COURT OF APPEALS
DECISION
DATED AND FILED

July 13, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP2384 **Cir. Ct. No. 2016TR1759**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

IN THE MATTER OF THE REFUSAL OF JARRED S. MARTENS:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JARRED S. MARTENS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Clark County: JON M. COUNSELL, Judge. *Affirmed*.

¶1 BLANCHARD, J.[1] This is a refusal case. Jarred Martens appeals a judgment imposing a twelve-month revocation of his operating privileges upon a determination that he unreasonably refused to submit to an evidentiary chemical test of his blood under Wisconsin's implied consent law. Martens contends that the circuit court erred in concluding that a deputy had probable cause to arrest him for operating a motor vehicle while under the influence of an intoxicant. I disagree and affirm.

¶2 The following undisputed facts are taken from the testimony at Martens' refusal hearing of two Clark County sheriff's deputies, one of whom arrested Martens, and the uncontested findings of the circuit court.

¶3 At around 11:00 p.m. one evening, the deputies responded to a complaint from a caller reporting a pickup truck operating at erratic speeds on the highway. The caller described the color of the pickup, gave a partial license plate number, and stated the location where the caller had witnessed the pickup turning off the highway. While deputies were en route to the reported location of the pickup, a second caller reported that a pickup truck with the same description had come to a stop in a field on her property. The second caller reported that she had watched the pickup from the time it pulled into the field until deputies arrived (11:18 p.m.) and that during that time no one had exited the cab of the pickup or switched places within the cab.

¶4 The two deputies arrived on the scene and observed two males in a pickup. The pickup matched the callers' descriptions and was still running. When

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

the deputies approached the pickup, a person subsequently identified as Martens appeared to be sitting in the driver's seat, but he was asleep or unconscious and slumped over the center console. One of the deputies yelled at Martens in an attempt to rouse him. When Martens did not respond, the deputy opened the driver's side door of the pickup.

¶5 Martens seemed to become more alert. The deputy attempted to ask him questions, but Martens was initially completely unresponsive, simply staring ahead. The deputy asked Martens for his driver's license, which he was initially unable to find. Martens appeared to have difficulty comprehending the deputy's questions and his speech was slurred. One deputy detected that there was an odor of intoxicants coming from Martens and that he had bloodshot and "glossy" eyes.

¶6 One of the deputies removed Martens from the pickup and placed him under arrest.[2] The deputies asked Martens to perform either a field sobriety test or a preliminary breathalyzer test. Martens refused to participate in either test. One deputy read Martens the Wisconsin Department of Transportation's Informing the Accused form, *see* WIS. STAT. § 343.305(4), after which the deputy asked Martens if he would submit to an evidentiary chemical test of his blood. Martens replied, "No." The deputy subsequently provided Martens with a Notice of Intent to Revoke Operating Privilege.

¶7 Martens requested a refusal hearing, at which he argued that the deputies did not have probable cause to arrest him for driving under the influence.

[2] The parties disagree about the moment at which Martens was arrested, based on the uncontested facts. In Martens' favor, I assume without deciding that, as he now argues, he was arrested at the moment when a deputy removed him from the pickup.

The circuit court disagreed, concluding that under the totality of the circumstances, probable cause existed at the time of the arrest. Martens appeals.

¶8 Under Wisconsin's implied consent law, a driver may be subject to penalty if he or she unreasonably refuses to submit to an evidentiary chemical test. WIS. STAT. §§ 343.305(8)-(10). A refusal is unreasonable if: (a) the officer had probable cause to arrest the driver for driving under the influence; (b) the driver is informed of the consequences of refusing to submit to the evidentiary tests; and (c) the driver refuses an evidentiary test. Section 343.305(9)(a)5. To repeat, Martens' sole argument is that the State lacked probable cause to arrest him for driving under the influence.

¶9 The legal standard for probable cause to arrest for driving under the influence is well established, as is our standard of review:

> 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 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. The burden is on the state to show that the officer had probable cause to arrest.
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> The question of probable cause must be assessed on a case-by-case basis, looking at the totality of the circumstances. Probable cause is a "flexible, common-sense measure of the plausibility of particular conclusions about human behavior." When the facts are not disputed, whether probable cause to arrest exists in a given case is a question of law that [is subject to de novo review on appeal]. 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.

State v. Lange, 2009 WI 49, ¶¶19-20, 317 Wis. 2d 383, 766 N.W.2d 551 (quoted sources and footnotes omitted).

¶10 On appeal, Martens effectively argues that if police do not conduct a field sobriety test, as they did not do here, then the State is obligated to point to an especially extensive or strong set of indicia that the driver was driving under the influence to support probable cause. As we now explain, there is no law to support this proposition, and even if it were the law, the deputies here were presented with an especially strong set of indicia.

¶11 For the proposition that the absence of a field sobriety test sets a higher bar for probable cause, Martens relies primarily on a footnote in an opinion of our supreme court. *See* ***State v. Swanson***, 164 Wis. 2d 437, 453 n.6, 475 N.W.2d 148 (1991), *abrogated on other grounds by* ***State v. Sykes***, 2005 WI 48, 279 Wis. 2d 742, 695 N.W.2d 277. In ***Swanson*** the court observed that "[u]nexplained erratic driving, the odor of alcohol," and driving at bar time are an insufficient set of indicia to support probable cause to arrest for driving under the influence, but that it would be different if the State had the benefit of the additional evidence of a failed field sobriety test. ***Id.*** (quoted source omitted).

¶12 However, our supreme court has explicitly rejected the ***Swanson***-based argument that Martens now makes, explaining that a field sobriety test is simply one potential indication of driving under the influence among many potential indicia:

> ***Swanson*** did not announce a general rule requiring field sobriety tests in all cases as a prerequisite for establishing probable cause to arrest a driver for operating a motor vehicle while under the influence of an intoxicant.
>
> Furthermore, the ***Swanson*** court's statement pertained to the circumstances of that case. The question of probable cause must be assessed on a case-by-case basis.

Washburn Cty. v. Smith, 2008 WI 23, ¶33-34, 308 Wis. 2d 65, 746 N.W.2d 243 (footnote omitted).

¶13 Applying the case-by-case review standard here, the facts do not present a close call. The deputies had strong evidence that Martens had driven under the influence, including evidence not present in many driving under the influence cases. In addition to two separate sources reporting erratic or strange driving behavior, the deputies had direct evidence of erratic driving: late at night and for no obvious reason, Martens had driven a vehicle into a stranger's field and then stopped there, with the engine running. Then there was the odor of intoxicants, slurred speech, and bloodshot and glossy eyes. On top of all that, it was highly significant that when the deputies approached, Martens appeared to be either asleep or unconscious, was not easily roused, and even after he was roused he appeared to have trouble responding to their queries. Considered together, these facts easily established reason to believe that Martens had driven under the influence. *See*, *e.g.*, ***State v. Babbitt***, 188 Wis. 2d 349, 357, 525 N.W.2d 102 (Ct. App. 1994) (probable cause to arrest for driving under the influence established by erratic driving, odor of intoxicants, uncooperative behavior, bloodshot and glassy eyes, and walking in a "sway[ing]," "slow," and "deliberate" manner); ***State v. Kasian***, 207 Wis. 2d 611, 622, 558 N.W.2d 687 (Ct. App. 1996) (probable cause to arrest for driving under the influence established by odor of intoxicants, slurred speech, one-vehicle accident).

¶14 For these reasons, I affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

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