

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 6, 2001

Cornelia G. Clark
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. 01-1182
STATE OF WISCONSIN**

Cir. Ct. No. 00-TR-4712

**IN COURT OF APPEALS
DISTRICT IV**

**CITY OF CLINTONVILLE,

PLAINTIFF-RESPONDENT,

V.

MICHAEL J. KUHN,

DEFENDANT-APPELLANT.**

APPEAL from a judgment of the circuit court for Waupaca County:
PHILIP M. KIRK, Judge. *Affirmed.*

¶1 DEININGER, J.¹ Michael Kuhn appeals a judgment convicting him of operating a motor vehicle with a prohibited alcohol concentration, in violation of a city ordinance. He claims the trial court erred in denying his motion to

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

suppress evidence of the result of a breath test administered following his arrest. Specifically, he claims that the arresting officer did not have probable cause to arrest him for operating a motor vehicle while under the influence of an intoxicant (OMVWI) prior to administering a preliminary breath test (PBT), and that the court erroneously admitted the PBT reading at the hearing on Kuhn's motion to suppress. We reject Kuhn's arguments and affirm the appealed judgment.

BACKGROUND

¶2 With one exception, the underlying facts are not in dispute. A City of Clintonville police officer stopped Kuhn for a vehicle equipment violation shortly after midnight. During the interchange between the officer and Kuhn, the officer observed the following indications of Kuhn's possible intoxication: the right rear tire of his vehicle hopped the curb during the traffic stop; Kuhn had difficulty retrieving his driver's license from his wallet; Kuhn had a strong odor of alcoholic beverage on his breath; and his eyes were bloodshot and glassy.

¶3 Based on the foregoing observations, the officer requested Kuhn to perform field sobriety tests, and he did so. While Kuhn walked to the rear of the vehicle to perform the tests, the officer observed him to have "stutter stepped" once. Kuhn did not stop at the proper letter, as instructed, when performing the alphabet test. During the one-legged stand test, Kuhn raised his arms for balance and put his foot down three times. Kuhn also terminated the walk-and-turn test prematurely, contrary to the officer's instructions.

¶4 The officer then requested Kuhn to submit to a preliminary breath test (PBT), and Kuhn did so. There is a conflict in the testimony regarding Kuhn's "consent" to take the PBT. The officer testified that he "asked him if he would submit to a preliminary breath test, and he said he would." The officer also

testified that if Kuhn would have “answered me negatively, I would not have administered the test. He gave me a positive response to my question.” Kuhn testified, however, that he was not really given a choice, but was simply told that the PBT was “[s]omething I needed to do.” He testified further that he didn’t feel he had “any choice” in the matter. The trial court made the following finding with respect to the conflicting testimony:

The officer said it was voluntary. Mr. Kuhn said it wasn’t. I suspect that under the circumstances there that -- and I don’t think either of them remember the exact words that were spoken. I am certainly convinced that the officer has a better understanding of what was said and more importantly the effect of those words.

¶5 The PBT produced a breath alcohol concentration of .12, and the officer arrested Kuhn for OMVWI and transported him for a breath test under WIS. STAT. § 343.305(3). At the hearing on Kuhn’s motion to suppress the results of the post-arrest breath test, Kuhn objected to the admission of the PBT result for purposes of the probable cause determination. The trial court admitted the PBT result, but also concluded that probable cause to arrest for OMVWI existed even without the PBT result. A jury subsequently found Kuhn guilty of operating a motor vehicle with a prohibited alcohol concentration. Kuhn appeals the judgment entered on that verdict, citing as error the denial of his suppression motion.

ANALYSIS

¶6 We will uphold a trial court’s factual findings unless they are clearly erroneous, WIS. STAT. § 805.17(2), but whether those facts constitute probable cause to arrest is a question of law which we decide de novo. *State v. Kasian*, 207 Wis. 2d 611, 621, 558 N.W.2d 687 (Ct. App. 1996). Our task is to determine, based on the totality of the circumstances within the knowledge of the arresting

officer at the time of Kuhn's arrest, whether a reasonable law enforcement officer could conclude that Kuhn had probably committed OMVWI. *Id.*; *State v. Wille*, 185 Wis. 2d 673, 682, 518 N.W.2d 325 (Ct. App. 1994).

¶7 Kuhn first argues that, contrary to the trial court's conclusion, the arresting officer did not have probable cause to arrest him for OMVWI prior to obtaining the PBT result. He claims that the pre-PBT "observations made by the officer in this case are far more favorable to this defendant than were the observations made by" the arresting officer in *County of Jefferson v. Renz*, 231 Wis. 2d 293, 603 N.W.2d 541 (1999).² Thus, in Kuhn's view, at the point when the officer requested him to take a PBT, the officer did not have probable cause to arrest him. Kuhn does not argue, however, that the information available to the arresting officer was insufficient to satisfy the lesser standard enunciated in *Renz* to justify an officer's request for a PBT. *See id.* at ¶47. Also, by failing to argue otherwise, Kuhn concedes that after obtaining the PBT result of .12, the arresting officer did have probable cause to arrest him for OMVWI.

¶8 We thus conclude that we should first address whether the PBT result was properly admitted into evidence at the suppression hearing. If it was (that is, if the arresting officer could properly rely on the PBT result in determining probable cause), we will affirm. If not, we will consider whether the record, absent the PBT result, would still support a determination that the officer had probable cause to arrest Kuhn for OMVWI.

² This court concluded that the officer's observations in *Renz*, absent the PBT result, were insufficient to establish probable cause to arrest for OMVWI. *County of Jefferson v. Renz*, 222 Wis. 2d 424, 588 N.W.2d 267 (Ct. App. 1998), *reversed on other grounds*, 231 Wis. 2d 293, 603 N.W.2d 541 (1999).

¶9 Kuhn contends that the trial court erred in admitting the PBT result because the City did not establish a proper foundation for it. He argues that “[t]he record in this case clearly fails to identify the device used, its maintenance history, or the officer’s qualifications for its operation.” Kuhn points to WIS. STAT. § 343.305(6)(b) and (d), as well as to certain administrative code provisions, to establish that the Department of Transportation is authorized to set standards for PBT devices and criteria for issuing permits to PBT operators. He provides no authority, however, for the proposition that the City is obligated to produce evidence identifying the PBT device, its maintenance history, or the officer’s qualifications for its operation, prior to admitting the PBT result at a suppression hearing.

¶10 The relevant decisional standard at the suppression hearing in this case was whether a reasonable police officer, given the facts and information known to the officer at the time of the arrest, could conclude that a detained driver had probably committed OMVWI. *Wille*, 185 Wis. 2d at 682. Put another way, the question was not whether Kuhn was in fact operating his motor vehicle while intoxicated when the officer stopped his vehicle, but whether it was reasonable for the officer to conclude that he was probably doing so. For purposes of this determination, we see no need for the City to present foundational information regarding the PBT device, unless there is some basis in the record for calling into question the reasonableness of the officer’s use and reliance on the device. Moreover, we note that “the rules of evidence” do not necessarily apply during a preliminary proceeding to determine the admissibility of evidence at trial. *See State v. Frambs*, 157 Wis. 2d 700, 703-04, 460 N.W.2d 811 (Ct. App. 1990); WIS. STAT. § 901.04(1).

¶11 We thus conclude that the trial court did not err in admitting the PBT result at the suppression hearing. Kuhn argues further, however, that, notwithstanding the Wisconsin Supreme Court's holding in *Renz*, “[t]he level of probable cause required for a warrantless search cannot constitutionally be lowered by legislative action.” It is not entirely clear whether Kuhn is arguing that the supreme court wrongly decided *Renz*, or simply noting that it did not reach the constitutional issue. Given the trial court's factual findings, we conclude that Kuhn consented to the PBT, which, as the supreme court noted in *Renz*, obviates further Fourth Amendment analysis. *Renz*, 231 Wis. 2d 293, ¶37 n.14.

¶12 Kuhn argues in his reply brief that the City failed “to cite law or fact sufficient to meet its burden regarding the applicability of the consent exception.” We disagree. As we have noted, the issue of whether Kuhn consented to the PBT was disputed at the suppression hearing. The trial court found the officer's testimony regarding “what was said and more importantly the effect of those words” to be more credible than Kuhn's version of events. The officer testified that he asked Kuhn to take the PBT and that Kuhn agreed to do so. This testimony mirrors the facts recited in *County of Jefferson v. Renz*, 231 Wis. 2d 293, 603 N.W.2d 541 (1999), which the supreme court deemed sufficient to meet the consent exception to the Fourth Amendment's warrant requirement. *See id.* at ¶12; ¶37 n.14.

¶13 Accordingly, because the trial court did not err in admitting the PBT test result, and because the record with the PBT result included establishes that the arresting officer had probable cause to arrest Kuhn for OMVWI, the trial court did not err in denying Kuhn's motion to suppress evidence.

CONCLUSION

¶14 For the reasons discussed above, we affirm the appealed judgment.

By the Court.—Judgment affirmed.

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

