d 630, 645, 292 N.W.2d 641, 648 (1980); *see also* ***Kuroske v. Aetna Life Ins. Co.***, 234 Wis. 394, 404, 291 N.W. 384, 388 (1940). There is no reason that a police officer's lay observations made during sobriety tests cannot be used to determine whether a person had probably been operating a motor vehicle while intoxicated. Probable cause determinations "are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent [people], not legal technicians, act." ***State v. Paszek***, 50 Wis.2d 619, 625, 184 N.W.2d 836, 840 (1971) (quoting ***Brinegar v. United States***, 338 U.S. 160, 175 (1949)). Expert testimony will not help determine whether field sobriety tests are reliable in a probable cause determination.

By the Court.—Order affirmed.

Not recommended for publication in the official reports. See RULE 809.23(1)(b)4, STATS.