

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 30, 2009

David R. Schanker
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.

Appeal No. 2008AP2116-CR

Cir. Ct. No. 2007CT901

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER I. STAHL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
DIANE M. NICKS, Judge. *Affirmed.*

¶1 DYKMAN, J.¹ Christopher Stahl appeals from a judgment convicting him of operating a motor vehicle while under the influence of an

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

intoxicant (OWI), second offense, contrary to WIS. STAT. § 346.63(1)(a). Stahl contends that the arresting officer lacked probable cause to request he take a preliminary breathalyzer test (PBT), and also lacked probable cause to arrest him for OWI. We conclude that the State had probable cause to arrest Stahl based on the arresting officer's observations before requesting Stahl take a PBT. We affirm.

Background

¶2 The following undisputed facts are taken from the motion hearing transcript. On March 1, 2007, City of Middleton Police Officer Michael Ash stopped Stahl's vehicle for speeding. When Ash contacted Stahl, he observed a strong smell of intoxicants. When Stahl responded to Ash's questions, Ash noted that Stahl's speech was slurred. Ash also noted that Stahl's eyes were red and bloodshot. He asked Stahl if he had been drinking, and Stahl said that he had.

¶3 Ash determined, based on his twenty years of experience as a police officer, that these observations were indicative of intoxication. Therefore, Ash asked Stahl to exit the vehicle to perform field sobriety tests. He again observed that Stahl smelled of intoxicants, which was noticeable even when the two were three or four feet apart.

¶4 Ash then instructed Stahl to complete several field sobriety tests. First, Ash asked Stahl if he could recite the alphabet without singing. Stahl stated he could, and attempted to do so. Stahl was able to correctly state the alphabet up to the letter T, and then made several errors. After Ash instructed Stahl to try a

second time, Stahl was able to recite the full alphabet, but he did so while singing, despite Ash's instruction not to sing.²

¶5 Ash then performed the Horizontal Gaze Nystagmus (HGN) test on Stahl, and noted several indications of intoxication. Ash also instructed Stahl to perform the walk-and-turn test and the one-leg stand. During the last two tests, Ash observed that Stahl had difficulty maintaining his balance and following directions, which he noted indicated possible intoxication.

¶6 Ash then administered a PBT, and arrested Stahl for OWI. Stahl moved to suppress the evidence obtained during the traffic stop, arguing that Ash lacked probable cause to support the PBT or the arrest. After an evidentiary hearing, the court denied the motion, and Stahl pled no contest to OWI, second offense. Stahl appeals.

Standard of Review

¶7 Whether a police officer had probable cause to request a PBT is a question of law, which we review de novo. *County of Jefferson v. Renz*, 231 Wis. 2d 293, 316, 603 N.W.2d 541 (1999). Whether the officer had probable cause to arrest the defendant is also a question of law, subject to our independent review. *State v. Kasian*, 207 Wis. 2d 611, 621, 558 N.W.2d 687 (Ct. App. 1996).

² Stahl argues he did not sing, but merely recited the alphabet "rhythmically." However, the trial court viewed the video of the traffic stop and heard testimony by Ash that Stahl "sang" the alphabet. Stahl does not argue that any of the court's findings were clearly erroneous. We therefore have no basis to disturb the court's factual findings. *See* WIS. STAT. § 805.17(2).

Discussion

¶8 Stahl argues that Ash lacked probable cause to request a PBT, and also lacked probable cause to arrest him for OWI. He also contends that the State never properly introduced Ash’s testimony regarding the PBT results at the suppression hearing, and that we therefore may not consider the PBT when determining whether probable cause to arrest existed. The State responds that Ash had sufficient evidence to request a PBT and, regardless, he also had probable cause to arrest before he conducted the PBT. We agree with the State that probable cause to arrest existed prior to Ash’s request for a PBT. Because this issue is dispositive, we need not address Stahl’s other arguments.³

¶9 We have explained the following usual process in OWI investigations:

First, an officer may make an investigative stop if the officer “reasonably suspects” that a person has committed or is about to commit a crime, or reasonably suspects that a person is violating the non-criminal traffic laws. After stopping the car and contacting the driver, the officer’s observations of the driver may cause the officer to suspect the driver of operating the vehicle while intoxicated. If his observations of the driver are not sufficient to establish probable cause for arrest for an OWI violation, the officer may request the driver to perform various field sobriety tests.

³ Because probable cause to request a PBT is a lower standard than probable cause to arrest, our conclusion that there was probable cause to arrest necessarily implies there was probable cause for the PBT. *See County of Jefferson v. Renz*, 231 Wis. 2d 293, 315-16, 603 N.W.2d 541 (1999) (holding that probable cause to request a PBT “refers to a quantum of proof greater than the reasonable suspicion necessary to justify an investigative stop ... but less than the level of proof required to establish probable cause for arrest”). However, our conclusion that there was probable cause to arrest based on the evidence available to Ash before he requested a PBT resolves any dispute Stahl has with the admissibility of the PBT evidence.

Renz, 231 Wis. 2d at 310 (citations and footnote omitted). Stahl does not argue on appeal that the initial stop of his vehicle was illegal, or that the stop was unlawfully extended to obtain evidence that he was intoxicated. *See, e.g., State v. Arias*, 2008 WI 84, ¶¶35-48, 311 Wis. 2d 358, 752 N.W.2d 748. The only contested issue is whether Ash’s observations during the valid traffic stop amounted to probable cause to arrest.

¶10 “Probable cause to arrest is the sum of evidence within the arresting officer’s knowledge at the time of the arrest which would lead a reasonable police officer to believe that the defendant probably committed or was committing a crime.” *State v. Nieves*, 2007 WI App 189, ¶11, 304 Wis. 2d 182, 738 N.W.2d 125. “Probable cause to arrest does not require proof beyond a reasonable doubt or even that guilt is more likely than not. 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. Babbitt*, 188 Wis. 2d 349, 357, 525 N.W.2d 102 (Ct. App. 1994) (citations omitted).

¶11 We conclude that the totality of the circumstances in Ash’s knowledge prior to administering the PBT provided probable cause to arrest Stahl for OWI. Ash testified that he stopped Stahl for speeding; Stahl’s eyes were bloodshot and his speech was slurred; there was a strong odor of intoxicants coming from Stahl; and Stahl admitted he had been drinking prior to driving. Additionally, Ash performed several field sobriety tests on Stahl and observed further indicia of intoxication. Ash is an experienced officer who has investigated numerous cases of intoxicated driving. *See State v. Wille*, 185 Wis. 2d 673, 683, 518 N.W.2d 325 (Ct. App. 1994) (we may consider an officer’s investigative experience in determining whether facts known to officer established probable cause). Taken together, these facts clearly supported the reasonable conclusion

that Stahl had probably operated a motor vehicle while intoxicated. *See, e.g., Kasian*, 207 Wis. 2d at 622 (probable cause to arrest existed when defendant was involved in one-car accident, officer observed strong odor of intoxicants on defendant, and defendant’s speech was slurred).

¶12 Stahl’s arguments as to why Ash’s observations do not amount to probable cause are unconvincing. First, Stahl argues that Ash did not have probable cause because, unlike in many OWI cases, there was no evidence Stahl was driving erratically. Erratic driving, however, is merely one indication of possible intoxication, not a prerequisite to probable cause to arrest for OWI. *See State v. Gaudesi*, 112 Wis. 2d 213, 221, 332 N.W.2d 302 (1983) (“Although erratic driving may be evidence that the defendant is under the influence of an intoxicant, the statute does not require proof of an appreciable interference in the management of a motor vehicle.” (citation omitted)).

¶13 Next, Stahl argues that each of the factors relied on by Ash—that Stahl was speeding, smelled of intoxicants, admitted to drinking, had bloodshot eyes and slurred his speech—were indicative of drinking only, not of intoxication.⁴ Moreover, Stahl argues, any of those factors could have innocent

⁴ Stahl also argues that speeding and slurred speech should not be considered at all, because Ash admitted that speeding does not indicate intoxication and the police video does not reveal that Stahl’s speech was slurred. However, we are unconcerned with whether Ash considered speeding indicative of intoxication. *See State v. Kasian*, 207 Wis. 2d 611, 621, 558 N.W.2d 687 (Ct. App. 1996) (we are not bound by an officer’s subjective assessment). Speeding is a factor we consider in the totality of the circumstances. *See City of West Bend v. Wilkens*, 2005 WI App 36, ¶19, 278 Wis. 2d 643, 693 N.W.2d 324. Also, the trial court found that Stahl was slurring after viewing the traffic stop video and hearing testimony by Ash that Stahl was slurring. And, again, Stahl has not argued that any of the trial court’s factual findings, including that Stahl was slurring, were clearly erroneous. We will not disturb the trial court’s factual findings and credibility determinations where there is credible evidence to support them. *See WIS. STAT. § 805.17(2)*.

explanations. While that may be true, these arguments do not impact our probable cause analysis. The factors Ash testified he observed are precisely the factors courts consider when determining whether the totality of the circumstances—not each individual fact—supports probable cause. Ash was not required to draw an inference of innocence merely because one existed. *See Nieves*, 304 Wis. 2d 182, ¶14.

¶14 Stahl next attacks Ash’s testimony regarding the field sobriety tests he performed. First, Stahl argues that we may not consider the results of the alphabet test because that test is not recognized by the National Highway Traffic Safety Administration (NHTSA) as revealing scientific evidence of intoxication. He then argues that Ash improperly performed the HGN test, rendering its results unreliable. Finally, Stahl argues that Ash improperly “scored” the walk-and-turn test and the one-leg stand, thus counting two “clues” on each rather than one, which is a “passing” score under NHTSA guidelines. We are not persuaded.

¶15 We have explained that field sobriety tests are observational tools rather than scientific tests. *See City of West Bend v. Wilkens*, 2005 WI App 36, ¶¶1, 17-19, 278 Wis. 2d 643, 693 N.W.2d 324. Thus, we treat an officer’s observations with respect to field sobriety tests as we do any other observations by the officer. *Id.*, ¶19. Ash testified that during the field sobriety tests, Stahl exhibited difficulty following directions and poor balance. These are precisely the observations that field sobriety tests allow in the course of an officer trying to make a probable cause determination.⁵ Additionally, we disagree that Ash was

⁵ Stahl argues that the HGN test should be treated differently than the other field sobriety tests because it is scientific evidence. We note that we have specifically left this question open. *Wilkens*, 278 Wis. 2d 643, ¶18 n.3. However, we need not address this issue. The other field sobriety tests administered by Ash were sufficient to provide Ash with observations of Stahl’s

(continued)

required to perform any specific field sobriety tests to gather evidence of Stahl's intoxication. The supreme court has stated that "[a] field sobriety test could be as simple as a finger-to-nose or walk-a-straight-line test." *State v. Swanson*, 164 Wis. 2d 437, 453 n.6, 475 N.W.2d 148 (1991), *abrogated on other grounds by State v. Sykes*, 2005 WI 48, 279 Wis. 2d 742, 695 N.W.2d 277. We see no reason to discount Ash's observations during the field sobriety tests he performed. Because the totality of Ash's observations would support a reasonable officer's conclusion that Stahl had probably committed the offense of OWI, we affirm.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.

impairment—specifically, inability to follow directions and poor balance. Thus, we do not consider the results of the HGN test in our analysis.

