

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 11, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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. 2014AP1991

**Cir. Ct. Nos. 2013TR2492
2013TR2493**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

CITY OF SHEBOYGAN,

PLAINTIFF-RESPONDENT,

V.

NATHAN J. BECKER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sheboygan County: TERENCE T. BOURKE, Judge. *Affirmed.*

¶1 GUNDRUM, J.¹ Nathan Becker appeals his judgment of conviction for operating a motor vehicle while intoxicated (OWI) following the circuit court's

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.

denial of his motion to suppress evidence. Specifically, Becker contends the officer who arrested him lacked the requisite probable cause to administer the preliminary breath test (PBT) to him. We disagree and affirm.

Background

¶2 The City of Sheboygan police officers who were involved with Becker's arrest were the only witnesses to testify at the suppression hearing. Their relevant, undisputed testimony is as follows.

¶3 Around 11:30 p.m. on July 4, 2013, Sergeant Kurt Zempel received a report through dispatch of a driver being followed by a citizen who had observed the driver "driving erratically," including swerving between lanes. Zempel was advised that the citizen had identified himself or herself to dispatch, was willing to speak with police and give a statement if necessary, and provided the make, model, color, and license plate number for the suspect vehicle. Zempel located the identified vehicle and positioned his unmarked squad car behind it. After several blocks, Zempel observed the vehicle "swerve[] from the outside lane to the inside lane and ma[k]e an abrupt motion to the left where both of the left side tires crossed the [lane] divider and then ma[k]e another abrupt motion and correct[] back into the outside lane of traffic." The vehicle stopped for a red light at an intersection, and Zempel observed that while stopped, "the operator kept his foot on the brake and pressed the accelerator so that the engine revved." When the light turned green, Zempel performed a traffic stop on the vehicle.

¶4 Zempel approached the driver, Becker, and Zempel testified that Becker told him it "was the 4th of July, and he was just trying to have a fun night." Zempel observed that Becker "had glassy eyes and slurred speech. He had some difficulty articulating his consonants. And when I asked for his license, then he

had some difficulty getting it out of his wallet. Took him several tries to slide it out of the slot in his wallet.” When Zempel asked Becker how much he had had to drink, Becker responded that he probably had three or four beers. Zempel asked Becker to step out of the vehicle, but another officer, Officer Mike McCarthy, took over the investigation.

¶5 McCarthy testified that he took over the OWI investigation from Zempel and had Becker perform field sobriety tests. McCarthy stated that he had been trained in conducting field sobriety tests and had performed them “many” times. While McCarthy was explaining to Becker that he was going to have Becker perform field sobriety tests, he observed a “strong odor” of intoxicants coming from Becker. In response to McCarthy’s inquiry regarding how much Becker had had to drink, Becker responded, “Two.” McCarthy had Becker perform the Horizontal Gaze Nystagmus (HGN), walk-and-turn, and one-legged stand tests.

¶6 Regarding the HGN test, McCarthy explained that one of the effects of alcohol is that it “enhances” the “jerkiness” in the eyes. He detailed the manner in which he had Becker perform the test and stated that he observed “all six clues” indicating Becker was impaired—“Lack of smooth pursuit in both eyes, distinct jerkiness at maximum deviation in both eyes, and jerkiness onset before 45 degrees in both eyes.” McCarthy next explained and demonstrated the walk-and-turn test for Becker. McCarthy observed three out of eight possible clues of impairment on this test, with the first being that Becker “stopped walking during the first nine steps.... I believe it was his fifth step in. When he was walking he raised his left foot off the ground, and he paused with it in the air [for around two seconds] to catch his balance.” McCarthy also explained that Becker was supposed to take nine steps before turning around, but instead took ten, and that

Becker also conducted “an improper turn” during the test, i.e., a turn which was contrary to the explanation and demonstration McCarthy had provided. McCarthy then had Becker perform the one-legged stand test, during which McCarthy observed no clues of intoxication. McCarthy next administered the PBT to Becker.

¶7 Following the PBT, McCarthy arrested Becker for OWI. Becker moved to suppress the evidence. At the evidentiary hearing Becker argued, in relevant part, that probable cause to request the PBT did not exist because McCarthy had not properly administered the field sobriety tests. The circuit court denied Becker’s motion, concluding that the officers had probable cause to believe Becker operated his vehicle while under the influence of an intoxicant. Becker appeals.

Discussion

¶8 During an OWI investigation, a law enforcement officer lawfully requests the subject to perform a PBT where the officer has “probable cause to believe” the person has been operating a motor vehicle while under the influence of an intoxicant. *See* WIS. STAT. § 343.303. “[P]robable cause to believe’ refers to a quantum of proof greater than the reasonable suspicion necessary to justify an investigative stop ... but less than the level of proof required to establish probable cause for arrest.” *County of Jefferson v. Renz*, 231 Wis.2d 293, 316, 603 N.W.2d 541 (1999). “[A] PBT may be requested when an officer has a basis to justify an investigative stop but has not established probable cause to justify an arrest.” *State v. Fischer*, 2010 WI 6, ¶5, 322 Wis. 2d 265, 778 N.W.2d 629.

¶9 On appeal, we uphold a circuit court’s factual findings unless they are clearly erroneous. *State v. Kutz*, 2003 WI App 205, ¶13, 267 Wis. 2d 531, 671

N.W.2d 660. If the facts are not in dispute, or when we uphold the circuit court's findings of fact, all that remains is the question of whether the facts fulfill the probable cause standard. *Id.* This court reviews that question de novo. *Id.*

¶10 We determine whether probable cause for a PBT existed by considering the totality of the circumstances. *State v. Goss*, 2011 WI 104, ¶25, 338 Wis. 2d 72, 806 N.W.2d 918. In considering whether probable cause exists, we apply “an objective standard” and are “not bound by the officer’s subjective assessment or motivation.” *Kutz*, 267 Wis. 2d 531, ¶12. Further, when an officer “is confronted with two reasonable competing inferences, one justifying arrest and the other not, the officer is entitled to rely on the reasonable inference justifying arrest.” *Id.*

¶11 Here, the undisputed facts support the circuit court’s determination that at the time the arresting officer administered the PBT to Becker, he had probable cause to believe Becker had been operating while under the influence of an intoxicant. At that time, the officers involved with the arrest were aware that (1) a citizen witness had called police with concern about Becker’s “erratic” driving² at 11:30 p.m. on July 4; (2) Zempel located the vehicle identified by the caller and within several blocks personally observed Becker swerve between driving lanes and, while stopped at an intersection, “ke[ep] his foot on the brake and press[] the accelerator so that the engine revved”; (3) Zempel observed Becker to have “glassy eyes,” “slurred speech,” and difficulty pulling his driver’s license from his wallet; (4) Becker told Zempel he had consumed three or four beers;

² Becker does not challenge the validity of the citizen witness’s report that he was driving erratically.

(5) McCarthy observed a “strong odor” of intoxicants coming from Becker; (6) Becker told McCarthy he had “two” drinks; and (7) McCarthy observed six out of six clues of impairment on the HGN test and three out of eight clues on the walk-and-turn test.

¶12 The circuit court made no error in denying Becker’s motion to suppress. To begin, we note that Becker does not argue that Zempel lacked reasonable suspicion to perform the traffic stop on Becker and temporarily detain him for the OWI investigation. Nor would Becker have succeeded with such a challenge; the observations of erratic driving at 11:30 p.m. on July 4, as reported by the citizen witness and directly observed by Zempel, provided that reasonable suspicion. Poor driving at this time of night “does lend some further credence” to an officer’s suspicion of intoxicated driving. *See State v. Post*, 2007 WI 60, ¶36, 301 Wis. 2d 1, 733 N.W.2d 634. And it is common knowledge that Americans often include alcoholic beverages in their celebration of this patriotic holiday.

¶13 From there the evidence of impairment continued to build. Zempel observed Becker to have “glassy eyes,” “slurred speech,” and difficulty extracting his driver’s license from his wallet, and McCarthy noted a “strong odor” of intoxicants coming from Becker. Becker told Zempel he consumed three or four beers and told McCarthy he consumed two. Becker’s downgrading of the number of drinks he had consumed could be reasonably interpreted as (1) evidencing consciousness of his guilt—once he realized he was being investigated for OWI, he wanted to minimize in the eyes of the police the amount of alcohol he had consumed or (2) evidencing an inability to accurately recall the correct number of drinks he had consumed or even the number he had just provided to Zempel. McCarthy observed additional indicia of intoxication during the field sobriety

tests, during which he observed six out of six clues of impairment on the HGN test and three out of eight clues on the walk-and-turn test.

¶14 Becker argued to the circuit court, and contends on appeal, that McCarthy incorrectly administered the HGN test; however, he has presented no evidence or law demonstrating that McCarthy's training was inadequate or that his methodology was flawed. There is evidence in the record, however, which the circuit court found credible, that McCarthy was trained in administering the standard field sobriety tests, and McCarthy's undisputed testimony was that he had performed these tests many times over the years. The circuit court found that all six HGN clues of intoxication were present, and Becker has not convinced us that that finding is clearly erroneous.

¶15 Becker contends he performed the walk-and-turn test "in a manner consistent with being able to control his physical performance." McCarthy testified that he observed three out of eight indicia of intoxication on this test. The fact that Becker may have performed other aspects of the test correctly does not nullify McCarthy's observations suggesting impairment. *See Kutz*, 267 Wis. 2d 531, ¶12 (where competing inferences exist, the officer may rely on the reasonable inference that justifies arrest). Becker also complains that "Officer McCarthy very clearly refused to consider the fact that Becker performed the One Leg Stand Test satisfactorily." We apply an objective standard, however, and are "not bound by the officer's subjective assessment or motivation." *Id.* Considering the totality of the circumstances before the officers involved with this traffic stop, as we must, *see Goss*, 338 Wis. 2d 72, ¶25, at the time the PBT was administered to Becker,

there was more than ample evidence to provide a reasonable officer with probable cause to believe Becker was operating while intoxicated, justifying the PBT.³

By the Court.—Judgment affirmed.

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

³ Becker further points out that McCarthy “observed no slurred speech.” But the circuit court found that Zempel *did* observe Becker’s speech to be slurred and that finding is clearly supported by Zempel’s testimony and is fully consistent with the other uncontested testimony of Becker’s poor driving, admitted alcohol consumption, glassy eyes, strong odor of intoxication, and clues of intoxication on the field sobriety tests.

