

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 30, 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. 2013AP2628-CR

Cir. Ct. No. 2013CF265

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

DAVID L. KLINE, JR.,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Rock County:
RICHARD T. WERNER, Judge. *Reversed and cause remanded.*

Before Blanchard, P.J., Sherman and Kloppenburg, JJ.

¶1 PER CURIAM. The State appeals an order suppressing evidence obtained against defendant David Kline in an operating while intoxicated (OWI) and prohibited alcohol concentration (PAC) case. The circuit court concluded that the investigating officer transformed an investigatory stop into an arrest without

probable cause when he transported defendant David Kline to the police department garage to perform sobriety tests. We will assume for the sake of argument that the transportation constituted an arrest. However, for the reasons discussed below, we conclude that the officer had probable cause for arrest at that time. Accordingly, we reverse the suppression order and remand for further proceedings.

BACKGROUND

¶2 Shortly after noon on a cold but clear January day, a City of Beloit police officer with ten years of experience was dispatched to a park in response to a report about a person lying in the snow next to a truck with her pants down, being helped up by another person with his pants down. Upon arriving, the officer found Kline sitting in the driver's seat of the truck with the engine running, with his belt undone and the zipper of his pants down. His female passenger was too intoxicated to be effectively questioned.

¶3 While questioning Kline about his well-being and the incident in the park, the officer smelled a strong odor of intoxicants coming from the vehicle and observed that Kline had red, glassy eyes and was slurring his speech. After initially denying any alcohol consumption, Kline eventually stated that he had consumed one alcoholic beverage several hours before. Based on his own observations of Kline, the officer believed that Kline had consumed more than one drink. The officer obtained Kline's driver's license and went back to the squad car to run a check on him. Upon doing so, the officer discovered that Kline was on probation and had three prior OWI convictions, the last of which was within the past five years. The officer was aware that this meant Kline was subject to a PAC level of 0.02.

¶4 The officer returned to the vehicle and asked Kline to exit the vehicle to perform sobriety tests. Kline asked to perform the tests on the scene, but the officer advised Kline that he was going to take Kline to the police department garage so that the tests could be performed on a flat dry surface out of the elements. Although the officer advised Kline that he was not under arrest, the officer handcuffed Kline and placed him in a locked back seat of the squad car in order to transport him to the department.

STANDARD OF REVIEW

¶5 When reviewing a suppression motion, we defer to the circuit court's credibility determinations and uphold its findings of fact unless they are clearly erroneous. *See State v. Angiolo*, 186 Wis. 2d 488, 494-95, 520 N.W.2d 923 (Ct. App. 1994); *State v. Eckert*, 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996); *see also* WIS. STAT. § 805.17(2) (2011-12).¹ However, we independently determine whether the facts establish that a particular search or seizure violated constitutional standards. *See State v. Richardson*, 156 Wis. 2d 128, 137-38, 456 N.W.2d 830 (1990).

DISCUSSION

¶6 Probable cause for arrest exists when “the totality of the circumstances within the arresting officer’s knowledge would lead a reasonable police officer to believe that the defendant probably committed a crime.” *State v. Kutz*, 2003 WI App 205, ¶11, 267 Wis. 2d 531, 671 N.W.2d 660. The standard

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

requires “more than a possibility or suspicion that [the] defendant committed an offense, but the evidence need not reach the level ... that guilt is more likely than not.” *State v. Mitchell*, 167 Wis. 2d 672, 681-82, 482 N.W.2d 364 (1992). When competing reasonable inferences could be drawn, the officer is entitled to rely on the inference justifying arrest. *Kutz*, 267 Wis. 2d 531, ¶12.

¶7 Two cases are particularly instructive here.

¶8 In *State v. Lange*, 2009 WI 49, 317 Wis. 2d 383, 766 N.W.2d 551, the Wisconsin Supreme Court determined that there was probable cause to arrest an individual involved in a car crash for drunk driving—despite the absence of any of the common indicators of intoxication usually observed in sobriety tests—based upon five factors: (1) the officers’ direct observation of the defendant’s driving, which was “the sort of wildly dangerous driving that suggests the absence of a sober decision maker behind the wheel”; (2) the senior arresting officer’s years of experience; (3) the fact that the accident occurred during the time “when Saturday night bar-time traffic arrives” in the area; (4) the arresting officer’s knowledge of the defendant’s prior OWI conviction; and (5) the fact that the accident rendered the suspect unconscious and spilled gasoline over the scene, impeding the officer’s ability to smell the odor of intoxicants and to observe the defendant’s speech, eyes, or balance for other indicators of intoxication. *Id.*, ¶¶24-40.

¶9 In *State v. Goss*, 2011 WI 104, 338 Wis. 2d 72, 806 N.W.2d 918, the Wisconsin Supreme Court held that a police officer had probable cause under WIS. STAT. § 343.303 to request that a defendant provide a preliminary breath test (PBT) where: (1) the officer smelled the odor of intoxicants on the defendant when he arrested him and placed him in the squad car on a charge of driving with a revoked license, but observed no other indicators of intoxication; and (2) the

officer knew that the defendant had four prior OWI convictions and was subject to a PAC of .02. *Id.*, ¶¶17-18, 25-26. In the course of its discussion, the court noted that “[t]he ordinary investigative tools employed in an investigation of an OWI case with a .08 PAC standard are of little or no use where the PAC standard is one fourth of that level because the ordinary physical indications of intoxication are not typically present in a person with [a .02] blood alcohol content.” *Id.*, ¶27.

¶10 Although *Goss* addressed the lower probable cause standard applicable to PBT requests rather than the higher probable cause standard required for arrest, we conclude that the court’s rationale in *Goss* supports the proposition that the evidence required to establish probable cause for an arrest on a .02 PAC charge must necessarily be less than the evidence required to establish probable cause for an arrest on an OWI or .08 PAC charge.

¶11 Based on *Lange* and *Goss*, we conclude that the police officer here had probable cause to arrest Kline on a .02 PAC charge based upon the following factors. First, the officer was aware that Kline had three prior OWI convictions. This fact had dual significance: it both decreased the applicable PAC level and alerted the officer that Kline had a history of driving while intoxicated. Second, the officer smelled an odor of intoxicants coming from inside Kline’s vehicle. The officer was not required to accept possible innocent explanations for that odor, such as that the odor came solely from the passenger or that the passenger had spilled alcohol on Kline, when an equally reasonable explanation for the odor was that Kline understated the number of drinks he had consumed before driving. Third, the officer observed that Kline had red, glassy eyes and slurred speech. The presence of indicators of intoxication that are generally sufficient to provide reasonable suspicion at the .08 PAC level are highly suggestive that the .02 PAC

level has been surpassed. Finally, the officer had ten years of experience, which further informed his evaluation of Kline's actual level of intoxication.

¶12 Because we conclude that the officer had probable cause to arrest Kline on a PAC charge when he transported him to the police garage for sobriety tests on an OWI charge, we reverse the circuit court's suppression order and remand for further proceedings.

By the Court.—Order reversed and cause remanded.

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

