COURT OF APPEALS
DECISION
DATED AND FILED

October 23, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP696 **Cir. Ct. No. 2007TR5220**

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

COUNTY OF GRANT,

PLAINTIFF-APPELLANT,

V.

MARK PAUL WICKA,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Grant County: GEORGE S. CURRY, Judge. *Affirmed*.

¶1 LUNDSTEN, J.[1] Grant County appeals the circuit court's order dismissing Mark Wicka's citation for operating under the influence of an

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(b) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

intoxicant (first offense). Wicka was the driver in a one-vehicle rollover accident. He was arrested at the scene of the accident. The County challenges the circuit court's suppression ruling that the officer lacked probable cause for the arrest. We affirm the order.

¶2 The test for probable cause in this context is 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). Whether a given set of facts satisfies the test is a question of law that we review *de novo*. *See* ***State v. Kutz***, 2003 WI App 205, ¶13, 267 Wis. 2d 531, 671 N.W.2d 660. However, in reviewing an order granting or denying a motion to suppress evidence, we uphold the circuit court's underlying findings of fact unless they are clearly erroneous. ***Id.*** Similarly, it is for the circuit court to judge the credibility of witnesses and the weight of their testimony. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 504, 451 N.W.2d 752 (1990).

¶3 Before addressing the County's argument, we make the general observation that the County's brief essentially treats this court as a fact-finding court. Instead of viewing the evidence in a light most favorable to the circuit court's fact finding, the County, in effect, reargues the factual inferences that should be drawn from the evidence. We are, of course, bound to view the evidence in a light most favorable to the decision of the circuit court, *see* ***State v. Goyette***, 2006 WI App 178, ¶22 n.11, 296 Wis. 2d 359, 722 N.W.2d 731, *review denied*, 2007 WI 59, 299 Wis. 2d 325, 731 N.W.2d 635 (No. 2004AP2211-CR), and that approach leads us to affirm the circuit court in this case.

¶4 The County relies primarily on ***State v. Kasian***, 207 Wis. 2d 611, 558 N.W.2d 687 (Ct. App. 1996). In ***Kasian***, we concluded that there was probable cause to arrest Kasian for driving under the influence of an intoxicant based on the following facts:

> In this case, the arresting officer came upon the scene of a one-vehicle accident. The officer observed a damaged van next to a telephone pole. The engine of the van was running and smoking. An injured man, whom the officer recognized as Kasian, was lying next to the van. The officer observed a strong odor of intoxicants about Kasian. Later, at the hospital, the officer observed that Kasian's speech was slurred.

Id. at 622. Thus, the key facts constituting probable cause in ***Kasian*** were (1) a one-vehicle accident, (2) a strong odor of intoxicants on the driver, and (3) the driver's slurred speech.

¶5 The County's ***Kasian***-based argument, *in its entirety*, is as follows:

> Our facts include *all of the factors outlined in* ***Kasian*** *plus more*. [The officer] testified that there was [1] an accident, there was a [2] moderate odor of intoxicants coming from Mr. Wicka, and [3] his speech was slurred. In addition, [the officer] noted that Mr. Wicka's eyes were bloodshot and glassy and that he admitted to consuming intoxicants earlier in the day. Further, [the officer] testified that he had Mr. Wicka perform the horizontal gaze nystagmus test in a manner which was proper according to his training and that he failed that test. Based upon ***Kasian***, ample evidence existed to support probable cause to arrest Mr. Wicka.

(Emphasis added.)

¶6 The County's cursory argument is insufficient. The County's assertion that Wicka's case includes all of the facts outlined in ***Kasian*** is inaccurate. It is true that both ***Kasian*** and this case involve one-vehicle accidents

with injured drivers found near their vehicles at the scene. *See* ***id.*** at 622. After that, however, the parallels are not so clear.

¶7 In ***Kasian***, the officer detected a "strong" odor of intoxicants coming from the driver. ***Id.*** Here, the circuit court found that the odor was "slight," and there was no evidence that the odor was "strong."[2] Moreover, the County does not acknowledge evidence that an emergency responder told the officer that he (the responder) had been drinking and might be the source of the odor.

¶8 In ***Kasian***, the defendant exhibited slurred speech. ***Id.*** Here, it is true that the officer testified that Wicka's speech was slurred. However, the circuit court ignored this testimony in its oral decision, and discounted the testimony in its written decision, reasoning that "the slurred speech was not corroborated by any of the emergency medical technicians in attendance." We understand the circuit court to have made an implicit fact finding that this portion of the officer's testimony was insufficiently credible or reliable to be considered. Such a finding is supported by the evidence. The officer conceded under cross-examination that, although he put everything important in his report to the best of his recollection, he did not include any reference in his report to Wicka's speech being slurred. Similarly, the officer admitted that, although it was possible that he simply forgot to note the slurred speech in his report, it was also possible that Wicka's speech was not slurred.

[2] We are uncertain why the circuit court characterized the odor as "slight." The officer testified that the odor was "moderate." Regardless, the odor detected in ***State v. Kasian***, 207 Wis. 2d 611, 558 N.W.2d 687 (Ct. App. 1996), was characterized by the officer there as "strong," a higher level than either "slight" or "moderate."

¶9 So far, contrary to the County's argument, we have shown that this case cannot be straightforwardly analyzed as "***Kasian*** plus more." We turn next to the "plus more" to which the County refers. It includes that Wicka's eyes were bloodshot and glassy, that Wicka admitted to consuming intoxicants earlier in the day, and that Wicka failed the horizontal gaze nystagmus (HGN) test. The County's reliance on these facts, without more explication, is incomplete at best.

¶10 First, the County fails to address the circuit court's finding that Wicka's bloodshot and glassy eyes were a questionable indicator of intoxication because Wicka had been hit in the face with his vehicle's airbag. Absent argument by the County that this finding was erroneous, we will defer to the circuit court.

¶11 Second, Wicka's admission to consuming intoxicants earlier in the day is apparently in reference to the officer's testimony that Wicka said he had one beer at 1:00 p.m., approximately six hours before the accident. The circuit court did not cite this testimony in its probable cause analysis. Apparently the circuit court viewed this admission as inconsequential given the amount and timing of alcohol consumption. Again, the County does not weigh in.

¶12 Finally, the County fails to squarely address one of the most significant rulings underlying the circuit court's decision. Specifically, the circuit court disregarded the HGN test results because, in the circuit court's view, the County failed to show that the test had any validity under the circumstances. The court noted that Wicka had been in an accident; that the test was performed while Wicka was flat on his back with his head being held by an EMT; that Wicka had been hit in the face with an airbag; that there were several indications that Wicka had a substantial injury and that medical personnel were "very concerned" about a

head injury; and that there was nothing to rule out injury as the reason Wicka failed the test.

¶13 The closest the County comes to addressing this part of the circuit court's decision is its assertion that the officer testified that he performed the HGN test in the manner that he was trained. Although the officer did so testify, the County's assertion does not squarely address key issues raised by the court's ruling, such as whether, given all of the circumstances, the County had a heightened obligation to affirmatively demonstrate the validity of the test or whether the HGN test results were entitled to any weight.

¶14 In sum, when we view the evidence in light of the circuit court's explicit and implicit fact findings, we cannot conclude that the circuit court erred in its legal conclusion that the police lacked probable cause. Perhaps more to the point, the County's arguments are unavailing because the County has failed to develop legal arguments addressing the facts as found by the circuit court.

By the Court.—Order affirmed.

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