

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 16, 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. 2009AP425

STATE OF WISCONSIN

Cir. Ct. No. 2008TR7062
2008AP7063

**IN COURT OF APPEALS
DISTRICT IV**

COUNTY OF JEFFERSON,

PLAINTIFF-RESPONDENT,

V.

DELL W. HORAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Jefferson County: WILLIAM F. HUE, Judge. *Affirmed.*

¶1 HIGGINBOTHAM, P.J.¹ Dell W. Horan appeals 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)(d) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

intoxicant (OWI), first offense, contrary to WIS. STAT. § 346.63,² and an order denying his motion to suppress evidence. The issue on appeal is whether there was probable cause to arrest Horan for OWI because he had recently been in a one-vehicle accident; avoided eye contact with the arresting officer; had bloodshot, glassy eyes; was emitting the odor of intoxicants from his person; admitted to having been drinking; made contradictory statements regarding where he was coming from at the time of the accident and the amount of alcohol he had consumed; and had difficulty maintaining his balance.

¶2 Horan argues that because the arresting officer did not administer standardized field sobriety tests, a preliminary breath test (PBT), or conduct a thorough investigation into the circumstances of the accident, he did not have probable cause to arrest Horan for OWI. We disagree and conclude, based on the totality of the circumstances, that the investigating officer had probable cause to arrest Horan for OWI. Accordingly, we affirm.

BACKGROUND

¶3 The following facts are unchallenged on appeal. In the late afternoon of November 2, 2008, Jefferson County sheriff deputies were dispatched to the scene of a one-vehicle accident involving a motorcycle at the intersection of Carcajou and Kuehn Roads in Jefferson County. Deputy Robert Meyer, a law enforcement officer of approximately twenty-two and one-half years' experience, ascertained the driver of the motorcycle to be the defendant, Dell Horan.

² WISCONSIN STAT. § 346.63(1)(a) provides, in relevant part, that “[n]o person may drive or operate a motor vehicle while [u]nder the influence of an intoxicant ... to a degree which renders him or her incapable of safely driving.”

¶4 The deputy attempted to converse with Horan, but had difficulty because Horan was crouched down trying to repair a strap on his motorcycle, and “was trying to avoid any type of facial contact” with him. Upon telling Horan to stand and produce a driver’s license, the deputy noticed that Horan had bloodshot, glassy eyes and detected a strong odor of intoxicants on his breath. The deputy also noted that Horan appeared to be staggering and was having a difficult time maintaining his balance. Upon questioning, Horan admitted to having “a couple of beers” starting around 4 p.m., and stated that he was coming from Janesville. Approximately thirty minutes after the deputy arrived on the scene, Horan was transported to the hospital, where the deputy questioned him once more. This time, Horan told the deputy that he had been coming from Edgerton, and had drunk only one beer starting at 3 p.m.

¶5 While the deputy conducted no standardized field sobriety tests at the scene of the accident, he did administer a horizontal gaze nystagmus (HGN) test at the hospital. However, the trial court excluded the HGN from its consideration of the evidence because it was administered while Horan was lying prone in a hospital bed, a circumstance which casts doubt on the reliability of the test. Furthermore, Horan did not exhibit any slurred speech, no preliminary breath test was administered, and the deputy did not question available witnesses about the circumstances of the accident or the extent of Horan’s injuries.

¶6 Following his administration of the HGN test, Deputy Meyer arrested Horan for operating a motor vehicle while under the influence of an intoxicant, contrary to WIS. STAT. § 346.63.

¶7 Horan filed a motion challenging probable cause to arrest. After a hearing on the motion, the trial court found the deputy had probable cause to arrest

Horan and denied the motion. The case was tried to a jury, which found Horan guilty of operating under the influence and operating with a blood alcohol concentration in excess of .10%. Judgment was entered on the verdict. Horan appeals the judgment of conviction and the order denying his motion to suppress.

DISCUSSION

¶8 “In reviewing a motion to suppress, we accept the circuit court’s findings of fact unless they are clearly erroneous; the correct application of constitutional principles to those facts presents a question of law, which we review de novo.” *State v. Drew*, 2007 WI App 213, ¶11, 305 Wis. 2d 641, 740 N.W.2d 404. Whether probable cause to arrest exists in a given case is a question of law that we determine independently of the circuit court, but benefiting from its analysis. See *Washburn County v. Smith*, 2008 WI 23, ¶16, 308 Wis. 2d 65, 746 N.W.2d 243. Here, Horan does not challenge the circuit court’s findings of historical fact, and argues only that the court erred in concluding that the facts as found established probable cause to arrest.

¶9 “Under both the Fourth Amendment and Article I, § 11 of the Wisconsin Constitution, probable cause must exist to justify an arrest.” *State v. Secrist*, 224 Wis. 2d 201, 209, 589 N.W.2d 387 (1999). The burden is on the State to show that the officer had probable cause to arrest. *State v. Wille*, 185 Wis. 2d 673, 682, 518 N.W.2d 325 (Ct. App. 1994). Probable cause to arrest for operating while under the influence of an intoxicant refers to that quantum of evidence that would lead a reasonable law enforcement officer to believe that the defendant was operating a motor vehicle while under the influence of an intoxicant. *State v. Kasian*, 207 Wis. 2d 611, 621, 558 N.W.2d 687 (Ct. App. 1996). Such evidence need not be sufficient to prove guilt beyond a reasonable doubt “or even that guilt

is more likely than not.” *State v. Babbitt*, 188 Wis. 2d 349, 357, 525 N.W.2d 102 (Ct. App. 1994). It is sufficient that the evidence known to the investigating officer at the time of the arrest would lead a reasonable officer to believe that the defendant was probably guilty of OWI. *State v. Lange*, 2009 WI 49, ¶38, ___ Wis. 2d ___, 766 N.W.2d 551. The determination of probable cause is made on a case-by-case basis, considering the totality of the circumstances. *Kasian*, 207 Wis. 2d at 621-22.

¶10 Horan contends that Deputy Meyer lacked probable cause to arrest him for OWI because he failed to administer field sobriety tests or a PBT, or conduct a thorough investigation into the circumstances of the accident. He appears to argue that an officer cannot have probable cause to arrest for OWI following an auto accident without first conducting an investigation into its circumstances, and without administering field sobriety tests and a preliminary breath test. We agree with Horan that officers obtaining evidence to determine whether probable cause to arrest exists will, as they are trained to do, conduct field sobriety tests, administer a preliminary breath test, and, where appropriate, gather evidence from witnesses concerning an accident. However, we disagree with Horan that probable cause to arrest may be based only on this evidence. As the following cases demonstrate, probable cause to arrest may be based on factors other than field sobriety tests, a PBT, or the results of an investigation of an accident.

¶11 In *Kasian*, we held that probable cause to arrest existed solely on the evidence that the defendant was found at the scene of a one-vehicle accident, smelled strongly of intoxicants, and was slurring his speech. *Id.* at 622. Likewise, in *Wille*, we found probable cause to arrest when the arresting officer smelled intoxicants on the defendant’s person, knew that the defendant had driven his car

into the rear of a parked automobile on the shoulder of the highway, and heard the defendant say he had “to quit doing this,” thereby evincing a consciousness of guilt. *Wille*, 185 Wis. 2d at 683.

¶12 Recently, the supreme court held that officers had probable cause to arrest after observing the defendant’s “wildly dangerous driving” which resulted in a one-vehicle accident, during the time of night when bars in the area normally close, and after learning that the defendant had a prior conviction of operating a vehicle while under the influence of an intoxicant. *Lange*, 2009 WI 49, ¶23-34. In *Lange*, the court determined that the standard for probable cause to arrest had been satisfied despite the fact that “the defendant did not admit alcohol consumption [t]here were no odors of intoxicants, no slurred speech or difficulty balancing, no known visits to a bar, no inconsistent stories or explanations, no intoxicated traveling companions, no empty cans or bottles, and no suggestive field sobriety tests.” *Id.*, ¶21. In determining there was probable cause, the court placed special emphasis on the experience of the arresting officers and the fact that the defendant’s need for medical attention cut short the officers’ opportunity to conduct field sobriety tests. *Id.*, ¶30.

¶13 Horan relies on *State v. Swanson*, where the supreme court determined that “[u]nexplained 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” *State v. Swanson*, 164 Wis. 2d 437, 453 n.6, 475 N.W.2d 148 (1991). The *Swanson* court also pointed out that the failure of the officers to further investigate the incident detracted from the strength of the evidence used in the probable cause determination. *Id.* However, in *Washburn County v. Smith*, the supreme court disavowed any suggestion in *Swanson* that field sobriety tests are

necessary in all circumstances to establish probable cause to arrest for operating a motor vehicle while intoxicated, and reiterated the long-held principle that “probable cause must be assessed on a case-by-case basis.” *Smith*, 308 Wis. 2d 65, ¶33-34.

¶14 Moreover, the instant case is distinguishable from *Swanson* because several more indicia of intoxication are observable here than were present in that case, including an admission of alcohol consumption, contradictory statements made to the arresting officer, and bloodshot, glassy eyes. As in *Swanson*, the arresting officer in the present case failed to conduct a thorough investigation into the circumstances of the incident prior to making an arrest. However, the absence of such an investigation does not negate the existence of probable cause to arrest Horan for operating while intoxicated based on the cumulative weight of the multiple indicia of intoxication observed by the arresting officer.

¶15 Horan maintains that the facts in this case are more favorable than the facts of *State v. Seibel*, 163 Wis. 2d 164, 471 N.W.2d 226 (1991), where the supreme court concluded there was no probable cause to arrest where the officers conducted a thorough investigation; the defendant crossed the center line on his motorcycle; the defendant emitted a strong odor of intoxicants detected by multiple officers; and the defendant “exhibited a belligerence and lack of contact with reality often associated with drinking.” *Id.*, at 180-183. Horan’s reliance on *Seibel* is unavailing, because, as the supreme court recently observed, *Seibel* never addressed the question of whether probable cause to arrest existed, instead basing its holding on other grounds. *Smith*, 308 Wis. 2d 65, ¶22.

¶16 Finally, Horan contends that the supreme court has found no probable cause to arrest on facts that arguably provided stronger evidence of

intoxication than those here, citing *County of Jefferson v. Renz*, 231 Wis. 2d 293, 603 N.W.2d 541 (1999). Horan misreads *Renz*. The *Renz* court, in concluding that the investigating officer had probable cause to request a PBT, did not address whether the officer also had probable cause to arrest. Contrary to Horan's suggestion, the *Renz* court's conclusion that the facts fulfilled the lower probable cause standard does not foreclose the possibility that the facts may have also constituted probable cause to arrest.

¶17 Turning to the present facts, we conclude under the totality of the circumstances that Deputy Meyer had probable cause to arrest Horan for operating while intoxicated. The cumulative effect of the fact that Horan was involved in a one-vehicle accident, had bloodshot eyes, showed difficulty maintaining balance, emitted strong odor of intoxicants, and admitted to consuming alcohol gave sufficient reason for the deputy to conclude that Horan was likely operating his motorcycle while under the influence of an intoxicant. These facts, combined with Horan's attempt to avoid facial contact with the deputy and his contradictory statements about the amount of alcohol he had consumed—both of which reasonably indicate a consciousness of guilt—and Deputy Meyer's twenty-two years of experience as a law enforcement officer, collectively support a finding of probable cause. We therefore affirm.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

