COURT OF APPEALS
DECISION
DATED AND FILED

April 4, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-2606-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

GENE RENZONI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: DENNIS J. BARRY, Judge. *Reversed and cause remanded with directions.*

¶1 BROWN, P.J.[1] Gene Renzoni appeals from his conviction for causing injury while driving with a prohibited blood alcohol concentration. He

[1] This is a one-judge appeal pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000).

contends that the trial court erred in denying his motion to suppress all evidence or, in the alternative, the blood test, on grounds that his arrest was without probable cause. The only two pieces of evidence supporting the officer's decision to arrest were the accident and an odor of intoxicants on Renzoni's breath. After reviewing all the pertinent case law, this court agrees with Renzoni that such evidence was insufficient to support probable cause. We reverse the conviction and remand with directions that all evidence resulting from the illegal arrest be suppressed.

¶2 The facts are not disputed. Renzoni was involved in a two-car accident on October 30, 1999, at approximately 7:00 p.m. He was extricated from his vehicle by the jaws-of-life. He was then placed on a board and transported to a rescue vehicle. The arresting officer was at the scene of the accident and talked with Renzoni as he lay in the rescue vehicle. The officer asked Renzoni what happened. Renzoni responded that he had been driving northbound on Highway 32, speaking on a cellular phone. He did not notice the vehicle in front of him brake and he then rear-ended the vehicle. The officer smelled intoxicants on Renzoni's breath at this time. When asked, Renzoni told the officer that he had one beer with dinner that evening.

¶3 One hour later, the officer arrived at the hospital where Renzoni had been transported. During the next hour, the officer had the opportunity to observe and speak with Renzoni. The officer verified information contained in Renzoni's driver's license and other facts pertinent to the investigation. During this time, the officer observed that Renzoni seemed to speak coherently. His speech was normal. His attitude was cooperative. The officer did not see Renzoni walk at all during this time, did not ask him to recite the alphabet and did not ask him to count backwards. At approximately 9:00 p.m., the officer placed Renzoni under

arrest. At about 10:00 p.m. the first of two blood tests was administered. The blood test showed that he was over the .10% limit. Renzoni subsequently brought a motion to suppress all evidence on grounds that there was no probable cause to arrest. The circuit court denied the motion and Renzoni then pled guilty. He now brings this appeal.

¶4 As we said, the above facts are undisputed. Whether undisputed facts constitute probable cause is a question of law that is reviewed without deference to the trial court. ***State v. Babbitt***, 188 Wis. 2d 349, 356, 525 N.W.2d 102, 104 (Ct. App. 1994). The standard is whether the specific facts of the particular case would have led a reasonable officer to conclude that the defendant probably violated the law. ***State v. Wille***, 185 Wis. 2d 673, 682, 518 N.W.2d 325 (Ct. App. 1994). The standard for probable cause to arrest is comparatively low. The conclusion must be based on more than a suspicion that the defendant committed a crime, but the evidence need not even reach the level that guilt is more likely than not. ***State v. Mitchell***, 167 Wis. 2d 672, 681-82, 482 N.W.2d 364 (1992).

¶5 The problem with this case is that the case law has not clearly outlined the minimum evidence necessary to establish probable cause to arrest for operating while intoxicated. In ***State v. Seibel***, 163 Wis. 2d 164, 183-84, 471 N.W.2d 226 (1991), the supreme court held that several factors were sufficient to give the police *reasonable suspicion* that Seibel's driving was impaired by alcohol. However, ***Seibel*** did not need to consider what factors would constitute *probable cause* for arrest and therefore did not do so. Then, in a footnote to ***State v. Swanson***, 164 Wis. 2d 437, 453 n.6, 475 N.W.2d 148 (1991), the supreme court said that while the factors found in ***Seibel*** added up to reasonable suspicion, they did not add up to probable cause.

¶6 So, we begin our analysis with the ***Seibel*** case. There, we find five factors that the supreme court said were indicative of reasonable suspicion. Those factors were: (1) unexplained erratic driving which caused the accident; (2) a strong odor of alcohol from Seibel's traveling companions; (3) the knowledge that Seibel and his companions had been travelling between taverns in a joint venture and that the companions had a "strong" odor of alcohol; (4) the police chief's belief that he smelled an intoxicant on Seibel; and (5) Seibel's belligerent conduct and lack of contact with reality when he was in the hospital. ***Seibel***, 163 Wis. 2d at 181-83.

¶7 Contrasting these factors in ***Seibel***, which the supreme court said in ***Swanson*** did not add up to probable cause, with the facts here, we conclude that the facts here are not nearly as strong as they were in ***Seibel***. First, the erratic driving by Renzoni was explained by him. It may not have been the truth or may not have been the sole reason for his inattention, but the salient question to be asked is whether the accused at least had an explanation for his erratic driving. Seibel gave no justifiable reason for crossing the center line just before a curve in a no-passing zone. ***Seibel***, 163 Wis. 2d at 181. Renzoni gave a justifiable reason. Second, while Seibel was traveling from tavern to tavern, the only evidence here was that Renzoni drank at home. Third, there is no testimony showing a "strong" odor of alcohol. Fourth, Renzoni was coherent and cooperative, not belligerent like Seibel. If the facts in ***Seibel*** were not enough to convince the ***Swanson*** court that they amounted to probable cause, this court does not know how the facts here can pass muster.

¶8 Of course, this court recognizes that, irrespective of the supreme court's footnote in ***Swanson***, it could be that the supreme court misspoke and that, if given the opportunity, the supreme court might withdraw or modify the footnote

to say simply that ***Seibel*** did not discuss probable cause. Until that time, however, we are bound by that language.

¶9 Nonetheless, because we also recognize that there are facts outside the ***Seibel/Swanson*** paradigm that our appellate courts have found to be sufficient for probable cause, we will discuss those fact situations. Here is what we find. In ***Wille***, the court was faced with a rear-end accident just as is the case here. The defendant's unexplained erratic driving and the odor of intoxicants were factors in favor of probable cause. But the key to affirming the finding of probable cause in that case was Wille's statement that he "had to quit doing this." ***Wille***, 185 Wis. 2d at 683. Had Wille not made his inculpatory statement at the hospital, it is doubtful whether this court would have upheld the probable cause determination. Renzoni made no similar inculpatory statement. While the State here believes that Renzoni's admission to having had one beer is similar to Wille's statement, we reject that. Wille's statement was inculpatory. It is not illegal, however, to have one beer. Whether Renzoni was truthful or not when he made the statement, the statement itself does not show a guilty mind that could be used by the officer as a basis for probable cause to arrest.

¶10 In ***State v. Kasian***, 207 Wis. 2d 611, 622, 558 N.W.2d 687 (Ct. App. 1996), the markers in that one-car accident were a strong odor of intoxicants about Kasian and slurred speech. Neither is present here.

¶11 We have perused a list of similar cases where no field sobriety tests were conducted because of the accused's physical injuries resulting from the accident. In a Westlaw search, we discovered fifty-two cases, published and unpublished. There is no need to cite to them and, indeed, we cannot cite unpublished decisions. Suffice it to say, the decisions affirming findings of

probable cause all have characteristics that are not present here. In no particular order, they are combinations of the following: *strong* odor of intoxicants on the suspect's breath, slurring of words, glassy eyes, unsteady gait, incoherent speech, fumbling with a wallet, belligerence or uncooperative attitude, *unexplained* erratic driving, evidence of bar hopping, eyewitness accounts, the accident occurring soon after bar closing time, and empty or partially empty beer cans or liquor bottles strewn about the vehicle. None of these factors are present here. Based upon our review of the case law, we must reverse with directions that all evidence be suppressed as the fruit of an illegal arrest.

By the Court.—Judgment and order reversed and cause remanded with directions.

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