

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 19, 2007

David R. Schanker
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. 2006AP3113

Cir. Ct. No. 2006TR3549

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

VILLAGE OF HORTONVILLE,

PLAINTIFF-RESPONDENT,

V.

ALAN E. LINDSAY, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: MARK J. MCGINNIS, Judge. *Affirmed.*

¶1 HOOVER, P.J.¹ Alan Lindsay, Jr. appeals a judgment of conviction entered on a jury verdict for operating while intoxicated, first offense. Lindsay

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

argues the court erred by denying his motion to suppress based on lack of probable cause. Lindsay contends that under the totality of the circumstances at the time of the arrest, a reasonable police officer would not have believed Lindsay was under the influence of an intoxicant. We disagree and affirm the judgment.

BACKGROUND

¶2 On April 5, 2006, officer Chad Cleman arrested Lindsay for operating while intoxicated. Lindsay filed motions to suppress evidence and statements, claiming Cleman did not have reasonable suspicion to stop him or probable cause to arrest him.

¶3 At the motion hearing, Cleman testified that at approximately 1:40 a.m. on April 5, 2006, he observed a vehicle strike the shoulder or the curb of the roadway. The vehicle swerved back to the center line and struck the curb again. Cleman then stopped the vehicle, which was operated by Lindsay.

¶4 Cleman stated he detected the odor of intoxicants while speaking with Lindsay. He also stated Lindsay's eyes were bloodshot. Cleman asked Lindsay if he had been drinking and Lindsay replied that he had, but that "he knew his limit and that he was not intoxicated or over his legal limit."

¶5 Cleman then asked Lindsay to perform field sobriety tests. According to Cleman, Lindsay had trouble performing the horizontal gaze nystagmus test. Cleman testified that the involuntary jerkiness of Lindsay's eyes indicated alcohol in his system. Cleman also asked Lindsay to perform a one-legged stand test. According to Cleman, Lindsay was "very unsteady" while standing on one leg. Cleman also testified Lindsay failed the walk and turn test

because he started walking backwards rather than turning around. Finally, Cleman testified that Lindsay's preliminary breath test result was .13%.

DISCUSSION

¶6 Probable cause exists where the totality of the circumstances within the officer's knowledge at the time would lead a reasonable officer to believe a violation has occurred. *State v. Nordness*, 128 Wis. 2d 15, 35, 381 N.W.2d 300 (1986). The facts need not prove guilt beyond a reasonable doubt, merely "that the information lead a reasonable officer to believe that guilt is more than a possibility." *State v. Paszek*, 50 Wis. 2d 619, 625, 184 N.W.2d 836 (1971). The trial court "simply must ascertain the plausibility of a police officer's account." *Nordness*, 128 Wis. 2d at 36. "Whether probable cause to arrest exists based on the facts of a given case is a question of law which we review independently of the trial court." *State v. Kasian*, 207 Wis. 2d 611, 621, 558 N.W.2d 687 (Ct. App. 1996).

¶7 Lindsay argues there was insufficient probable cause to arrest him.² He claims his eyes were bloodshot due to his recently leaving a smoky bar. Lindsay further claims he performed many parts of the field sobriety tests correctly and, therefore, did not fail the tests.

¶8 Lindsay's argument that he did not fail the field sobriety tests is a question of credibility, which we will not examine on appeal. The trial court, not

² Lindsay's brief violates WIS. STAT. RULE 809.19(1)(e) by failing to provide any citation to the record in his argument section. "Time is scarce, and judicial resources must 'not [be] frittered away' attempting to ascertain the true state of the record." *Mogged v. Mogged*, 2000 WI App 39, ¶22, 233 Wis. 2d 90, 607 N.W.2d 662.

the appellate court, is the ultimate arbiter of weight and credibility. WIS. STAT. § 805.17(2). Its credibility assessments will not be overturned on appeal unless they are inherently or patently incredible. *Chapman v. State*, 69 Wis. 2d 581, 583, 230 N.W.2d 824 (1975).

¶9 Looking at the totality of the circumstances, we conclude that Cleman had probable cause to arrest Lindsay. Cleman observed Lindsay strike the curb twice. In addition, Cleman detected an odor of intoxicants in Lindsay's car and observed that Lindsay had bloodshot eyes. Lindsay also performed poorly on the field sobriety tests. Finally, Lindsay admitted drinking.³ Lindsay's innocent explanation for why his eyes were bloodshot is irrelevant. Probable cause may exist notwithstanding a possible innocent explanation for the defendant's conduct. *State v. Higginbotham*, 162 Wis. 2d 978, 995, 471 N.W.2d 24 (1991).

By the Court.—Judgment affirmed.

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

³ Lindsay also argues there was insufficient probable cause to arrest him because his preliminary breath test registered .06%. However, in reviewing the record it is clear that Cleman testified Lindsay's preliminary breath test had a reading of .13%, while Lindsay claimed the test only registered .06%. This is a question of fact we will not resolve on appeal. It does not appear that the trial court made a finding of fact on this issue or based its holding that there was probable cause on the preliminary breath test results.

The preliminary breath test is not the sole determinant of probable cause to arrest. *County of Dane v. Sharpee*, 154 Wis. 2d 515, 520, 453 N.W.2d 508 (Ct. App. 1990). Its results may be outweighed by other indicia of intoxication. See *id.* In this case, there is sufficient probable cause regardless of the preliminary breath test results.

