

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**October 1, 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. 2009AP110-CR  
STATE OF WISCONSIN**

Cir. Ct. No. 2007CF413

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**MICHAEL L. WITTMERSHAUS,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Monroe County:  
TODD L. ZIEGLER, Judge. *Affirmed.*

¶1 LUNDSTEN, J.<sup>1</sup> Michael Wittmershaus appeals a circuit court judgment convicting him of operating a motor vehicle while under the influence of

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<sup>1</sup> 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.

an intoxicant as a fourth offense. He challenges the circuit court's determinations that the police had probable cause to arrest him and also had reasonable suspicion to test his blood for evidence of a crime. I affirm the judgment.

### ***Background***

¶2 On August 26, 2007, Edward Burckhardt was driving a pickup truck and trailer on a two-lane highway with a double-yellow stripe that divided the lanes. As Burckhardt came into or around a corner, a motorcycle operated by Wittmershaus was heading toward Burckhardt in Burckhardt's lane. Burckhardt moved as far to the side of the road as he could to avoid an accident, but Wittmershaus nonetheless struck Burckhardt's truck and/or trailer with his motorcycle. Wittmershaus was thrown into the road and suffered severe injuries, including "bones sticking out of [his] legs" and "bleeding from his head."

¶3 A police investigator arrived on the scene and began assisting first responders who were tending to Wittmershaus. The investigator had known Wittmershaus for many years and thought he might be able to calm him down or comfort him. The investigator also knew that Wittmershaus had prior OWIs. The investigator tried to speak with Wittmershaus, but Wittmershaus could only mumble in response.

¶4 The investigator detected the odor of intoxicants on Wittmershaus's breath, but deemed it impossible to conduct field sobriety tests given Wittmershaus's injuries. The investigator determined that a legal blood draw should be performed at a facility in La Crosse where Wittmershaus would be Med-flighted. A test of Wittmershaus's blood showed a blood alcohol content of 0.210.

¶5 The circuit court concluded that the police had probable cause to arrest Wittmershaus and also had reasonable suspicion to draw Wittmershaus's blood based on a number of facts known to the investigator by the time police ordered the blood draw. I agree.

### *Discussion*

¶6 A police officer has probable cause to arrest when the totality of the circumstances within that officer's knowledge at the time of the arrest would lead a reasonable officer to believe that the defendant has probably committed an offense. *State v. Koch*, 175 Wis. 2d 684, 701, 499 N.W.2d 152 (1993). Probable cause requires only that the totality of the evidence would lead a reasonable officer to believe that guilt is more than a possibility. *State v. Paszek*, 50 Wis. 2d 619, 625, 184 N.W.2d 836 (1971).

¶7 Wittmershaus argues that the circuit court erroneously found the investigator knew about Wittmershaus's erratic driving behavior by the time the police ordered the blood draw. He asserts that nothing in the record shows when the investigator learned of that behavior. He argues that, without knowledge of the erratic driving behavior, the police did not have probable cause to arrest him for driving while under the influence of an intoxicant.

¶8 Our review of a circuit court's findings of fact is deferential. *State v. Martwick*, 2000 WI 5, ¶18, 231 Wis. 2d 801, 604 N.W.2d 552. Only if a finding is against the "great weight and clear preponderance" of the evidence is it clearly erroneous. *See id.*, ¶18 & n.8.

¶9 The most pertinent portions of the investigator's testimony are as follows:

Q Did you speak with the driver of the truck at all?

A I spoke briefly with him, but other than that, I assisted in ... helping with the accident reconstruction.

....

Q At some point were you the officer that asked for legal blood to be drawn?

A I advised ... [a deputy] that I could smell the intoxicants. And I believe at that point is when [the deputy] contacted La Crosse to have the blood draw.

Q When you talked to or when you made [the deputy] aware of the odor of intoxicants, do you know or did you make [the deputy] aware of the other thing that you [had] observed?

A The odor of the intox, yes.

Q What about information related to how the crash had occurred?

A I don't believe that we were into the investigation quite fully to the extent of that. He was working that issue on that end of it....

....

Q Okay. And when they Med Flighted [Wittmershaus] to La Crosse, you were still in the process of doing accident reconstruction on—assisting with accident reconstruction?

A That is correct.

Q And when you and [the deputy] talked about contacting La Crosse about a legal blood draw, ... you were still in the process of assisting with accident reconstruction; is that correct?

A Correct.

Q And at that point really what you had was ... the odor of intoxicants ... as well as some familiarity with Mr. Wittmershaus that led you to believe you had probable cause for an OWI legal blood draw?

A I also had statements from the [truck] driver who said [Wittmershaus] was in the wrong lane. I also had the point of contact on the opposite—in it would be the eastbound lane, point of contact with the trailer and the bike.

Q Would you agree that that ... would basically essentially be erratic driving, odor of intoxicants, and some familiarity with Mr. Wittmershaus that led you to have probable cause to authorize a legal blood draw?

A All of those put together, yes.

¶10 I conclude, based on this testimony, that the circuit court could reasonably find that, by the time police ordered Wittmershaus's blood draw, the investigator had spoken at least briefly with Burckhardt and knew at least generally about Wittmershaus's erratic driving behavior. In the final portion of the investigator's testimony, he explained that he concluded he should order a blood draw based, in part, on Wittmershaus's erratic driving behavior. The circuit court could reasonably infer from that testimony that the investigator was aware of Wittmershaus's erratic driving behavior by the time the police ordered the blood draw.

¶11 Wittmershaus points to the earlier portions of the investigator's testimony which, in isolation, could be read as suggesting that the investigator had not spoken with Burckhardt, the truck driver. The ambiguity Wittmershaus finds in some portions of the testimony is not enough to render the circuit court's finding clearly erroneous. Rather, I agree with the State that a reasonable overall reading of the investigator's testimony is that, although the "accident reconstruction" was ongoing when the police ordered the blood draw, the investigator had by that time spoken at least briefly with Burckhardt.

¶12 Wittmershaus may also be arguing that the circuit court erroneously found that the investigator detected a “strong” odor of intoxicants on Wittmershaus’s breath. If so, I disagree. I acknowledge that the investigator’s testimony appears contradictory on this point. Specifically, the investigator initially testified that the odor was “strong” but, when defense counsel revisited that topic, the investigator seemed to state that he had previously testified only that he could “smell alcohol.” However, the circuit court as arbiter of fact was entitled to resolve this inconsistency by crediting one portion of the investigator’s testimony over another. “The fact finder ... not only resolve[s] questions of credibility when two witnesses have conflicting testimony, but also resolves contradictions in a single witness’s testimony.” *State v. Owens*, 148 Wis. 2d 922, 930, 436 N.W.2d 869 (1989).

¶13 Wittmershaus does not appear to be arguing that, even if the circuit court’s findings of fact are upheld, probable cause is lacking. Regardless, I would reject such an argument after comparing the facts here to those in *State v. Wille*, 185 Wis. 2d 673, 518 N.W.2d 325 (Ct. App. 1994), and *State v. Kasian*, 207 Wis. 2d 611, 558 N.W.2d 687 (Ct. App. 1996).

¶14 In *Wille*, the facts constituting probable cause to arrest for driving while under the influence of an intoxicant were these: the defendant struck the rear end of a parked car on the shoulder of a highway, causing a serious accident; three individuals detected an odor of intoxicants on the defendant; and the defendant declared that he had “to quit doing this.” *Wille*, 185 Wis. 2d at 683. Similarly, here there is significant erratic driving behavior that is suggestive of impaired driving, a serious accident as a result, and police detection of a strong odor of intoxicants on the defendant. Although Wittmershaus made no incriminating admission, the investigator knew that Wittmershaus had previous

OWIs, a fact that may be considered in the probable cause analysis. See *State v. Lange*, 2009 WI 49, ¶33, \_\_\_ Wis. 2d \_\_\_, 766 N.W.2d 551 (officer “could take this evidence [of a prior OWI conviction] into account when determining whether she had probable cause to believe that the defendant was under the influence of an intoxicant while operating his vehicle”); see also *id.*, ¶39 (considering the prior OWI as a factor in the court’s probable cause analysis).<sup>2</sup>

¶15 In *Kasian*, the following facts were sufficient to constitute probable cause to arrest for driving while under the influence of an intoxicant:

[T]he 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.

*Kasian*, 207 Wis. 2d at 622. As in *Kasian*, the investigator in Wittmershaus’s case knew there was a serious accident and detected a strong odor of intoxicants. Although Wittmershaus was not slurring his speech like the driver in *Kasian*, Wittmershaus’s case involves two additional factors not present in *Kasian*—

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<sup>2</sup> I recognize that the investigator testified that his knowledge of Wittmershaus’s prior OWIs was secondhand. Specifically, the investigator stated that he knew about the prior OWIs from both friends and other law enforcement officers who had picked up Wittmershaus for drunk driving. Although the argument is undeveloped, Wittmershaus seems to be asserting that the officer’s knowledge cannot be considered unless it is firsthand. That assertion is wrong. Probable cause “may be predicated in part upon hearsay information, and the officer may rely on the collective knowledge of the officer’s entire department.” *State v. Kutz*, 2003 WI App 205, ¶12, 267 Wis. 2d 531, 671 N.W.2d 660.

namely, Wittmershaus's erratic driving behavior and the investigator's knowledge that Wittmershaus had prior OWIs.<sup>3</sup>

¶16 Finally, Wittmershaus argues that the circuit court erred in concluding that police had a reasonable suspicion that Wittmershaus's blood would contain evidence of a crime. I disagree. The facts that supply probable cause here also supply reasonable suspicion that Wittmershaus's blood contained evidence of a drunk-driving related crime.

*By the Court.*—Judgment affirmed.

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

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<sup>3</sup> The State relies on the fact that Wittmershaus mumbled when the investigator spoke to him. Given the extent of Wittmershaus's injuries, however, I am not persuaded that this fact adds to the probable cause analysis.



