COURT OF APPEALS
DECISION
DATED AND FILED

October 11, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 01-0595

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

COUNTY OF DANE,

PLAINTIFF-APPELLANT,

V.

JEFFREY J. MAWHINNEY,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: C. WILLIAM FOUST, Judge. *Reversed and cause remanded.*

¶1 ROGGENSACK, J.[1] Jeffrey J. Mawhinney was charged with operating a motor vehicle while intoxicated and operating a motor vehicle with a prohibited alcohol concentration, both as first offenses. He moved to suppress the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1999-2000). Additionally, all further references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

results of a blood alcohol test. The circuit court granted the motion because it concluded that the police did not have probable cause to arrest. Because we conclude that the police did have probable cause when the blood test was taken, we reverse the circuit court's suppression order and remand for further proceedings.

BACKGROUND

¶2 Mawhinney was involved in a one-vehicle motorcycle accident, which occurred when he failed to negotiate a curve, crossed the lane for oncoming traffic and crashed. He sustained multiple injuries. Deputy Eric Novotny contacted Mawhinney at the scene of the accident, while an EMT was providing medical attention to him. Mawhinney said that he could not remember much about the accident. As they conversed, Novotny noticed a strong odor of alcohol coming from Mawhinney's breath and observed that his eyes were bloodshot and watery. Novotny asked him whether he had been drinking prior to the accident, and Mawhinney said that he had "had a couple." Novotny also testified that Mawhinney's speech was slurred during their conversation.

¶3 Mawhinney complained of pain in his neck, back, chest, leg and arm. Novotny noted a laceration on the top of Mawhinney's head and that his mouth was bleeding. Novotny testified that he did not attempt to conduct any field sobriety tests because of Mawhinney's injuries and because Mawhinney was being treated by medical personnel. He conferred with Deputy Rauch about his observations.

¶4 At the hospital, Rauch continued to investigate whether an alcohol-related offense had occurred. As he spoke with Mawhinney, Rauch noticed a strong odor of intoxicants and also observed that Mawhinney's eyes were

bloodshot and glassy. In response to questioning, Mawhinney told Rauch that he had been at two bars that afternoon and that he had consumed four beers. According to Mawhinney, he had his last beer between four and five o'clock in the afternoon; the accident occurred at about five forty-five.

¶5 During the entire time that Rauch met with him, Mawhinney was in a neck brace and lying on his back. As with Novotny, Rauch did not attempt to conduct any field sobriety tests because of the medical treatment Mawhinney was receiving. However, Rauch determined that the cumulative effect of the information he had gathered at the hospital and the information he had obtained from Novotny was sufficient to support probable cause to arrest Mawhinney for driving a motor vehicle while intoxicated (OMVWI), in violation of WIS. STAT. § 346.63(1)(a). Accordingly, Rauch informed Mawhinney that he was being placed under arrest. Rauch read him the Informing the Accused form, and Mawhinney then gave his consent to draw blood for a blood alcohol test.[2]

¶6 Prior to trial, Mawhinney filed a motion to suppress the results of the blood alcohol test. He argued that the police did not have probable cause to make an arrest and therefore, the blood test was an illegal search in violation of the Fourth Amendment. The circuit court agreed with Mawhinney and granted his motion to suppress. The State sought leave to appeal the non-final suppression order. We granted the State leave, and we now reverse the order of the circuit court.

[2] Rauch later issued a citation for driving a motor vehicle with a prohibited alcohol concentration, in violation of WIS. STAT. § 346.63(1)(b), as well as the citation for OMVWI.

DISCUSSION

Standard of Review.

¶7 We sustain a circuit court's findings of fact relating to a suppression motion, unless they are clearly erroneous. ***State v. Roberts***, 196 Wis. 2d 445, 452, 538 N.W.2d 825, 828 (Ct. App. 1995). Whether the established facts constitute probable cause to arrest is a question of law that we review *de novo*. ***State v. Babbitt***, 188 Wis. 2d 349, 356, 525 N.W.2d 102, 104 (Ct. App. 1994).

Probable Cause.

¶8 The test for probable cause is a commonsense test. ***County of Dane v. Sharpee***, 154 Wis. 2d 515, 518, 453 N.W.2d 508, 510 (Ct. App. 1990). A police officer has probable cause to arrest when the totality of the circumstances within that officer's knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant probably committed an offense. ***State v. Koch***, 175 Wis. 2d 684, 701, 499 N.W.2d 152, 161 (1993). The officer's observations supporting an arrest need not be sufficient to prove guilt beyond a reasonable doubt, nor adequate to prove that guilt is more likely than not. ***Babbitt***, 188 Wis. 2d at 357, 525 N.W.2d at 104; ***State v. Mitchell***, 167 Wis. 2d 672, 681-82, 482 N.W.2d 364, 367-68 (1992). It is only necessary that the evidence would lead a reasonable officer to believe that guilt is more than a possibility. ***State v. Paszek***, 50 Wis. 2d 619, 625, 184 N.W.2d 836, 839-40 (1971).[3]

[3] In determining probable cause, an officer may rely on the collective knowledge of the officer's entire department. ***State v. Wille***, 185 Wis. 2d 673, 683, 518 N.W.2d 325, 329 (Ct. App. 1994).

¶9 In granting Mawhinney's motion to suppress, the circuit court expressed reservations but ultimately concluded that the outcome in this case was controlled by a footnote in ***State v. Swanson***, 164 Wis. 2d 437, 475 N.W.2d 148 (1991), which opines that the facts present in an earlier case, ***State v. Seibel***, 163 Wis. 2d 164, 181-83, 471 N.W.2d 226, 234 (1991), fell short of establishing probable cause for arrest, and also that:

> [u]nexplained 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.

Swanson, 164 Wis. 2d at 453 n.6, 475 N.W.2d at 155 n.6. The circuit court reasoned that this language controlled the outcome here for two reasons. First, it compared the facts of this case with the facts reported in ***Seibel*** and determined that ***Seibel*** presented stronger facts for probable cause, yet those facts had been held to be insufficient.[4] Second, neither Novotny nor Rauch had conducted field sobriety tests on Mawhinney.

¶10 On appeal, the State contends that the footnote in ***Swanson*** is simply *obiter dictum*, and accordingly does not control the outcome in this case. The State also argues that the circuit court did not properly consider the totality of the circumstances known to Rauch at the time of the arrest, which is the correct procedure for determining whether probable cause exists. We agree with the State.

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[4] The relevant indicia of intoxication involved in ***Seibel*** were unexplained erratic driving, a strong odor of intoxicants emanating from defendant's traveling companions, a possible odor of an intoxicant from the defendant and the defendant's belligerent behavior at the hospital. ***State v. Seibel***, 163 Wis. 2d 164, 181-83, 471 N.W.2d 226, 234 (1991).

1. The significance of field sobriety tests.

¶11 Footnote six in ***Swanson*** could be read to suggest that, at least under some circumstances, field sobriety tests are essential to concluding that probable cause to arrest exists. However, a careful reading of ***Swanson*** shows the supreme court specifically stated that it was not addressing whether there was probable cause to arrest Swanson for operating under the influence: "[W]e need not address whether probable cause existed to arrest Swanson for any of the other offenses [aside from possession of a controlled substance]." ***Swanson***, 164 Wis. 2d at 453, 475 N.W.2d at 155. Additionally, later cases establish the totality of the circumstances test as the correct analysis for deciding whether probable cause to arrest existed. ***Koch***, 175 Wis. 2d at 701, 499 N.W.2d at 161. Furthermore, we have concluded that probable cause to arrest may exist where no field sobriety tests were given. *See, e.g.*, ***State v. Kasian***, 207 Wis. 2d 611, 621-22, 558 N.W.2d 687, 691-92 (Ct. App. 1996) (concluding there was probable cause to arrest suspect injured in a one-vehicle accident where the officer noted a strong odor of intoxicants coming from the defendant and slurred speech); ***Babbitt***, 188 Wis. 2d at 357, 525 N.W.2d at 104 (concluding that probable cause to arrest existed even though Babbitt refused to submit to field sobriety tests); ***State v. Wille***, 185 Wis. 2d 673, 683, 518 N.W.2d 325, 329 (Ct. App. 1994) (holding that an officer had probable cause to arrest a suspect who had hit the rear of a parked car, smelled of intoxicants and stated in his hospital room that he had "to quit doing this").

2. Totality of circumstances.

¶12 At the time of Mawhinney's arrest, Rauch had the following information upon which to base a conclusion that Mawhinney had probably committed an OMVWI offense: (1) Mawhinney had lost control of his

motorcycle, causing him to cross the oncoming traffic lane and crash in a field on the opposite side of the road; (2) a strong odor of intoxicants emanated from him; (3) his speech was slurred; (4) his eyes were bloodshot and glassy; (5) he admitted that he had been to two bars and that he drank four beers; and (6) he said that he could have had his last drink as recently as forty-five minutes before the accident. We conclude that these facts, even in the absence of field sobriety tests, are sufficient to cause Rauch to have reasonably believed that Mawhinney was driving while intoxicated.

¶13 In concluding that probable cause supported Mawhinney's arrest for OMVWI, we note that if field sobriety tests were always required, those drivers who suffered injuries serious enough to require medical care that restrained their movement could never be arrested for OMVWI. In addition, always requiring field sobriety tests as a necessary factor to concluding that probable cause to arrest exists is contrary to our previous decisions, as noted above.

¶14 And finally, to the extent that Mawhinney argues that we should ignore certain facts because a reasonable officer could infer either guilt or innocence from those facts, we disagree. When a circuit court examines probable cause for a warrantless arrest in the context of a suppression hearing, it takes evidence, which is subject to cross-examination. However, in so doing it is not to choose between reasonable inferences if one of those inferences supports a basis for probable cause. *See* ***State ex rel. McCaffrey v. Shanks***, 124 Wis. 2d 216, 236, 369 N.W.2d 743, 754 (Ct. App. 1985) (citing ***State v. Dunn***, 121 Wis. 2d 389, 398, 359 N.W.2d 151, 155 (1984)). Therefore, while facts consistent with a person's innocence are part of the totality of the circumstances, an arresting officer is not deprived of the ability to draw reasonable adverse inferences merely because there is an alternative innocent explanation. Accordingly, we reverse the order of

the circuit court suppressing the results of the blood test, which we conclude were taken pursuant to a lawful arrest.

CONCLUSION

¶15 Because we conclude that the police had probable cause to arrest Mawhinney when the blood test was taken, we reverse the circuit court's suppression order and remand for further proceedings.

By the Court.—Order reversed and cause remanded.

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