

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 30, 2018

Sheila T. Reiff
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. 2017AP1816

Cir. Ct. No. 2016TR25970

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

IN THE MATTER OF THE REFUSAL OF JEFFREY A. JACOBI:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JEFFREY A. JACOBI,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
DENNIS R. CIMPL, Judge. *Affirmed.*

¶1 BRENNAN, P.J.¹ Jeffrey A. Jacobi seeks reversal of the circuit court's order revoking his operating privileges for unlawfully refusing a test of his

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

blood for the presence of alcohol. He contends that the arresting police officer lacked probable cause to believe that Jacobi was under the influence of alcohol *when* he was driving his motorcycle, although he does not dispute that he was under the influence of alcohol seventeen to twenty-two minutes *after* the accident when he returned to the scene.²

¶2 The record shows conclusively that the police had direct evidence from which reasonable inferences could be drawn, and those inferences support probable cause that Jacobi was operating his motorcycle while under the influence of an intoxicant. We therefore affirm the revocation order of the circuit court.

BACKGROUND

¶3 Officer Richard Lopez testified at the refusal hearing on September 5, 2017, that he was called to the scene of a motor vehicle accident on November 6, 2016, at 1018 East Brady Street in Milwaukee. The accident occurred approximately two minutes before his arrival. Upon arrival, he observed a motorcycle tipped over in the street with a single leather boot pinned beneath it. The motorcycle was listed to Jacobi. The driver of the motorcycle was not present when Officer Lopez arrived, but the driver of the car that was struck by the motorcycle was present on the scene and was interviewed by Officer Lopez' partner.

² We note that Jacobi's brief concedes that he was under the influence of alcohol "at the time he returned to the scene" and does not dispute the assertion in the State's brief that Jacobi does not challenge that he was intoxicated when he returned to the scene. Jacobi filed no reply brief.

¶4 The driver of the car told police that the man on the motorcycle had bumped into the back of her car and then tipped over on the motorcycle. She did not mention anything about noticing an odor of alcohol, staggering, or other evidence of being under the influence of alcohol.³

¶5 Approximately seventeen to twenty-two minutes after the accident, Jacobi arrived on the scene, on foot. Officer Lopez was still present and observed that Jacobi was wearing one black leather boot only, and it matched the boot on the scene under the tipped motorcycle. Jacobi's other foot was unshod. Officer Lopez testified that Jacobi lacked balance while standing and his eyes were red, glassy, and bloodshot. He detected an odor of alcohol on Jacobi's breath and his speech was slurred. He asked Jacobi if he had been drinking at all that evening and Jacobi said he had not. Officer Lopez asked Jacobi to perform three standardized field sobriety tests and Jacobi did one only, and then refused the rest. Officer Lopez testified that Jacobi failed that one test, the horizontal gaze nystagmus test, (HGN). He then arrested Jacobi for operating under the influence and conveyed him to St. Mary's Hospital for a blood test; Jacobi subsequently refused the blood test and a search warrant was obtained for his blood draw.⁴

³ The facts stated in this paragraph are taken from Jacobi's brief, and the citation provided was to the refusal hearing transcript in the record. However, the facts do not appear anywhere in the refusal hearing transcript. We infer that they came from Officer Lopez' partner's police report but cannot be sure because Jacobi failed to make this report a part of the appellate record. Nonetheless, we include the facts here because the State's brief explicitly agreed with Jacobi's fact statement, saying, "[t]he State agrees with the Statement of the Case set forth in Mr. Jacobi's filing and will not repeat those facts here, but will address the facts in [the] argument." We caution Jacobi's counsel for his apparent carelessness in compiling the record and then falsely claiming the report was in the record.

⁴ Jacobi raises no issue on appeal other than probable cause for the arrest. Accordingly we present no facts relating to the Informing the Accused report or the search warrant.

¶6 Jacobi did not testify at the refusal hearing. Officer Lopez was the only witness. The circuit court made the following factual findings at the conclusion of the hearing, unchallenged on appeal:

- Police arrived on the scene two minutes after the accident and saw the tipped-over motorcycle which was registered to Jacobi.
- Police observed one black leather boot under the motorcycle.
- The driver of the car gave police no indication that the driver of the motorcycle was intoxicated.
- The motorcycle driver was Jacobi who arrived back at the scene of the accident seventeen to twenty-two minutes after the accident occurred.
- Jacobi told the police that he had not been drinking.
- When Jacobi returned to the scene, he lacked balance, had bloodshot eyes, an odor of alcohol, slurred speech, failed the HGN test, and refused the other two field sobriety tests.

¶7 The court concluded as a matter of law that the police had probable cause that Jacobi had been operating under the influence of alcohol and that the refusal to submit to the blood test was therefore improper. The court entered the order revoking operation privileges, and Jacobi now appeals.

STANDARD OF REVIEW

¶8 Whether a police officer has probable cause to arrest is a mixed question of law and fact. *State v. Post*, 2007 WI 60, ¶8, 301 Wis. 2d 1, 733 N.W.2d 634. Upon review, we uphold the circuit court's factual findings unless they are clearly erroneous, but we review the court's legal conclusions independently of the circuit court. *Id.* Jacobi did not challenge the court's factual findings here. Thus, the sole issue before us is whether, at the time of arrest, the

police had probable cause that Jacobi was under the influence of an intoxicant *when he was operating* the motorcycle.

DISCUSSION

¶9 Jacobi argues that the evidence fails to show that *at the time* of the accident he was probably under the influence of an intoxicant. The standard of review of the sufficiency of probable cause to arrest is well established in Wisconsin case law. It is based on plausibility, common sense, and the totality of the circumstances when viewed objectively. As the Wisconsin Supreme Court stated in *State v. Lange*, 2009 WI 49, ¶20, 317 Wis. 2d 383, 766 N.W.2d 551:

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.... 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. (footnotes, citation, and quotation marks omitted). *See also State v. Kutz*, 2003 WI App 205, ¶12, 267 Wis. 2d 531, 671 N.W.2d 660. The U.S. Supreme Court described the process of probable cause determination as a process that “does not deal with hard certainties, but with probabilities.” *Texas v. Brown*, 460 U.S. 730, 742 (1983). *See also State v. Tompkins*, 144 Wis. 2d 116, 124, 423 N.W.2d 823 (1988) (citation omitted).

¶10 It is likewise well established in Wisconsin law that where there are competing inferences, an officer may draw a reasonable inference that favors probable cause even when there is also a reasonable inference that favors innocence. *State v. Nieves*, 2007 WI App 189, ¶14, 304 Wis. 2d 182, 738 N.W.2d 125.

¶11 Jacobi argues that because he was not at the scene of the accident when police arrived and because the other driver did not comment on whether he was intoxicated, probable cause was lacking. Jacobi is wrong for two reasons. First, the evidence that does exist is sufficient to support probable cause. And second, the law does not require a reasonable police officer to draw an inference favoring innocence from absent evidence when there are one or more reasonable inferences supporting probable cause. *See id.*

¶12 The undisputed facts in the record are:

- When the police arrived two minutes after the accident, they saw a motorcycle, registered to Jacobi, tipped over and abandoned in the street with one black leather boot trapped underneath it.
- The motorcycle had rear-ended another car which remained at the scene.
- Within seventeen to twenty-two minutes after the accident, Jacobi returned to the scene wearing one black leather boot which matched the boot trapped under the motorcycle, and with his other foot unshod.
- Jacobi was intoxicated upon his return to the scene.
- Jacobi's eyes were bloodshot, his speech slurred, he had an odor of alcohol, he was unable to stay standing, he failed the HGN test, refused the two other field sobriety tests, and refused the request for blood draw.
- Jacobi denied any drinking that evening despite his undisputed intoxication.

¶13 These facts create probable cause for arrest for operating under the influence of an intoxicant. A reasonable person in the police officer's position could infer from these facts and reasonable inferences that the motorcycle driver was impaired. For example, the motorcycle rear-ended the car, the motorcycle

was abandoned by its owner despite the fact it was easily traceable to him by registration, and the driver fled with only one boot on in November. Additionally, the driver, Jacobi, came back to the scene intoxicated seventeen to twenty-two minutes later—a very short period of time within which to become intoxicated. His eyes, odor, speech, balance, the HGN field test, and the denial of drinking, all demonstrated intoxication to the officer. As noted by our court in *Lange*, 317 Wis. 2d 383, the officer in the position of making the probable cause determination may rely on common sense but also his training and experience. *Id.*, ¶20. Looking at all of the facts available to the officer, it was reasonable for him to conclude that Jacobi was under the influence of an intoxicant when driving.

¶14 Jacobi’s argument also fails because it is built on his premise that the *absence of evidence* from the other driver of any observations of Jacobi’s intoxication defeats probable cause. Jacobi’s analysis is incorrect. Rather, we view the evidence that *does exist* and determine whether it reasonably supports probable cause. It is true that there are competing inferences that could be drawn here. But although one could infer from the other driver’s absence of comment on intoxication that she did not believe Jacobi to be under the influence, other inferences are also possible. Perhaps she was not asked. It is possible that Jacobi had no contact with her—that he crashed into the rear of her car and fled the scene before she even got out of her car. Importantly, the existence of other possible inferences from her silence, favoring innocence, does not defeat probable cause here. The test is whether it was objectively reasonable for Officer Lopez to believe that Jacobi was under the influence at the time of the accident. *See Nieves*, 304 Wis. 2d 182, ¶14. As discussed above, it was.

¶15 Accordingly, for all of the foregoing reasons, the order of the circuit court is affirmed.

By the Court.—Order affirmed.

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

