

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 14, 2013

Diane M. Fremgen
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. 2013AP110-CR

Cir. Ct. No. 2011CT1775

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SCOTT E. BARTELT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County:
WILLIAM DOMINA, Judge. *Affirmed.*

¶1 BROWN, C.J.¹ This appeal follows Scott Bartelt's conviction for driving while intoxicated. During his investigation of a bar fight, a village of

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(?) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Butler police officer came to the conclusion that Bartelt should not drive home and offered to give him a ride. Bartelt declined the ride, told the officer he would walk home, and walked away. Not twenty minutes later, back on patrol, the officer saw Bartelt drive by in his truck. Bartelt attempted to flee but was ultimately arrested.

¶2 On appeal Bartelt argues that the officer lacked probable cause for the arrest, primarily because the officer did not conduct field sobriety tests. We conclude that in view of the totality of the circumstances, it was quite obvious to the officer that Bartelt was intoxicated, without any need to conduct field sobriety tests. The officer had ample probable cause for the arrest. We affirm.

Facts

¶3 On December 20, 2011, at approximately 1:08 a.m., while on a routine patrol in the village of Butler, a police officer was waved down by a female bartender at the Bottom's Up Tavern. The bartender told the officer that "a male patron inside the bar ... was swearing and starting fights." The officer began to enter the bar and observed two men escorting a third man out of the bar.

¶4 Outside, the officer spoke with the male patron who had been escorted out, Scott Bartelt. As they talked, the officer noticed Bartelt's speech was slow, his body was swaying back and forth, he had a strong odor of intoxicants on his breath, and his eyes were red and glassy. The officer noticed swelling above Bartelt's right eye from the physical confrontation inside the bar, but Bartelt said he did not need any help and did not want to file any complaint related to the incident.

¶5 As the conversation ended, the officer asked Bartelt to identify his vehicle in the parking lot and said that Bartelt should not drive home. The officer

even offered to give Bartelt a ride. Bartelt identified his black Silverado in the lot, but said that he did not live very far away and could walk home. After the conversation with the officer ended, Bartelt walked away from the tavern, west to 126th Street, and out of the officer's sight.

¶6 Once Bartelt walked away, purportedly on his way home for the night, the officer went inside to gather more information. The patrons who had escorted Bartelt out of the bar said that Bartelt was intoxicated and inappropriately grabbed the arm of their female friend. These patrons further reported that when they told Bartelt to take his hands off of their friend, he became belligerent, and that they had to wrestle Bartelt to the ground and escort him out of the bar. The bartender likewise told the officer that Bartelt was intoxicated.

¶7 After collecting this information about Bartelt's behavior in the bar incident, the officer left the bar and resumed his patrol. About ten minutes later, driving on 126th Street, the officer passed Bartelt driving his black Silverado truck in the opposite direction. The officer immediately made a U-turn to follow Bartelt and pull him over. Bartelt apparently saw the officer, too, because he quickly pulled into a nearby driveway and ran into the dark back yard, leaving his truck's dome and parking lights on. The officer pulled in behind Bartelt and hid near the garage of the house until Bartelt came out of the backyard. He then arrested Bartelt for operating a vehicle while under the influence of an intoxicant.

¶8 Bartelt subsequently was charged with operating a vehicle while under the influence of an intoxicant and with a prohibited alcohol concentration as second offenses. The circuit court denied the defense's motion challenging the arrest and seeking to suppress evidence. Thereafter Bartelt pled guilty to the

charge of operating a motor vehicle while under the influence of an intoxicant as a second offense, was sentenced, and now appeals.

Analysis

¶9 Bartelt’s appeal is based on the claim that the police officer lacked probable cause to arrest Bartelt after seeing Bartelt driving. The state has the burden of showing that a police 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 within the arresting officer’s knowledge at the time of the arrest 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. Lange, 2009 WI 49, ¶19, 317 Wis. 2d 383, 766 N.W.2d 551. The totality of the circumstances must be analyzed to determine whether probable cause existed for an arrest on a case-by-case basis. *State v. Cheers*, 102 Wis. 2d 367, 388, 306 N.W.2d 676 (1981.) The existence of probable cause is a question of constitutional fact, subject to a mixed standard of review; we uphold the circuit court’s findings of historical fact unless they are clearly erroneous, but whether those facts established probable cause is a legal question reviewed de novo. *State v. Anagnos*, 2012 WI 64, ¶21, 341 Wis. 2d 576, 815 N.W.2d 675.

¶10 Considering the totality of the circumstances in this case, the officer had probable cause to arrest Bartelt. The test for probable cause is a commonsense one. *County of Dane v. Sharpee*, 154 Wis. 2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990.) We examine the “totality of circumstances” within the officer’s knowledge at the time of the arrest, and ask whether those

circumstances would have led a reasonable police officer to believe that the defendant committed the offense in question. *State v. Koch*, 175 Wis. 2d 684, 701, 499 N.W.2d 152 (1993.)

¶11 In an OWI case, the relevant circumstances include the place and time of the arrest, the driver's appearance and manner of speech, a smell of intoxicants, and any other facts supporting the inference that the driver is intoxicated. See *Washburn Cnty. v. Smith*, 2008 WI 23, ¶36, 308 Wis. 2d 65, 746 N.W.2d 243 (discussing various factors supporting officer's suspicion); *Wille*, 185 Wis. 2d at 683-84. Actions revealing the driver's consciousness of guilt are also relevant. For instance, in *Cheers*, the court determined the defendants'

conduct and retreat or "flight" from the police officers' show of authority immediately prior to the time of his arrest certainly constitutes evidence of consciousness of guilt and, therefore, "is a factor to be considered in determining whether probable cause exists."

Cheers, 102 Wis. 2d at 391 (citations omitted.) Also, while field sobriety tests can provide relevant information for an officer assessing whether there is probable cause to suspect a driver was driving while intoxicated, they are by no means necessary, particularly when there is ample other evidence providing the officer with probable cause. See *Wille*, 185 Wis. 2d at 684.

¶12 In this case, the officer had probable cause based upon the totality of circumstances. We note that he was an experienced officer, having arrested approximately 200 people for operating while intoxicated during his eleven-year career. He also had training to detect intoxication.

¶13 To begin with, the officer's initial suspicion was surely triggered when a bartender flagged him down asking for help with Bartelt, who was

reportedly “swearing and starting fights” in the bar just after 1:00 a.m. This initial suspicion of Bartelt’s intoxication was confirmed by personal observations during the officer’s minutes-long, face-to-face conversation with Bartelt. The officer smelled a strong odor of intoxicants on Bartelt’s breath; heard Bartelt’s slowed speech; saw Bartelt’s glassy, bloodshot eyes, and noted that Bartelt’s body was swaying back and forth. He also noted that Bartelt’s manner at the time was aggressive, as Bartelt said he was a “tough guy.” These would all be indicators of intoxication to a layperson, so it should be especially so for an experienced officer.

¶14 Furthermore, the time and location of this contact were also relevant. The discussion took place at 1:00 a.m., in the parking lot of a bar, near closing time. The bartender and other witnesses later confirmed that Bartelt had been drinking, was intoxicated, and had been acting belligerently. With all of that information, on top of his personal observations of Bartelt’s appearance and smell of intoxicants, the officer had probable cause to suspect Bartelt was too drunk to drive. This conclusion was confirmed by Bartelt’s ready acquiescence to the officer’s demand that he leave his car in the bar’s parking lot.

¶15 Since Bartelt’s arrest happened less than half an hour later, probable cause was still in place. Twenty minutes was not long enough for Bartelt’s apparent intoxication to wear off. The officer could have stopped Bartelt for driving while intoxicated without any additional supporting facts, at the moment when he saw him driving by.

¶16 Bartelt’s actions after the officer saw him driving produced even more evidence of Bartelt’s guilt when Bartelt attempted to flee. Pulling into a driveway without turning off his parking or dome lights and running into the backyard was strong evidence of Bartelt’s consciousness of guilt. *Id.* This guilt

was further confirmed when the officer announced his presence and arrested Bartelt, because Bartelt asked the officer to give him a break. Bartelt's actions when caught driving were additional relevant circumstances supporting probable cause.

¶17 In this context, field sobriety tests would have been superfluous. Nonetheless, Bartelt insists field sobriety tests should have been performed, apparently in the mistaken belief that such tests are required to support probable cause in OWI cases except in exigent circumstances. Bartelt attempts to distinguish *Wille*, *Lange*, *Kasian*, 207 Wis. 2d 611, 558 N.W.2d 687 (Ct. App. 1996), and where probable cause existed without field sobriety tests, by pointing out that unlike in those cases, in his “there was no accident.” Bartelt argues that in those cases, the defendants’ injuries made it impractical to test them.

¶18 Bartelt has it wrong. Just as there is no case requiring field sobriety tests in all cases as a prerequisite for establishing probable cause in OWI cases, there is no case holding that field sobriety tests are required unless there is an accident or the suspect has injuries making it difficult to test her or him.

¶19 Instead, the standard for measuring probable cause in OWI cases is the familiar, fact-based “totality of the circumstances” test for probable cause: we look at all of the relevant facts and determine whether a reasonable officer with knowledge of those facts would have probable cause to believe the defendant was driving while intoxicated. Depending upon the circumstances, in “some cases, the field sobriety tests may be necessary to establish probable cause; in other cases, they may not.” *Kasian*, 207 Wis. 2d at 622.

¶20 In this case, it is manifestly obvious that any reasonable officer in Bartelt's position would have had probable cause to arrest Bartelt for driving while

intoxicated, with no need for field sobriety tests. There was no need for field sobriety tests to pile on more evidence to support probable cause. The circuit court properly denied Bartelt's motion to suppress.

By the Court.—Judgment affirmed.

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

