

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Appeal No. 2018-AP-920

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

TIMOTHY EDWARD CURTIS,
Defendant-Appellant

BRIEF FOR PLAINTIFF-RESPONDENT, STATE OF WISCONSIN

This above-captioned matter is an appeal from a ruling by the Hon. Kelly J. Thimm, Circuit Court Judge, Douglas County, on February 21, 2018, deny the Defendant's motion to suppress evidence.

Respectfully submitted,

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Statement of the Issue

Did Officer Esler have probable cause to arrest Mr. Curtis for operating while intoxicated?

Statement on Publication

Respondent believes this appeal does not qualify for publication. The issue involves no more than the application of well-settled rules of law.

Statement on Oral Argument

Respondent believes this appeal is not appropriate for oral argument, unless the Court concludes that the briefs have not fully presented the issue. The Court's ruling is not contrary to relevant legal authorities that appear sound and are not significantly challenged, and the Court's decision is supported by authority.

Statement of the Case

Respondent concurs with Appellant's Statement of the Case.

Statement of Facts

Officer Esler, an professional with more than 20 years of experience as a law enforcement officer (p. 38) , arrived at the 1200 block of Hammond Avenue (p. 37) regarding a call that came in as a hit-and-run crash (p. 7). Sgt. Poskozim was already at the scene and advised Officer Esler that he was "with a vehicle that was probably involved" in the crash. (p. 7). Officer Esler proceeded to talk to two witnesses. The first witness saw the gray truck strike a parked vehicle, then a tree, and then end up in the snowbank (p. 9). The second witness Officer Esler spoke to advised that he heard a crashing noise and looked out, fearing that his own vehicle had been struck, and saw the truck in the snowbank with the driver getting out of the truck (p. 9). Officer Esler then spoke with Timothy Curtis (p.11). Officer Esler noted that Timothy Curtis's eyes were red, his speech was slurred and he smelled of intoxicating beverage (p.11). Based on Officer Esler's training and experience, Timothy Curtis was exhibiting signs that suggested intoxication. (p. 12). Officer Esler also noticed Timothy Curtis had blood on his person (p. 29). Timothy Curtis denied being the driver of the truck when Officer Esler spoke with him. Officer Esler had already

obtained statements from two witnesses who said Timothy Curtis was driving (p. 39). Based off Timothy Curtis' lying about the simple fact of who was driving, Officer Esler felt Timothy Curtis was uncooperative (p. 32-33) and did not attempt to request that Curtis perform Standardized Field Sobriety Tests (SFST) (p. 39). Officer Esler also testified that Timothy Curtis refused to be treated or seen by medical personnel. (p. 30).

Argument

1. The Circuit Court properly denied Mr. Curtis's motion to suppress because Officer Esler had probable cause to arrest Mr. Curtis.

A. Standard of Review

"In reviewing an order granting or denying a motion to suppress evidence, this court will uphold a circuit court's findings of fact unless they are clearly erroneous." *State v. Secrist*, 224 Wis.2d 201, 207, 589 N.W.2d 387 (1999). Whether those facts constitute probable cause is a question of law that this Court reviews *de novo*. *Id.* at 208.

A warrantless arrest is unconstitutional unless the arresting officer has probable cause to suspect that a crime has been committed. *State v. Young*, 2006 WI 1 ¶ 98, 294 Wis.2d 1, 717 N.W.2d 729. "Probable cause requires that an arresting officer have sufficient knowledge at the time of arrest to 'lead a reasonable police officer to believe that the defendant probably committed or was committing a crime.'" *Id.* (quoting *Secrist*, 224 Wis.2d at 212).

A mere hunch by the officer is not enough to establish reasonable suspicion, and therefore not enough to establish probable cause. *Young* at ¶ 22. "Inevitably, the lines between hunch, reasonable suspicion, and probable cause are fuzzy, with each case requiring an examination of the facts." *Id.* (footnote omitted). Nevertheless, probable cause is a less exacting standard of proof than establishing guilt "beyond a reasonable doubt or even that guilt is more likely than not." *Id.* (quoting *Secrist* at 212). "Whether probable cause exists in a particular case must be judged by the facts of that case." *Secrist* at 212.

B. Applicable Law

An officer may arrest a person on probable cause. *See* Wis. Stat. § 968.07(1)(d). “Probable cause is a commonsense determination.” *State v. Griffin*, 220 Wis.2d 371, 386, 584 N.W.2d 127 (Ct. App. 1998); *State v. Mitchell*, 167 Wis.2d 672, 681-682, 482 N.W.2d 364 (1999). “It is judged by the factual and practical considerations of everyday life.” *Griffin* at 386. Probable cause to arrest refers to the evidence which would lead a reasonable officer to believe that the defendant probably committed a crime. *State v. Paszek*, 50 Wis.2d 619, 624-625, 184 N.W.2d 836 (1971). In determining probable cause, the courts will look at the totality of the facts and circumstances the officer obtained at the time of arrest to determine whether probable cause exists that the defendant committed a crime. *County of Dane v. Sharpee*, 154 Wis.2d 515, 518, 453 N.W.2d 408 (Ct. App. 1990). The quantum of evidence necessary for probable cause shall be measured by the facts of each particular case, it is a case-specific standard. *State v. Blatterman*, 2015 WI 46, ¶35, 362 Wis.2d 138, 165 864 N.W.2d 26.

Factors have been laid out by the courts that officers can use to help determine whether probable cause exists. In *State v. Willie*, the Court used the odor of intoxicants as a factor in determining probable cause for arrest. 185 Wis.2d 673, 683, 518 N.W.2d 325 (Ct. App. 1994). In *State v. Dunn* the Court used the defendant’s slurred speech in helping to determine probable cause. 158 Wis.2d 138, 144, 146, 462, N.W.2d 538 (Ct. App. 1990). Also in *Dunn*, when the defendant, after an officer detected a very strong odor of intoxicants after opening a car door and after the officer told the defendant that she could detect the odor of intoxicants, and the defendant replied “no”, the Court used the defendant’s irrational denial of the odor of intoxicant’s as a factor in determining that probable cause to arrest the defendant for operating while intoxicated was present. *Id.* at 144. Courts have held that the officer can also use the manner in which the suspect was driving as a factor in considering the totality of the circumstances for probable cause to arrest on an operating while intoxicated. *State v. Lange*, 2009 WI 49, ¶24, 317 Wis.2d 383, 766 N.W.2d 551; *Willie* at 684.

The defendant's driving is a factor a court considers in determining probable cause. Courts have considered one-vehicle accidents as a factor. In *State v. Pfaff* the fact that vehicle driven by a defendant hit a car that was stopped approximately four feet off the road in the distress lane was a factor considered. 2004 WI App 31, ¶¶ 3-5, 20, 269 Wis.2d 786, 792-93, 98-99, 676 N.W.2d 562.

While officers are to look at the indicators of intoxication presented to them, they are not required to stop seeking probable cause because some common indicators are not present. In *Lange*, defense argued that there was no probable cause because

"..many common indicators of intoxication do not exist...The defendant did not admit to alcohol consumption. There were no odors of intoxicants, no slurred speech or difficulty balancing, no known visits to a bar, no inconsistent stories or explanations, no intoxicated traveling companions, no empty cans or bottles, and no suggestive field sobriety test."

Lange at 393.

The Court in *Lange* nevertheless held, "(w)e conclude that the totality of circumstances within [the officer's] knowledge at the time of arrest would lead a reasonable police officer to believe, as [two officers] each believed in the present case, the defendant was under the influence of an intoxicant while operating his vehicle. We reach this conclusion based on the totality of the circumstances in the present case." *Id.* at 394-395.

The Courts have addressed the necessity of conducting field sobriety tests prior to an operating while intoxicated arrest. Officers are not required, with every operating while intoxicated arrest, to have the suspect perform field sobriety test before arrest to substantiate probable cause. *State v. Wille* at 684.

C. Application of Law to Fact

Officer Brad Esler had a truck in a snowbank, eyewitness reports that said truck had hit both a tree and another car prior to its ascent into the snowbank, one of those eyewitnesses reporting that the

man later identified as Timothy Curtis had gotten out of that truck, Timothy Curtis exhibiting signs of intoxication, and Timothy Curtis having blood on his person.

Timothy Curtis eyes were red, his speech was slurred and he smelled of intoxicating beverage. While no single factor, alone, may, by itself, have provided Officer Esler with probable cause to arrest Curtis for an operating while intoxicated, the totality of the circumstances fully supports a finding of probable cause. Similar to the facts in *Dunn* and *Willie*, Mr. Curtis had slurred speech and odor of intoxicants. In addition to those indicators of alcohol use, the defendant also smelled of intoxicating beverages and his eyes were red. When Mr. Curtis was asked by Officer Esler if he had been driving, the defendant stated he had not. This was after Officer Esler had communication with two witnesses who stated Mr. Curtis was the driver and that one of them saw him hit a car, tree and land in the snow bank. Just as in *Dunn*, the defendant's irrational denial of what occurred and whether Mr. Curtis was the driver or not is a factor the officer can use to substantiate probable cause. Mr. Curtis had blood on his person, and refused to be seen by medical personnel. Clearly, Mr. Curtis did not want additional witnesses, medical personnel, discovering that indeed he had been operating while intoxicated.

Timothy Curtis' truck was also atop a snowbank and eyewitness reports suggested a tree and parked car were its first targets. As in *Pfaff*, the defendant's driving is a factor's the court can consider in determining probable cause. The defendant was driving in a manner that not only hit one stationary object, another vehicle, but also a second stationary object, a tree, and still proceeded to land in a nearby snow bank. This is the type of driving and loss of control that is consistent with an individual that is operating while impaired because of intoxicants. Mr. Curtis did not have enough control of his vehicle because of the level of intoxicants in his system.

Timothy Curtis does not get to choose how he is investigated. Law enforcement personnel, like Officer Esler, have broad discretion in choosing what investigative techniques fit the circumstances at hand. Just as in *Willie*, an officer is not required to have a suspect perform Standardized Field Sobriety Tests (SFST) in every operating while intoxicating case. Officer Esler did not have a lying and

uncooperative Mr. Curtis perform field sobriety tests. He did not feel it was worth the time to attempt the complicated exercise with someone who had refused simpler requests. Officer Esler gathered evidence, spoke with the intoxicated suspect, reviewed the ample visual evidence (truck, snowbank), and made a reasoned determination that there was sufficient probable cause for an arrest for operating while under the influence.

Conclusion

For the foregoing reasons, this Court should affirm the holding of the trial court and deny the motion to suppress, because there was probable cause to arrest Mr. Curtis.

By: /s/
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State Bar No. 1027438

Certification

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c), Stats., for a brief produced with Monospaced Font. The length of this brief is 9 pages long.

By: /s/
Jennifer Bork
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Certification

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 23 day of August, 2018.

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