COURT OF APPEALS
DECISION
DATED AND FILED

September 26, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-3348-CR **Cir. Ct. No. 00-CT-523**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

MARTIN ANTHONY AZEVEDO,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Sauk County: JAMES EVENSON, Judge. *Reversed and cause remanded*.

¶1 DEININGER, J.[1] The State appeals an order which granted Martin Azevedo's motion to suppress evidence in this drunk driving case. The State argues that the trial court erred in suppressing all evidence gathered following

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

Azevedo's arrest on the grounds that the arresting officer did not have probable cause to request a preliminary breath screening test (PBT) under WIS. STAT. § 343.303. We conclude that, even if the results of two field sobriety tests which Azevedo challenged as unreliable are disregarded, the officer had observed sufficient indicators that Azevedo was intoxicated to meet the standard established in ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 603 N.W.2d 541 (1999) for requesting a PBT. Accordingly, we reverse the appealed order and remand for further proceedings on the State's complaint against Azevedo.

BACKGROUND

¶2 Azevedo's vehicle first came to the attention of a City of Reedsburg police officer at about 1:49 a.m. when the officer observed the vehicle travel the wrong way on a one-way street. After stopping the vehicle and identifying Azevedo as its driver, the officer asked Azevedo to step out of his car and step into the alcove of a nearby business in order to shield the two men from the wind. The officer noted "an odor of intoxicants coming from Mr. Azevedo." In response to an inquiry from the officer, Azevedo "said he had five beers in an hour and a half." The officer then asked Azevedo to perform field sobriety tests, the first one being the horizontal gaze nystagmus (HGN) test, which the officer was trained and certified to perform. The officer testified that he observed four of the possible six clues for intoxication on this test. The officer also testified that "[a]ccording to my training, four clues is an indication that the subject's at or above a .10."

¶3 The officer went on to request that Azevedo perform both the "one-legged-stand" and the "walk-and-turn" tests. The officer acknowledged that these two tests "may not necessarily be indicative if the person is 50 pounds or more overweight." The officer testified, however, that in his opinion, Azevedo was not

more than fifty pounds overweight at the time of the performance of these field sobriety tests. Azevedo's performance on the two tests was generally satisfactory, except that he did exhibit several additional "clues" that the officer testified were "indicative of intoxication."

¶4 After the completion of the field sobriety tests, the officer requested Azevedo to perform a PBT. At the initial hearing on Azevedo's motion to suppress, the court sustained Azevedo's objection to admission of the PBT result on the grounds that the officer had testified that he had not received formal training on the PBT, and the State had not presented testimony establishing the scientific accuracy and reliability of the PBT. In a subsequent hearing on the State's motion to reconsider this ruling, the officer was permitted to testify that the PBT registered a result of .10. The officer then placed Azevedo under arrest for operating a motor vehicle while under the influence of an intoxicant (OMVWI) and transported him to obtain a blood test.

¶5 Azevedo testified at the hearing that he weighed 250 pounds at the time of his arrest, notwithstanding the fact that his driver's license indicated his weight was 205 pounds. Azevedo also introduced documents from a government agency tending to establish that a person of Azevedo's height and weight would have a "body mass index" of greater than thirty, thereby classifying the individual as "obese." Based on this evidence, Azevedo argued that the one-legged-stand and walk-and-turn tests were presumptively invalid. He also argued that factors such as squad car flashing lights could have affected Azevedo's performance on the HGN test.

¶6 The trial court concluded that the initial traffic stop was valid, given that Azevedo was driving the wrong way on a one-way street. The court also

credited the officer's testimony that he smelled the odor of intoxicants, and that Azevedo had admitted to consuming alcohol. The court ultimately ruled, however, that the validity of Azevedo's arrest "turns on the validity of the one leg stand and, more specifically, the walk and turn test, as that was the one that ultimately made the determination, and how that is impacted … by Exhibit 2, which is the weight factor." Because the defendant had established that he was significantly overweight, and that this condition could affect his performance on the latter two tests, the court determined that the officer lacked probable cause to arrest Azevedo for OMVWI. Accordingly, the court granted Azevedo's motion to suppress evidence gathered following the unlawful arrest.

¶7 The State moved the court to reconsider its decision on the basis that the court had erred in not permitting the PBT result to be used as evidence supporting the officer's decision to arrest Azevedo. The court agreed to take additional testimony from the officer and to accept into evidence the PBT result of .10. Azevedo renewed his objection to consideration of the PBT result, however, now arguing that the officer did not have probable cause as required under WIS. STAT. § 343.303 to request that Azevedo perform a PBT. The court, after reviewing a transcript of the initial hearing and considering the additional testimony and arguments of counsel, ruled as follows:

> The issue is whether or not there was probable cause for an arrest prior to the administration of the preliminary breath test.
>
> I would concede that if that probable cause did exist, then the preliminary breath test would conclude that and establish a basis for arrest. However, based on my review of the transcript and findings that I made previously at the earlier suppression hearing, I do find that there was not probable cause to administer the breath test, and the motion to suppress is granted.

¶8 The State appeals the order granting the motion to suppress evidence. *See* WIS. STAT. § 974.05(1)(d)2 (providing that State may appeal an order suppressing evidence).

ANALYSIS

¶9 Azevedo's motion to suppress challenges the legality of his arrest under the Fourth Amendment. The trial court's factual findings on the issue will not be set aside unless they are clearly erroneous. WIS. STAT. § 805.17(2); ***State v. Roberts***, 196 Wis. 2d 445, 452, 538 N.W.2d 825 (Ct. App. 1995). Whether undisputed facts constitute probable cause, however, is a question of law we decide de novo. ***State v. Babbitt***, 188 Wis. 2d 349, 356, 525 N.W.2d 102 (Ct. App. 1994). This case also involves the interpretation of a statute, WIS. STAT. § 343.303, which is also a question of law we decide independently of the trial court. ***State v. Sweat***, 208 Wis. 2d 409, 414-15, 561 N.W.2d 695 (1997).

¶10 The State claims that the trial court erred in concluding that the arresting officer did not have "sufficient probable cause" to request a PBT, and that the PBT result, combined with the other valid indications of Azevedo's intoxication, produced probable cause to arrest Azevedo for OMVWI. Azevedo maintains that the trial court correctly found that the one-legged stand and walk-and-turn sobriety tests administered to him on the night of his arrest could not be relied on to establish probable cause that he was OMVWI. He further argues that the remaining indications the officer observed were insufficient to establish

probable cause to request a PBT under WIS. STAT. § 343.303.[2] We agree with the State.

¶11 As a preliminary matter we note that the trial court concluded in its decision on reconsideration that, if the PBT result were considered, the officer had probable cause to arrest Azevedo for OMVWI.[3] Azevedo does not argue otherwise and we take the point as conceded. Accordingly, we must address only the question of whether the trial court erred in disallowing consideration of the PBT result on the ground that the officer lacked the requisite probable cause to request a PBT.

¶12 We accept the trial court's findings that, based on the record made at the suppression hearing, Azevedo's performance on the one-legged stand and walk-and-turn tests provided no valid indication that he was intoxicated or impaired. The State does not argue that these findings were clearly erroneous, and

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[2] WISCONSIN STAT. § 343.303 provides in relevant part as follows:

> If a law enforcement officer has probable cause to believe that the person is violating or has violated s. 346.63(1) [prohibiting OMVWI] … the officer, prior to an arrest, may request the person to provide a sample of his or her breath for a preliminary breath screening test using a device approved by the department for this purpose. The result of this preliminary breath screening test may be used by the law enforcement officer for the purpose of deciding whether or not the person shall be arrested for a violation of s. 346.63(1) … and whether or not to require or request chemical tests as authorized under s. 343.305(3). The result of the preliminary breath screening test shall not be admissible in any action or proceeding except to show probable cause for an arrest, if the arrest is challenged, or to prove that a chemical test was properly required or requested of a person under s. 343.305(3).

[3] The court stated, "I would concede that if that probable cause [for an arrest] did exist, then the preliminary breath test would conclude that and establish a basis for the arrest."

we are satisfied that they were not. Setting the officer's observations on these tests aside, however, we conclude that sufficient indications that Azevedo was OMVWI remained to meet the standard established in ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 603 N.W.2d 541 (1999), for requesting a PBT.

The supreme court concluded in ***Renz*** that:

> "[P]robable cause to believe" [as set forth in WIS. STAT. § 343.303] refers to a quantum of proof greater than the reasonable suspicion necessary to justify an investigative stop, and greater than the "reason to believe" that is necessary to request a PBT from a commercial driver, but less than the level of proof required to establish probable cause for arrest.

Renz, 231 Wis. 2d at 316. The court noted that if this standard is met, "[a]n officer may request a PBT to help determine whether there is probable cause to arrest a driver suspected of O[MV]WI, and the PBT results will be admissible to show probable cause for an arrest, if the arrest is challenged." ***Id***. Chief Justice Abrahamson explained in a concurrence her view that the standard would be met "when the driver exhibits several indicators of being under the impairment of intoxicants." ***Id***. at 318 (Abrahamson, C.J., concurring).

¶13 Here, the officer observed Azevedo commit a glaring traffic violation—driving the wrong way on a one-way street. It is the type of violation that, by its nature, raises the possibility, if not the probability, that the driver's attention or judgment is impaired. Upon stopping Azevedo, the office detected an odor of intoxicants and learned that Azevedo had consumed "five beers in an hour and a half." That amount of alcohol, within that timeframe, is a more specific indication that Azevedo may be intoxicated than had he given the more typical response, "I had a couple of beers." Finally, Azevedo's performance on the HGN test yielded four out of six possible clues for intoxication. The arresting officer

testified that he was trained and certified to perform this test. Except for noting that there were some bright or flashing lights in the area which may have affected his performance, Azevedo does not otherwise challenge the validity of the HGN test.[4]

¶14 Azevedo contends that the officer's testimony shows that he did not believe he had probable cause to either arrest Azevedo or request a PBT before conducting the two physical agility tests which the trial court deemed invalid. And, because of the invalidity of the latter two tests, Azevedo maintains the officer never acquired the requisite level of probable cause. We reject this argument. Even if the officer's testimony can be interpreted in the manner Azevedo advocates, our role is to apply an objective probable cause standard to the facts known to or observed by the arresting officer. That is, we must determine whether a reasonable officer could have concluded there was "probable cause to believe" that Azevedo was OMVWI before requesting the PBT, as that term is used in WIS. STAT. § 343.303 (and interpreted in ***Renz***), not whether this particular officer reached that conclusion at a particular point in time. *See, e.g.*, ***State v. Secrist***, 224 Wis. 2d 201, 209, 589 N.W.2d 387 (1999) (probable cause for search and probable cause to arrest are objective tests).

¶15 We conclude that the "indicators" set forth in ¶13 above meet the statutory standard as interpreted in ***Renz***. We need look no further for support

[4] The trial court did not declare the HGN test invalid, only insufficient without the other two field sobriety tests to establish "probable cause *for an arrest.* " (Emphasis added.) It appears, therefore, that the court may have made the same error for which this court was reversed in ***Renz***, i.e., equating the probable cause required under WIS. STAT. § 343.303 with probable cause to arrest for OMVWI. *See* ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 301, 603 N.W.2d 541 (1999) ("The court of appeals held that the legislature intended by this language to require an officer to have probable cause to arrest before requesting a PBT.").

than to the ***Renz*** case itself, where the supreme court applied the standard it established to the facts before it. The traffic stop in ***Renz*** was based on a loud muffler, 231 Wis. 2d at 296, a violation having nothing to do with possible driver intoxication or impairment. The indicators of intoxication available to the officer in ***Renz*** were that the driver "smelled strongly of intoxicants," admitted to "drinking three beers earlier in the evening," and exhibited several miscues during field sobriety tests, even though "his speech was not slurred, and he was able to substantially complete all of the tests." ***Renz***, 231 Wis. 2d at 316-17. We conclude that the evidence in this case (wrong-way/one-way violation, odor of alcohol, admission of consuming "five beers in an hour and a half," and four "clues" on the HGN test) is at least as strong as that in ***Renz***.

¶16 Thus, the officer in this case was also "faced with exactly the sort of situation in which a PBT proves extremely useful in determining whether there is probable cause for an OWI arrest." ***Id***. at 317. Accordingly, we conclude that the PBT was properly requested, and the trial court should have considered the PBT result in determining whether the officer had probable cause to arrest Azevedo for OMVWI. As we have noted, once the PBT result is considered along with the other valid indicators of Azevedo's intoxication, there is no dispute that the officer had probable cause to arrest Azevedo for OMVWI. His arrest was therefore not unlawful, and there is no basis to suppress the evidence gathered following the arrest.

CONCLUSION

¶17 For the reasons discussed above, we reverse the appealed order and remand for further proceedings on the State's complaint.

By the Court.—Order reversed and cause remanded.

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