

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 8, 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. 2008AP2509-CR

Cir. Ct. No. 2007CT296

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CRAIG J. IMMEL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Fond du Lac County: PETER L. GRIMM, Judge. *Affirmed.*

¶1 SNYDER, J.¹ Craig J. Immel appeals from a judgment of conviction for 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, third offense. He contends that his arrest was not supported by probable cause and was therefore illegal. We disagree and affirm the judgment.

¶2 At approximately 1:50 a.m. on March 25, 2007, Fond du Lac Police Officer Gregory Deike was dispatched to the scene of a one-vehicle accident. When he arrived, Deike observed a truck in the ditch and noticed an adult male prone in the ditch nearby. Deike made contact with the person, later identified as the driver of the truck, Immel. Deike stated that Immel was unresponsive to verbal stimuli, but did react to painful stimuli. Deike stated that Immel had extensive injuries and that, when talking to Immel, Deike would put his head down close to Immel's head. While in close proximity to Immel, Deike noticed the odor of intoxicants.

¶3 An ambulance arrived and Immel was taken to St. Agness Hospital. Deike went to St. Agnes also, to continue his investigation. At the hospital, Immel was conscious and speaking to other people. Deike identified himself to Immel, and Immel turned away and would not answer any questions. Based upon the one-car accident investigation and the odor of intoxicants on Immel, Deike placed him under arrest for OWI.

¶4 Immel argues that Deike did not have probable cause to effect an arrest. He asserts that the accident, the odor of intoxicants, and the time of day that the accident occurred were insufficient to justify his arrest. In particular, Immel takes issue with Deike's failure to administer field sobriety tests.

¶5 Probable cause exists where the totality of the circumstances within the officer's knowledge at the time would lead a reasonable officer to believe a violation of the law has occurred. *State v. Nordness*, 128 Wis. 2d 15, 35, 381 N.W.2d 300 (1986). The facts need not prove guilt beyond a reasonable doubt,

merely that guilt is more probable than not. *State v. Paszek*, 50 Wis. 2d 619, 625, 184 N.W.2d 836 (1971). “Whether probable cause to arrest exists based on the facts of a given case is a question of law which we review independently of the trial court.” *State v. Kasian*, 207 Wis. 2d 611, 621, 558 N.W.2d 687 (1996).

¶6 Immel contends that Deike did not articulate sufficient facts to establish probable cause and that the officer needed an objective factor such as a field sobriety test or an objective sign of physical impairment. He cites to *State v. Swanson*, 164 Wis. 2d 437, 475 N.W. 2d 148 (1991), abrogated in part on other grounds by *State v. Sykes*, 2005 WI 48, 279 Wis. 2d 742, 695 N.W.2d 277, to support his position. Specifically, Immel relies on the oft-cited footnote in *Swanson* to argue that the absence of field sobriety tests is fatal to probable cause:

Unexplained 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. 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.

Swanson, 164 Wis. 2d at 453 n.6. Immel summarizes his argument as follows: “Deike’s justification for arresting [him] is based on three factors discussed by the court in *Swanson* and found to be insufficient to establish probable cause for an arrest.” He argues by analogy that the traffic accident, odor of intoxicants, and time of night the accident occurred do not coalesce into probable cause.

¶7 However, as the State points out, the language in *Swanson* has since been qualified. See *Kasian*, 207 Wis. 2d at 622. Immel’s argument that an objective test such as a field sobriety test was needed in this case is incorrect. See

id. (An officer does not in every case need to perform a field sobriety test.) In *Kasian*, we concluded that there was probable cause to arrest for OWI when police found Kasian injured at the scene of a one-car accident, smelled intoxicants on Kasian, and noted Kasian’s speech was slurred. Similarly, in *State v. Wille*, 185 Wis. 2d 673, 683-84, 518 N.W.2d 325 (Ct. App. 1994), we concluded that police had probable cause to arrest Wille after Wille struck a car parked on the shoulder of a highway and the police smelled intoxicants on Wille at the hospital, knew that a firefighter had smelled intoxicants on Wille as well, and Wille told them he had “to quit doing this.”

¶8 Immel further emphasizes that Deike did not testify as to whether Immel was able to speak clearly to hospital staff or to whether Immel’s eyes were glassy or bloodshot. Immel implies that there were additional observations that Deike could have made that may have contributed to the totality of circumstances demonstrating probable cause. With this, we agree. There are additional indicators of intoxication that often serve as precursors to an OWI arrest. However, Immel offers no case law to support his position that without all of these observations, probable cause cannot exist. Our task is to consider whether probable cause can derive from the factors the officer did articulate, not to ponder those he did not.

¶9 Probable cause in the context of an OWI arrest may be demonstrated in many ways. Here, Deike observed a serious single car accident that occurred close to bar time and that involved a person who smelled of intoxicants. That is sufficient to lead a reasonable officer to believe a violation of the law has occurred. See *Kasian*, 207 Wis. 2d at 622; *Nordness*, 128 Wis. 2d at 35. The circuit court properly denied Immel’s motion to suppress. Accordingly, the judgment of conviction is affirmed.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.

23(1)(b)4.

