

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 23, 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. 2013AP2804

Cir. Ct. Nos. 2013TR957
2013TR1873

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

CITY OF OSHKOSH,

PLAINTIFF-RESPONDENT,

V.

JONATHAN D. BERGER,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Winnebago County: THOMAS J. GRITTON, Judge. *Affirmed.*

¶1 GUNDRUM, J.¹ Jonathan Berger appeals from judgments of conviction, arguing that the circuit court erred when it denied his motion to

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.

suppress evidence on charges against him for operating a motor vehicle while intoxicated (OWI) and with a prohibited blood alcohol concentration. He contends the police officer who arrested him did not have probable cause to do so and thus violated his right to be free from unreasonable seizures under the Fourth Amendment of the United States Constitution and article I, section 11 of the Wisconsin Constitution. We disagree and affirm.

BACKGROUND

¶2 The City of Oshkosh police officer who arrested Berger was the only witness to testify at the evidentiary hearing related to Berger's motion to suppress. Thus, the facts relevant to this appeal are derived from his testimony, undisputed, and as follows.

¶3 At approximately 11:30 p.m. on January 17, 2013, the officer, an eleven-year veteran of the Oshkosh police force, was dispatched to the location of Berger's vehicle following a report from a witness that there was a vehicle which appeared to the witness to have been in an accident because the vehicle had a flat tire and there was oil "all over the roadway." The witness had further reported that the driver appeared to be intoxicated. The witness provided his name and was still at the scene when the officer arrived.

¶4 At the scene, the officer observed Berger's vehicle "parked in the left lane kind of at an angle," with Berger seated in the driver's seat with the driver's door open and the vehicle running. Berger exited the vehicle and the officer engaged him in conversation. The officer observed Berger's eyes to be

“bloodshot and watery” and his speech to be “slowed and s[l]urred.”² Berger “had a hard time standing” and was “swaying back and forth and actually nearly falling into his car.” Standing between the door and the frame of the car, Berger needed to use the car to help him stand up on “several occasions.”

¶5 Berger told the officer he had been driving from the “Packer’s Pub” and that “he didn’t know what happened as far as the accident and he said he didn’t hit anything.” The officer smelled the odor of alcohol coming from Berger’s breath and asked Berger if he had been drinking. Berger responded that he had had two “pints” of beer. The officer twice asked Berger to perform field sobriety tests and, without explanation, Berger responded each time that he would rather not. The officer arrested Berger for OWI.

¶6 On cross-examination by Berger’s counsel, the officer testified that a second officer went to the Packer’s Pub and learned that Berger had left his wallet and identification in the bar. The second officer also had spoken with a bartender who indicated that Berger had not appeared to her to be intoxicated. According to the unobjected-to testimony of the officer, the second officer informed him of the bartender’s statement that Berger did not appear to be intoxicated. The testimony does not identify whether the second officer received the information from the Packer’s Pub before or after Berger was arrested or a blood sample was procured from him.

² While the transcript identifies the officer as testifying that Berger’s speech was slow and “spurred,” it also identifies the circuit court as recounting the officer’s testimony and stating that the officer testified that Berger’s speech was “slurred.” Whether the officer said “spurred” or “slurred” ultimately does not affect our conclusion in this case.

DISCUSSION

¶7 Probable cause to arrest for OWI “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. Probable cause is a question “based on probabilities; and, as a result, the facts faced by the officer ‘need only be sufficient to lead a reasonable officer to believe that guilt is more than a possibility.’” *County of Dane v. Sharpee*, 154 Wis. 2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990) (citation omitted). Probable cause “must be assessed on a case-by-case basis, looking at the totality of the circumstances.” *Lange*, 317 Wis. 2d 383, ¶20. When the facts are undisputed, whether probable cause exists in a given case is a question of law we review de novo. *Id.* “In determining whether there is probable cause, the court applies an objective standard, considering the information available to the officer and the officer’s training and experience.” *Id.*

¶8 At the time he arrested Berger, the officer in this case was aware (1) Berger had been operating the vehicle and involved in an incident which appeared to have caused a flat tire, oil to spill “all over the roadway,” and the vehicle to be “parked in the left lane kind of at an angle”; (2) that the witness, who had reported the incident to police, remained on the scene, and provided his name, also reported that he believed Berger to be intoxicated; (3) it was approximately 11:30 p.m. and Berger smelled of alcohol, his eyes were “bloodshot and watery,” his speech was “slowed and s[l]urred,” he “had a hard time standing” and needed to use the car to help him stand, and he was swaying back and forth and “actually nearly falling into his car”; (4) Berger stated he had driven from the “Packer’s Pub” where he acknowledged consuming two “pints” of beer; and (5) Berger

refused to perform field sobriety tests requested by the officer.³ Based on the foregoing, the circuit court here correctly concluded that the officer had probable cause to arrest Berger for OWI.

¶9 Berger contends “the record is silent as to [the officer’s] training and experience in detecting impaired drivers.” He asserts that “[i]t was unclear whether [the officer] was experienced or even trained in detecting impaired drivers” and “[w]hile he was employed for eleven years, it is uncertain if his eleven years were in the field or at a desk or if he had investigated multiple OWI incidents, or if this was his first OWI arrest.”

¶10 We must consider the totality of the circumstances, and, as Berger himself acknowledges, an officer’s training and experience is only one factor in that consideration. *See State v. Young*, 212 Wis. 2d 417, 429, 569 N.W.2d 84 (Ct. App. 1997). Further, the officer not only testified to his eleven years of experience with the Oshkosh police department, but also provided testimony suggesting his familiarity with OWI arrest procedures.⁴ While the officer did not provide significant testimony detailing the extent of his training and experience related to OWI arrests, a reasonable officer aware of the information this officer had at the time of arrest would have concluded that it was “more than a

³ *See State v. Babbitt*, 188 Wis. 2d 349, 363, 525 N.W.2d 102 (Ct. App. 1994) (holding that “a defendant’s refusal to submit to a field sobriety test may be used as evidence of probable cause”).

⁴ In response to cross-examination by Berger’s counsel, the officer affirmed that he did not ask Berger to perform a preliminary breath test (PBT) prior to “placing him in handcuffs.” Berger’s counsel then asked the officer whether he would “ever” have had Berger perform a PBT “immediately.” The officer responded, “If he would have performed the field sobriety tests, [the PBT] is essentially the final step of the field sobriety tests and I would have requested it.” When Berger’s counsel further asked the officer, “Would you have ever had him perform the [PBT] before the field sobriety tests?” the officer responded, “No.”

possibility” that Berger was intoxicated and had operated his vehicle in that condition.

¶11 Berger also points out that the officer testified that a second officer spoke with a bartender at the Packer’s Pub and that the bartender indicated that Berger did not appear to her to be intoxicated. This testimony, to which the City did not object, is of limited value because it does not provide any more details regarding the bartender’s observations than the witness at the scene who had indicated his belief that Berger was intoxicated. Significantly, the testimony also does not identify when the bartender made her observations regarding Berger’s condition or when the second officer learned of this information from the bartender—before or after arrest (or the blood draw for that matter). Also noteworthy, if information from the second officer’s visit to the pub in fact had been learned prior to arrest, the information cuts both ways on the probable cause question in that the second officer also learned from the visit that Berger had left his wallet and identification there—not something sober individuals typically do.

CONCLUSION

¶12 Based upon all of the foregoing, we conclude that the circuit court did not err in its conclusion that the officer had probable cause to arrest Berger.

By the Court.—Judgments affirmed.

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

