



State v. Nicholas Allen Paulson

2024 | Cited 0 times | Court of Appeals of Wisconsin | February 21, 2024

COURT OF APPEALS DECISION DATED AND FILED

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Appeal No. 2022AP186 Cir. Ct. No. 2018TR8068

STATE OF WISCONSIN IN COURT OF APPEALS DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NICHOLAS ALLEN PAULSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dunn County: CHRISTINA M. MAYER, Judge. Affirmed.

¶1 GILL, J. 1 Nicholas Paulson appeals an order that imposed penalties after a jury found him guilty of operating a motor vehicle while intoxicated (OWI), as a first offense. Paulson argues that the circuit court should have granted

1 This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2021-22). All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted. his motion to suppress evidence because he was arrested without probable cause. We conclude the court properly determined that law enforcement had probable cause to arrest Paulson. Accordingly, we affirm.

BACKGROUND



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¶2 At the suppression hearing, State Trooper Brett Boley testified that in the early morning hours of November 23, 2018, he was dispatched to a scene following a report that a passenger had jumped out of a moving vehicle and sustained injuries. Upon his arrival, Boley made contact with Paulson, who stated that he had called 911 after his wife jumped out of their vehicle while it was moving. Boley testified that upon making contact with Paulson, he observed that Boley also

w Paulson. He further noted

¶3 Boley testified that after making his initial contact with Paulson, he saw a thirty-six pack of the front seats, at least twelve cans missing. Boley then asked

Paulson whether he had been drinking alcohol. Paulson responded that he was confused about how much alcohol he had consumed, but he subsequently

admitted to consuming

¶4 Boley then asked Paulson to perform field sobriety tests. Before conducting the tests, Boley asked whether Paulson had any physical defects or injuries, and Paulson responded that he ¶5 Boley first had Paulson perform the horizontal gaze nystagmus (HGN) test, and he observed six out of six possible clues of impairment. Boley then conducted the vertical gaze nystagmus test. Boley next conducted the walk-and-turn (WAT) test, and he testified that Paulson displayed four out of eight clues of impairment. Boley then asked Paulson to perform the one-leg-stand (OLS) test and noted no clues of impairment.

¶6 Next, Boley asked Paulson to recite the alphabet from the letter E to the letter P. Paulson started back over at Boley then asked Paulson to count backwards from sixty-four to forty-nine. According to Boley, Paulson skipped over a number, said the number fifty-seven twice, and continued counting until the number forty-seven.

¶7 Boley testified that during the course of his duties as a law enforcement officer, he has observed people who were under the influence of intoxicants many times. Based on his training and experience, [he] observed from the moment [he] first arrived on scene until the moment [he]

took [Paulson] into custody Boley formed the opinion that Paulson was impaired by intoxicants. Boley further testified that he administered a preliminary breath test (PBT), the result of which was .198. Thereafter, Boley placed Paulson under arrest.

¶8 At the end of circuit court. On

cross-examination, Boley conceded that his administration of the HGN test did not comply with the National Highway Traffic Safety Administration (NHTSA) Manual in certain respects. For instance,



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Boley admitted that during the HGN test, ined at a distance of 12 to 15 inches from When defense counsel asserted that the video showed that the have been 12 to 15 inches but when you move it

moving it from one side to the next side, going from here to here is going to incre face.

¶9 Boley also acknowledged that when checking for a lack of smooth pursuit during the HGN test, the stimulus should be moved at a certain rate , for a total of four

seconds. Boley conceded that when administering that portion of the HGN test to Paulson, he moved the stimulus approximately twice as quickly as he should have.

¶10 suppression motion. The court found that Boley noticed an odor of intoxicants coming from Paulson, that Paulson admitted to drinking, and that Boley observed eyes were bloodshot and glassy. Based on its review of the dashboard camera

video, the court further nistering the HGN test. The court reasoned,

however, that field sobriety tests are observational tools to assist officers in determining whether there is probable cause to arrest. Thus, while to administer the HGN test in complete compliance with the NHTSA Manual

that support a determination that there was probable cause to arrest Paulson for OWI. ¶11 The circuit court next found, based on its review of the video, that during the WAT test. e

observations while [Paulson] was doing the [OLS test] as far as it appeared to be some balance that would be concerning er ing backwards.

¶12 Based on all of these factors, the circuit court concluded that Boley had probable cause to request a PBT and to arrest Paulson for OWI. The court The case subsequently proceeded to trial, and a jury found Paulson guilty of OWI. Paulson now appeals, arguing that the court erred by denying his suppression motion. 2

DISCUSSION

¶13 evidence, we apply a two-step standard of review. State v. Anderson, 2019 WI

97, ¶19, 389 Wis. findings of fact unless they are clearly erroneous that is, unless they are against

the great weight and clear preponderance of the evidence. Id., ¶20. Second, we independently review the application of constitutional principles to those facts. Id.



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¶14 Here, Paulson argues that the circuit court should have granted his suppression motion because Boley lacked probable cause to arrest him for OWI.

2 ed The Honorable Christina M. Mayer entered a final order imposing penalties after the jury found Paulson guilty of OWI. To be lawful, an arrest must be based on probable cause. *State v. Kutz*, 2003 WI App 205, ¶11, 267 Wis. 2d 531, 671 N.W.2d 660. Probable cause for arrest exists when the totality of the circumstances within the arrest knowledge would lead a reasonable police officer to believe that the defendant probably committed a crime. *Id.* The information must be sufficient to lead a reasonable officer's involvement in a crime is more than a possibility, but it need not reach the level of proof beyond a reasonable doubt, nor must it show that guilt is more likely than not. *Id.* Probable cause is a flexible, commonsense measure of the plausibility of particular conclusions about human behavior. *Id.*

¶15 We apply an objective standard in determining whether probable cause exists, and, accordingly, subjective assessments or motivations. *Id.*, ¶12. We must consider the

information available to the officer from the standpoint of one versed in law enforcement training and experience into account. *Id.* When a police 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.*

¶16 In this case, the circuit court correctly concluded, based on the evidence introduced at the suppression hearing, that Boley had probable cause to arrest Paulson for OWI. The court credited Boley's testimony that Boley was bloodshot and glassy and that Boley noticed an odor of intoxicants coming

from Paulson. In addition, Paulson admitted to drinking six to twelve beers, and Boley noticed a thirty-six pack of beer with approximately twelve cans missing. Boley also testified that upon his initial contact with Paulson, Boley administered sobriety tests further supporting a determination that Boley had probable cause to arrest him. Boley testified that he observed six out of six clues on the HGN test and four out of eight clues on the WAT test. He also testified that Paulson made mistakes during both the alphabet test and the counting backwards test. In addition, Boley administered a PBT, which registered a .198 significantly over the legal limit of .08. 3 The video also

3 In his reply brief on appeal, Paulson asserts that we should not consider the PBT result an opinion that [Paulson] was preliminary breath [test] was or was not administered in the instant case, [Paulson] would have

been arrested. Thus, the question is whether probable cause to arrest Paulson exists. Paulson cites no legal authority in support of his claim that the relevant question is whether probable cause to arrest existed before the PBT was administered. See *State v. Pettit*, 171 Wis. 2d 627, merit. As noted above, probable cause is an objective test, and we are not bound by the arresting



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s or motivations. *State v. Kutz*, 2003 WI App 205, ¶12, 267 Wis. 2d 531, 671 N.W.2d 660. Consequently, whether Boley had made a subjective decision to arrest Paulson before administering the PBT is immaterial. The operative question is whether at the time of the arrest would lead a reasonable police officer to believe that the defendant was operating a motor vehicle while under the State v. Nordness, 128 Wis. 2d 15, 35, 381 N.W.2d 300 (1986) (emphasis added). arrest included the PBT result.

Notably, Paulson does not develop any argument on appeal that Boley lacked probable cause to request a PBT. See *County of Jefferson v. Renz*, 231 Wis. 2d 293, 316, 603 N.W.2d proof greater than the reasonable suspicion necessary to justify an investigative stop but less

that Paulson submit to a PBT but instead gave the impression that Paulson was required to do so.

Paulson does not renew this argument on appeal, however, and we therefore deem it abandoned. See *A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998). shows that after the PBT was administered, but prior to his arrest, Paulson admitted that he was legal limit.

¶18 Based upon the evidence discussed above, we conclude that the totality of the circumstances within knowledge at the time of arrest would have led a reasonable police officer to believe that Paulson probably

committed the crime of OWI. See *id.*, ¶12; *State v. Nordness*, 128 Wis. 2d 15, 35, 381 N.W.2d 300 (1986).

¶19 the pervasive and serious Essentially, Paulson argues

that because Boley did not administer the HGN test in complete compliance with the standards set forth in the NHTSA Manual, the court could not rely on testimony regarding the clues that he observed on that test. In Wisconsin, however, there is no requirement for strict compliance with the NHTSA Manual as a prerequisite for field sobriety tests to be used in determining whether probable cause existed to arrest an individual for OWI. See generally *City of West Bend v. Wilkens*, 2005 WI App 36, 278 Wis. 2d 643, 693 N.W.2d 324.

¶20 In *Wilkens*, the defendant argued that his PBT result and all postarrest evidence should be suppressed because the arresting officer did not comply with the NHTSA Manual when administering field sobriety tests and, without the field sobriety tests, the officer lacked probable cause to request a PBT

In summary, we reject the only argument that Paulson raises on appeal as to why we should not consider the PBT result in our probable cause analysis. Regardless, we note that even absent the PBT result, we would still conclude that Boley had probable cause to arrest Paulson for OWI based on the other evidence introduced at the suppression hearing. and arrest the defendant. *Id.*, ¶¶1, 7, 12. We rejected this argument, reasoning that field sobriety tests officers commonly use to assist them in



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discerning various indicia of intoxication, the perception of whi Id., ¶1. Consequently, we held evidence, not its admissibility at a suppression hearing. Id. Thus, despite the defects in the the tests, court from s] testimony about what he observed when he administered the [field sobriety tests] whether probable cause existed. Id., ¶24. Similarly, in this case, nothing precluded the circuit court from during the HGN test when

¶21 Paulson also argues that clearly erroneous because the court relied on testimony, which was incredible for multiple reasons. A circuit court, when acting as the fact finder, is the ultimate arbiter of witness credibility. State v. Verhagen, 2013 WI App 16, ¶39 n.7, 346 Wis. 2d 196, 827 N.W.2d 891. [court] has the opportunity to observe the witnesses and their demeanor on the

State v. Anson, 2005 WI 96, ¶32, 282 Wis. 2d 629, 698 N.W.2d 776 (emphasis omitted) (citation omitted). Consequently, we must accept the unless the testimony relied upon is incredible as a matter of law. State v. Jacobs, 2012 WI App 104, ¶17, 344 Wis. 2d 142, 822 N.W.2d 885.

¶22 discrepancies between his testimony about his administration of the HGN test and

the dashboard camera video showing that test. For instance, Boley testified that When

asked whether he complied with that four- believe the approximation on the video from when I watched it was right around

this point. Be that as it may, the

suppression hearing the length of time that he held the stimulus at maximum deviation during the HGN test does not render the remainder of his testimony incredible as a matter of law.

¶23 Paulson also asserts that Boley testified that Paul was false. Based upon our review of the video, we agree with the State that

does appear to be slurred or less than clear at times As such,

¶24 Paulson next asserts that was incredible because Boley acknowledged that Paulson reported having shrapnel in his neck and back improper turn on the WAT test as a clue of impairment. We fail to see how

as a matter of law

impairments when administering field sobriety tests. Here, there is no evidence that Bole that Paulson reported. To the contrary, Boley confirmed before administering the tests that affect his balance. Moreover, while Paulson told Boley that his injuries cause him pain when turning, he did



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not mention being in pain at any point during the field sobriety tests. Under these circumstances, was incredible because he counted clue of impairment despite Paul .

¶25 Paulson also argues that there was no probable cause for his arrest because: (1) there was no testimony that Paulson misunderstood Boley or was otherwise confused; (2) there were no allegations of bad driving on Paulson (3) Boley admitted that he did not observe any swaying or lack of coordination;

Boley noted on the WAT test were not significant enough to indicate impairment;

(6) Paulson exhibited no clues on the OLS test; and (7) the dashboard camera Paulson asserts that when these factors are taken together, they undercut any conclusion that Boley had probable cause to arrest Paulson for OWI.

¶26 We disagree. The remaining factors that Paulson mentions do not outweigh the other evidence discussed above that supports a determination that Boley had probable cause to arrest Paulson for OWI namely, that Paulson smelled of admission to drinking six to twelve beers; the open pack of beer inside slurred speech; during his initial contact with Boley; during the HGN and WAT tests counting backwards tests; and the PBT result. 4 ¶27 Paulson asserts that the alphabet and counting backwards tests do standardized field sobriety tests. However, Paulson fails to cite any legal authority

in support of the proposition that a defendant's performance on nonstandardized field sobriety tests may not be considered when determining whether an officer had probable cause to arrest the defendant for OWI. See *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). To the contrary, case law the alphabet and counting backwards tests when determining whether probable cause existed for an arrest or a PBT. See, e.g., *State v. Colstad*, 2003 WI App 25, ¶25, 260 Wis. 2d 406, 659 N.W.2d 394 (alphabet test); *County of Dunn v. Newville*, No. 2018AP1167, unpublished slip op. ¶¶28, 36 (WI App Aug. 6, 2019) (counting backwards test). 5

¶28 Finally, redness in their eyes, that a person may smell of intoxicants without being intoxicated, and that it is not illegal to transport unopened alcoholic beverages in a vehicle in Wisconsin. Paulson is correct that each of these factors, standing alone, is not necessarily indicative of illegal behavior. As noted above, however, when

4 Although the PBT result supports a determination that Boley had probable cause to arrest Paulson, as noted above, we would conclude that probable cause existed even without considering the PBT result. See *supra* note 3. 5 An unpublished opinion that is authored by one judge and issued on or after July 1, 2009, may be cited for its persuasive value. WIS. STAT. RULE 809.23(3)(b). the facts give rise to two competing reasonable inferences, one justifying arrest and the other not, an officer is entitled to rely on the reasonable inference justifying arrest. *Kutz*, 267 Wis. 2d 531, ¶12. Here, taking into account all of the other circumstances discussed above, a reasonable officer could infer that the



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open pack of beer in his vehicle were evidence of intoxication.

¶29 On the whole, the totality of the circumstances within knowledge at the time would have led a reasonable police officer to believe that Paulson had probably committed a crime namely, OWI. Id., ¶11. resion motion.

By the Court. Order affirmed.

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

