

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 23, 2011

A. John Voelker
Acting 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. 2011AP1037-CR

Cir. Ct. No. 2010CT605

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GUSTAVO E. LOPEZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: JOHN A. JORGENSEN, Judge. *Affirmed.*

¶1 BROWN, C.J.¹ Gustavo E. Lopez appeals from a judgment convicting him of operating a motor vehicle while intoxicated, fourth offense.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

Lopez argues that the trial court's finding of probable cause to arrest Lopez was primarily deduced from video evidence recorded from the investigating officer's squad car during the roadside stop. Lopez alleges that the video is an insufficient substitute for the officer's testimony regarding the officer's personal observations. Without the officer's testimony, Lopez questions the officer's knowledge to decide that there was probable cause to arrest him. We conclude that evidence gleaned from the officer's testimony plus the video of the roadside stop is sufficient to infer probable cause. We affirm.

¶2 On April 23, 2010, at about 10:53 p.m., an officer from the Neenah police department neared an intersection in Winnebago county where he had the green light. Just prior to the officer passing through the intersection, Lopez drove through the same intersection in the direction perpendicular to the officer, thus running a red light. Moments prior to the officer activating the lights on his squad car, the officer saw Lopez swerve his vehicle over the center line of the lane.

¶3 When the officer approached Lopez's vehicle he could smell alcohol. After first denying it, Lopez eventually admitted to drinking alcohol prior to operating his vehicle that evening. The officer then conducted a field sobriety test from which the officer identified four out of a possible six indicia of intoxication in the horizontal gaze nystagmus test. The officer testified that the presence of four out of six clues points to a "good possibility" that the blood alcohol level is at or above .08. During the field sobriety test, the officer asked Lopez to walk heel-to-toe while counting his steps. In doing so, Lopez skipped the number five, moving straight from four to six. Lastly, Lopez swayed when asked to stand on one foot. After Lopez failed the field sobriety tests, the officer placed Lopez under arrest for operating a motor vehicle while intoxicated.

¶4 Before the trial court, Lopez moved to suppress all evidence based on a lack of probable cause to arrest. At the suppression hearing, the trial court found probable cause, stating that “the reasonable officer would have justification of arresting the defendant for operating while intoxicated.” The trial court based its finding of probable cause specifically on the failed field sobriety test, Lopez’s driving, the smell of alcohol, and the trial court’s observations of Lopez as seen in the video.

¶5 We uphold the trial court’s findings of fact unless they are clearly erroneous. *County of Jefferson v. Renz*, 231 Wis. 2d 293, 316, 603 N.W.2d 541 (1999). Where the evidence consists of disputed testimony and video recordings, the court applies the clearly erroneous standard to the trial court’s findings based on the recording. *State v. Walli*, 2011 WI App 86, ¶17, 334 Wis. 2d 402, 799 N.W.2d 898. Then, we review de novo whether those facts satisfy the constitutional standard of probable cause. *Id.*, ¶10. After reviewing the video evidence and the transcript of the motion hearing, we note that the facts as found by the trial court are supported by the record so we will not disturb them. Therefore, we focus on whether there was probable cause.

¶6 Probable cause exists where the totality of the circumstances within the arresting officer’s knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant probably committed a crime. *State v. Koch*, 175 Wis. 2d 684, 701, 499 N.W.2d 152 (1993). Probable cause is a commonsense concept we judge by the factual and practical considerations of everyday life on which reasonable and prudent persons, not legal technicians, act. *State v. Truax*, 151 Wis. 2d 354, 360, 444 N.W.2d 432 (Ct. App. 1989).

¶7 Lopez contends that the officer’s testimony is “sparse” in regards to his observations of Lopez’s conduct. As we stated at the outset, Lopez asserts that without the officer’s testimony concerning how his observations of Lopez were indicia of intoxication, there is no evidence that the officer possessed the requisite knowledge to suppose intoxication. Lopez complains that the trial court independently extrapolated specific observations from video evidence of the roadside stop, and not testimony from the officer, in formulating its finding of probable cause. Finally, Lopez claims that the trial court’s presumptions from the evidence are inadequate substitutions for the officer’s testimony to indicate the officer’s knowledge at the time of the arrest.²

¶8 While the record reveals that Lopez is correct in stating that the court took video evidence from the roadside stop into consideration when making the finding of probable cause, we disagree that this was in any way not allowed. When determining the facts available to the officer to formulate probable cause, “[t]he test is objective: what a reasonable officer would reasonably believe under the circumstances.” *State v. Londo*, 2002 WI App 90, ¶10, 252 Wis. 2d 731, 643 N.W.2d 869. Here, the trial court saw by video what the officer saw in person. As we already stated, we have reviewed the video and the trial court’s findings from it

² For this proposition, Lopez cites to *County of Jefferson v. Renz*, 222 Wis. 2d 424, 588 N.W.2d 267 (Ct. App. 1998), *rev’d on other grounds*, 231 Wis. 2d 293, 603 N.W.2d 541 (1999). In that case, the defendant was pulled over for a noisy muffler, admitted to consuming three beers before driving, and some minor deviations on the field sobriety tests. *Id.* at 428, 444-46. We emphasized that WIS. STAT. § 346.63(1)(a) does not prohibit operating a motor vehicle after having consumed alcohol, but prohibits driving “[u]nder the influence of an intoxicant ... to a degree which renders [one] incapable of safely driving.” *Renz*, 222 Wis. 2d at 444. Significantly, Lopez was pulled over based on his driving—running a red light and deviating from his lane of traffic. In addition, the officer testified specifically to observing four out of six signs of intoxication in the horizontal gaze nystagmus test, which he took to mean that Lopez was probably intoxicated. This is much more evidence of driving while impaired than was available to the court in *Renz*.

are not clearly erroneous. The video shows that Lopez was impaired. The trial court is not limited to the officer's testimony in finding probable cause. It is the testimony plus the video that allowed the trial court to reach the conclusion it did. We see no problem here. The video is evidence. Judges use evidence to find facts.

¶9 Under the totality of the circumstances, the facts available to the officer at the time of the arrest were sufficient to show probable cause. Lopez ran a red light and proceeded to drive his vehicle over the center line of the lane. Then, once the car was stopped, the officer smelled alcohol and Lopez admitted to consuming alcohol prior to driving. Lopez failed his field sobriety test and the officer detected four out of six signs of intoxication in the horizontal gaze nystagmus test. All of this evidence was available to the officer to formulate the conclusion that Lopez was likely intoxicated. We therefore affirm the trial court's finding of probable cause.

By the Court.—Judgment affirmed.

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

