

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**September 20, 2001**

Cornelia G. Clark  
Clerk of Court of Appeals

**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 WIS. STAT. § 808.10 and RULE 809.62.

**No. 01-1214-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**CASEY J. SHELTON,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Rock County:  
JAMES P. DALEY, Judge. *Affirmed.*

¶1 VERGERONT, P.J.<sup>1</sup> Casey J. Shelton appeals a judgment of conviction for operating a motor vehicle with a prohibited alcohol concentration in

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

violation of WIS. STAT. § 346.63(1)(b), fourth offense.<sup>2</sup> He contends the trial court erred in concluding that the officer had probable cause to arrest him. We conclude that the officer did have probable cause and therefore affirm.

## BACKGROUND

¶2 Deputy Gregory J. Niles was the only witness at the hearing on Shelton's motion to suppress. He testified as follows. At approximately 1:00 a.m. on October 23, 1998, he observed a vehicle driving westbound on Highway 11 in Rock County. The vehicle crossed the centerline on three separate occasions within approximately a one-mile distance. Deputy Niles activated his lights and the vehicle pulled over. The driver identified himself as Shelton and said he did not have a driver's license, that it was either revoked or suspended. Looking into the interior of the vehicle, Deputy Niles observed three beer cans on the back seat passenger side. The beer cans were unopened and were the three remaining in a twelve-pack container. Deputy Niles noticed an odor of intoxicants coming from the vehicle as he spoke with Shelton. He did not observe that Shelton had slurred speech or glassy or bloodshot eyes.

¶3 Deputy Niles asked Shelton to step out of his car to perform field sobriety tests, which Niles had been trained to administer to persons suspected of driving while intoxicated. Deputy Niles first administered the Horizontal Gaze Nystagmus (HGN) test. He instructed Shelton to follow his (Niles's) finger with his eyes. Deputy Niles observed jerkiness in Shelton's right eye and left eye at

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<sup>2</sup> Shelton was charged with operating while intoxicated, fourth offense, in violation of WIS. STAT. § 346.63(1)(a); operating with a blood alcohol concentration of 0.1% or more contrary to § 346.63(1)(b); and operating a motor vehicle after license revocation/suspension, in violation of WIS. STAT. § 343.44. He pleaded no contest to the second count.

maximum deviation, which indicated to him that Shelton had consumed some alcohol. However, the deputy acknowledged on cross-examination that the deviations he observed were two clues out of six, and that the training manual he used for the field sobriety tests stated that four or more clues constituted a failure of the HGN test. Deputy Niles next administered the walk-and-turn test and the one-leg-stand test, and Shelton did well on those tests. Finally, Deputy Niles administered a preliminary breath test (PBT) and obtained a reading of .13. He then informed Shelton that he was placing him under arrest for operating while intoxicated and took him into custody.

¶4 The trial court concluded that there was probable cause to arrest based on Shelton's crossing the centerline three times, the odor of intoxicants, the three cans of beer in the twelve-pack container, and the results of the PBT.

#### DISCUSSION

¶5 Shelton contends that the trial court erred in concluding there was probable cause to arrest him. He argues that, while the facts known to the officer may have indicated he had consumed alcohol, they did not indicate his ability to operate a motor vehicle was impaired.

¶6 Whether undisputed facts constitute probable cause to arrest presents a question of law, which we review de novo. *State v. Babbitt*, 188 Wis. 2d 349, 356, 525 N.W.2d 102 (Ct. App. 1994). In determining whether probable cause exists, we look to the totality of the circumstances. *Id.* The inquiry is whether the arresting officer's knowledge at the time of arrest would lead a reasonable police officer to believe that the defendant was operating a motor vehicle while under the influence of an intoxicant. *Id.* The State need not show evidence sufficient to prove guilt beyond a reasonable doubt, nor even sufficient to show that guilt is more

probable than not. *State v. Truax*, 151 Wis. 2d 354, 360, 444 N.W.2d 432 (Ct. App. 1989). Rather, we look to the totality of the circumstances, *Babbitt*, 188 Wis. 2d at 356, to determine whether the objective facts would “lead a reasonable officer to believe that guilt is more than a possibility.” *Truax*, 151 Wis. 2d at 360.

¶7 We conclude that the facts within Deputy Niles’s knowledge at the time he placed Shelton under arrest were sufficient to lead a reasonable officer to believe that Shelton was driving while under the influence of an intoxicant. The odor of intoxicants from the vehicle, the twelve-pack container in the car with only three cans, and the results of the PBT would lead a reasonable officer to believe Shelton had consumed alcohol. The fact that Shelton crossed the centerline on three separate occasions within a short distance and the results of the PBT would leave a reasonable officer to believe that Shelton had consumed enough alcohol to affect his ability to drive safely.<sup>3</sup>

¶8 Shelton makes a brief argument that it is impermissible to use the PBT results to “tip the scales” because “this device is not approved for use as a quantitative device.” He cites no authority for this position. WISCONSIN STAT. § 343.303 states that the result of a PBT is admissible in proceedings to establish probable cause to arrest. The probable cause required by § 343.303 to administer a PBT is a lower standard than probable cause to arrest. *County of Jefferson v. Renz*, 231 Wis. 2d 293, 313-14, 603 N.W.2d 541 (1999). Further, Shelton does not contend that the officer did not have sufficient ground to administer the PBT.

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<sup>3</sup> WISCONSIN STAT. § 346.63(1)(a) prohibits driving “[u]nder the influence of an intoxicant ... to a degree which renders [one] incapable of safely driving.”

Thus, his argument that the PBT results in this case may not be used to establish probable cause to arrest is without merit.

*By the Court.*—Judgment affirmed.

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

