COURT OF APPEALS
DECISION
DATED AND FILED

December 17, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1274-CR **Cir. Ct. No. 02CT001129**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TERENCE J. ADLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: BARBARA H. KEY, Judge. *Affirmed.*

¶1 SNYDER, J.[1] Terence J. Adler appeals a judgment of conviction for operating a motor vehicle while intoxicated (OWI). Adler argues that the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

arresting officer lacked probable cause to arrest him and therefore violated his right to be free from unreasonable search and seizure. We disagree.

¶2 The facts of this case are undisputed. On September 28, 2002, Deputy John Kruser of the Winnebago County Sheriff's Department arrived at the scene of a one-car accident in the town of Utica. Kruser observed a vehicle with severe damage to the front end. Upon making contact with the driver of the car, later learned to be Adler, Kruser noticed an odor of intoxicants coming from the vehicle. Kruser asked Adler if he had been drinking and Adler admitted he had.

¶3 Noticing that Adler had cuts on his face and possibly his hands, Kruser advised Adler to sit still while he called for an ambulance. Kruser did not ask Adler to perform field sobriety tests.

¶4 When the First Responder team arrived to tend to Adler, Kruser investigated the accident scene. He determined that Adler had likely been heading north when the car left the road and hit a tree, causing substantial damage.

¶5 Shortly thereafter, an ambulance arrived and took Adler to Mercy Medical Center. Kruser also went to Mercy Medical Center to process Adler for OWI.

¶6 Kruser issued two citations, the first for OWI contrary to WIS. STAT. § 346.63(1)(a), and the second for operating a motor vehicle with a prohibited alcohol content (PAC) contrary to § 346.63(1)(b). Kruser read Adler the Informing the Accused form and obtained his permission for a legal blood draw.

¶7 Whether undisputed facts constitute probable cause is a question of law that this court reviews without deference to the trial court. ***State v. Babbitt***, 188 Wis. 2d 349, 356, 525 N.W.2d 102 (Ct. App. 1994). We emphasize that every

probable cause determination must be made on a case-by-case basis, looking at the totality of the circumstances. ***State v. Multaler***, 2002 WI 35, ¶34, 252 Wis. 2d 54, 643 N.W.2d 437. It is sufficient that a reasonable officer would conclude, based upon the information in the officer's possession, that the "defendant probably committed [the offense]." ***State v. Koch***, 175 Wis. 2d 684, 701, 499 N.W.2d 152 (1993).

¶8 The question is whether, at the time Kruser issued Adler a citation at the hospital, the circumstances were such that a reasonable law enforcement officer could conclude that Adler probably had committed an offense. *See* ***State v. Wille***, 185 Wis. 2d 673, 683-84, 518 N.W.2d 325 (Ct. App. 1994).

¶9 Arguing that without field sobriety tests there could be no probable cause, Adler refers us to ***State v. Swanson***, 164 Wis. 2d 437, 475 N.W.2d 148 (1991), where our supreme court said:

> Unexplained erratic driving, the odor of alcohol, and the coincidental time of the incident [with bar closing] 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. A field sobriety test could be as simple as a finger-to-nose or walk-a-straight-line test. Without such a test, the police officers could not evaluate whether the suspect's physical capacities were sufficiently impaired by the consumption of intoxicants to warrant an arrest.

Id. at 453-54 n.6.

¶10 Adler's position lacks persuasiveness, however, as the relied-upon quote is a footnote to dicta. A more persuasive analysis is provided in ***Wille***, a case with substantially similar facts to those before us. Rejecting the idea that our supreme court intended to make field sobriety tests prerequisites to probable

cause, we determined that the facts in ***Wille*** supported the officer's decision to make an arrest. In ***Wille***, we stated:

> The ***Swanson*** footnote does not mean that under all circumstances the officer must first perform a field sobriety test, before deciding whether to arrest for operating a motor vehicle while under the influence of an intoxicant.

Wille, 185 Wis. 2d at 684.

¶11 In ***Wille***, probable cause existed where the defendant rear-ended a parked car, smelled of alcohol, and stated, "I've got to quit doing this." ***Id.*** No field sobriety tests were performed on Wille, yet we held that the totality of the circumstances supported a finding of probable cause. ***Id.*** Similarly, in ***State v. Kasian***, 207 Wis. 2d 611, 558 N.W.2d 687 (Ct. App. 1996), we concluded there was probable cause, even in the absence of field sobriety tests, where a defendant was injured in a one-car accident, the officer noted a strong odor of intoxicants, and the defendant slurred his speech. ***Id.*** at 622. Any one of these facts, standing alone, might be insufficient to support probable cause; however, that is not the test. We must look to the totality of the circumstances to determine whether the "arresting officer's knowledge at the time of the arrest would lead a reasonable police officer to believe ... that the defendant was operating a motor vehicle while under the influence of an intoxicant." ***State v. Nordness***, 128 Wis. 2d 15, 35, 381 N.W.2d 300 (1986).

¶12 Because we have determined that substantially similar facts in ***Wille*** and ***Kasian*** were sufficient to support probable cause, we conclude that Kruser's decision to cite Adler for OWI and PAC was supported by probable cause. The totality of the circumstances before us is sufficient to lead a reasonable police officer to believe that Adler was operating a motor vehicle while under the

influence of an intoxicant. Because the facts demonstrate probable cause, there was no violation of Adler's Fourth Amendment rights.

By the Court.—Judgment affirmed.

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