COURT OF APPEALS DECISION DATED AND FILED

March 26, 2014

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. 2013AP2725-CR

Cir. Ct. No. 2013CT1063

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

JEFFREY D. MARKER,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Winnebago County: SCOTT C. WOLDT, Judge. *Reversed.*

¶1 NEUBAUER, P.J.[1] The State appeals from the dismissal of its case against Jeffrey D. Marker for operating a motor vehicle while under the influence

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

of a controlled substance, second offense, contrary to WIS. STAT. § 346.63(1)(a).[2] The circuit court dismissed the case without prejudice because it found that there was no evidence of intoxication in the complaint.

¶2 A complaint is sufficient if it states facts that, when taken together with the reasonable inferences therefrom, establish probable cause. ***Lofton v. State***, 83 Wis. 2d 472, 478, 266 N.W.2d 576 (1978). "A complaint is sufficient if a fair-minded magistrate could reasonably conclude that the facts alleged justify further criminal proceedings and that the charges are not merely capricious." ***Id.*** (citation omitted). "The sufficiency of a complaint is a matter of law" we review de novo. ***State v. Adams***, 152 Wis. 2d 68, 74, 447 N.W.2d 90 (Ct. App. 1989).

¶3 To convict someone of a controlled substance, the State must prove:

> 1. The defendant … (operated) a motor vehicle on a highway.
>
> ….
>
> 2. The defendant was under the influence of <u>(name controlled substance)</u> at the time the defendant … (operated) a motor vehicle.
>
> ….

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[2] WISCONSIN STAT. § 346.63(1)(a) provides, in relevant part:

> **(1)** No person may drive or operate a motor vehicle while:
>
> (a) Under the influence of an intoxicant, a controlled substance, a controlled substance analog or any combination of an intoxicant, a controlled substance and a controlled substance analog, under the influence of any other drug to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving ….

The Definition of "Under the Influence"

> "Under the influence" means that the defendant's ability to operate a vehicle was impaired because of consumption of a controlled substance.
>
> [Not every person who has consumed (name controlled substance) is "under the influence" as that term is used here.] What must be established is that the person has consumed a sufficient amount of (name of controlled substance) to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.
>
> It is not required that impaired ability to operate be demonstrated by particular acts of unsafe driving. What is required is that the person's ability to safely control the vehicle be impaired.

WI JI—CRIMINAL 2664 (footnotes omitted).

¶4 The complaint charged Marker with OWI, second offense, and alleged that Marker "did operate a motor vehicle while under the influence of a controlled substance, contrary to [WIS. STAT. §§] 346.63(1)(a), 346.65(2)(am)2, 343.30(1q)(b)3." The complaint included a detailed report written by the arresting officer that included the following facts. The officer received a call from dispatch regarding a citizen's report of a reckless driver northbound on Hwy. 41. The complainant indicated the vehicle had almost hit several vehicles. The complainant provided the license plate number of the vehicle, and the officer ran that license plate and retrieved the year, make, model, and color of the vehicle. The officer located the vehicle and followed it. He observed the vehicle swerve within its lane and also observed that the vehicle had an obstruction hanging from the rearview mirror. The officer stopped the vehicle and, upon making contact with the driver (Marker), noticed that Marker had "very slow and slurred speech." The officer noticed that Marker seemed impaired. When the officer told Marker that there had been a call about his reckless driving, Marker told the officer that

"he had already gotten stopped earlier that day for similar driving behavior … and was given a warning." Marker told the officer that he was taking several prescription medications and even gave the officer a list of those medications, which included, among others, Dilantin, Chlordizep, Topamax, Keppra, Crestor, Plavix and Oxycodone, Diazepam and Lorazepam as needed. The officer conducted field sobriety tests, during which Marker exhibited poor balance and difficulty following the instructions. The officer then placed Marker under arrest for OWI, after which Marker was taken to the hospital. Marker was evaluated by a drug recognition expert, who opined that Marker "was under the influence of CNS [central nervous system] depressants and was unable to operate a motor vehicle safely." The results of the blood test taken at the hospital are included in the complaint and show that Marker's blood tested positive for Phenytoin, Topiramate, Oxazepam, Lorazepam, Chlordiazepoxide and Nordiazepam.

¶5 The circuit court found that "[t]here's absolutely nothing in this Complaint showing intoxication" and dismissed the complaint. In our de novo review, we conclude that the complaint states more than enough facts to establish probable cause for charging Marker with controlled substance OWI. We need not reiterate all the facts; the officer observed several signs of operating while under the influence of a controlled substance, i.e., that Marker's ability to drive safely was impaired, and his conclusion that Marker was under the influence was confirmed by the evaluation of the drug recognition expert and the blood analysis.

¶6 Marker's only argument on appeal is that the blood report's indication that the drugs were found at "low therapeutic concentration" means that the other facts alleged do not add up to probable cause. We disagree. Slurred speech, the call from the complainant about erratic driving, Marker's own voluntary admission to the officer that Marker had been pulled over earlier that

day, the poor performance on the field sobriety tests—these are sufficient to establish probable cause even without the blood test results. Furthermore, that the drugs were at low therapeutic levels does not mean that they could not have an impairing effect in combination. The significance of the drugs' levels would be a question for trial, not a detail that renders the rest of the alleged facts meaningless and strips the complaint of probable cause.

¶7 We reverse.

By the Court.—Judgment reversed.

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