COURT OF APPEALS
DECISION
DATED AND FILED

December 26, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1583 **Cir. Ct. No. 02-CV-51**

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

CITY OF WATERTOWN,

PLAINTIFF-RESPONDENT,

V.

JEFFREY M. WAGNER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Jefferson County: WILLIAM F. HUE, Judge. *Affirmed*.

¶1 DEININGER, J.[1] Jeffrey Wagner appeals a judgment convicting him of operating a motor vehicle with a prohibited alcohol concentration, first

[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.

offense. He claims the trial court erred in denying his motion to suppress the results of a blood test. Specifically, Wagner contends the arresting officer (1) lacked probable cause to arrest him for operating a motor vehicle while under the influence of an intoxicant (OMVWI), and (2) failed to honor his request for an alternative test for alcohol concentration. We disagree and affirm the conviction.

BACKGROUND

¶2 A patrolling City of Watertown police officer observed one of a group of three motorcycles drift into the oncoming lane of traffic at least twice. The officer testified that an oncoming vehicle had to slow and veer to its right to avoid a collision with the motorcycle. The officer stopped the motorcycle and, although Wagner was not carrying his driver license, identified Wagner as the driver. The officer testified that Wagner's eyes were "red and glassy," and he could smell "a strong odor of what I believed to be intoxicant emanating from his breath." Wagner acknowledged consuming "approximately four or five beers."

¶3 Based on the foregoing observations, the officer requested that Wagner perform field sobriety tests. The officer administered three tests which he had been trained to administer and evaluate: the horizontal gaze nystagmus (HGN), the one-legged stand, and the walk and turn. Wagner "passed" the latter two, but on the HGN, the officer observed all six of the "clues" for intoxication. He testified that if an individual exhibits four or more clues on the HGN test, "there is a 77 percent probability that the individual is impaired."

¶4 The officer testified that he next asked Wagner to submit to a preliminary breath test (PBT), but Wagner refused.[2] The officer then arrested Wagner for OMVWI, summarizing his basis for the arrest as follows:

> Beginning with the questionable driving, the drifting into oncoming traffic, upon making contact with him face to face, the odor of what I believe to be an intoxicant, the red and glassy eyes, his indication that he had consumed four or five beers, six clues observed with horizontal gaze nystagmus.
>
> Based on my training and experience I felt that I had probable cause to arrest him for the violation of O[MV]WI.

¶5 The officer took Wagner to the police station, issued him a citation for OMVWI and read Wagner the "Informing the Accused" document. Wagner agreed to submit to a blood test. The officer testified that "Wagner did not make any mention to me about taking an alternate test," either then or at any later time. Wagner disputed this point. He testified that after the officer asked him if he would submit to the blood test, he asked if he could take a breath test, and the officer told him "that wasn't an option." Wagner testified that he believed he "didn't have a choice…. That this [blood] was the only test that he was going to offer me." Wagner acknowledged on cross-examination, however, that he did not remember making any further request for a breath test after going to the hospital

[2] Wagner testified that he declined the PBT only after the officer told him "this one wasn't required. It won't be held against me."

for the blood draw, and further that the officer had informed him of his right to request an alternative test at agency expense.[3]

¶6 The circuit court concluded that "a reasonable officer under the circumstances" would have had probable cause to arrest Wagner for OMVWI. The court found those circumstances to be the following: Wagner "deviated from his lane of traffic" such that "vehicles from the other side of the road had to either slow down or move to their right" in order to avoid the motorcycle; the officer noted Wagner's "red, glassy eyes" and "a strong odor of intoxicant"; Wagner admitted "to having been drinking four to five beers"; Wagner exhibited "all six clues" on the HGN test; and Wagner refused to submit to the PBT, finding on this point that "the officer didn't talk him out of taking the test."

¶7 On the issue of whether Wagner requested an alternate test, the court found that although "the defendant and officer did have some conversation concerning the blood test or breath test at the police station after the Informing the Accused form ... had been read to him," Wagner "did not ask properly for an alternate test." In clarifying its ruling at defense counsel's request, the court said this:

> I found specifically after the Informing the Accused had been read, that he did ask for a breath test. That I can't conclude that was a request for an alternate test without something more to it. It can't just be defendant's

[3] The only other point in significant dispute between the two witnesses at the suppression hearing was whether cars were parked along the street at the points where the officer observed Wagner's motorcycle drift into the oncoming traffic lane. Wagner testified that there was at least one parked car which prompted him to swing "wide like I always do just to avoid a door opening." On cross-examination, he acknowledged that he would not normally need to swerve into the oncoming lane in order to safely pass by a legally parked car. The officer testified unequivocally that no cars were parked at the locations in question, and that he pointed this out to Wagner after the traffic stop.

> subjective belief that he was trying to assert an alternative test after the fact.
>
> I have to have some information that he was asking for an alternate in some way other than just saying I want a breath test.
>
> ….
>
> … I agree with that case.[4] I just don't agree that this case is like that case.

¶8 Accordingly, the trial court denied Wagner's motion to suppress the blood test result on both cited grounds, and thereafter found him guilty of operating a motor vehicle with a prohibited alcohol concentration.[5] Wagner appeals, citing as error the denial of his motion to suppress.

ANALYSIS

¶9 We first address whether the trial court correctly ruled that the City established probable cause for Wagner's arrest. 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 Wagner's arrest,

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[4] ***State v. Renard***, 123 Wis. 2d 458, 367 N.W.2d 237 (Ct. App. 1985).

[5] This case originated in the City of Watertown Municipal Court where Wagner was convicted, also on stipulated facts, of both OMVWI and the companion prohibited alcohol concentration (PAC) charge, as well as of "operating left of center." Wagner appealed to the circuit court, *see* WIS. STAT. § 800.14, requesting a trial de novo without a jury. After the circuit court denied his suppression motion, Wagner stipulated that the court could decide his guilt or innocence based on the evidence presented at the suppression hearing and the report of his blood test result, which was 0.167 g/100 mL. The court found Wagner not guilty of OMVWI but guilty of PAC. The record does not indicate a disposition for the "operating left of center" charge noted in the municipal court judgment.

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

¶10 Wagner first points to several of the officer's observations that would not support probable cause for the arrest, e.g., that Wagner safely pulled his motorcycle over and dismounted, that he did not slur his speech, that he did not sway or lose his balance, that he "passed" the one-legged stand and walk-and-turn tests. We agree that the record contains the cited evidence, but the record also establishes the points the officer relied on in determining that there was probable cause for an OMVWI arrest, and more importantly, the record amply supports the factual findings the trial court made. See ¶¶2-4, 6. Wagner does not argue that the court's findings were clearly erroneous, and the only question we must decide is whether the court's findings provide probable cause for an OMVWI arrest. We conclude that they do regardless of whether there may be other facts of record which would not.

¶11 Wagner also argues that the court improperly relied on his refusal to submit to a PBT in determining that a reasonable officer could conclude that Wagner had probably committed OMVWI. He cites ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 313, 603 N.W.2d 541 (1999), for the proposition that when a person "withholds consent [for a PBT], this may not be used against him, and there is no penalty for withholding consent." The cited passage notes that the history of the PBT statute, WIS. STAT. § 343.303, indicates the legislature's intent that "'[t]here will be no penalty for refusing to take a *preliminary* breath test.'" ***Id***. (citation omitted). ***Renz*** provides no support, however, for a claim that a police officer (or a court at a suppression hearing) may not consider a driver's

refusal to consent to a PBT in assessing whether there is probable cause to arrest the driver for OMVWI.[6]

¶12 The City defends the trial court's consideration of Wagner's PBT refusal in determining probable cause by pointing to our opinion in ***State v. Babbitt***, 188 Wis. 2d 349, 525 N.W.2d 102 (Ct. App. 1994). We concluded there that

> just as the refusal to take an Intoxilyzer test is indicative of consciousness of guilt so too is the refusal to perform a field sobriety test. The purpose of the field sobriety test is to make a preliminary determination of whether the defendant is intoxicated. The most plausible reason for a defendant to refuse such a test is the fear that taking the test will expose the defendant's guilt. Thus, because the defendant's refusal to submit to a field sobriety test is some evidence of consciousness of guilt, this evidence should be admissible for the purpose of establishing probable cause to arrest.

Id. at 359-60.

¶13 We note that, although the result of a PBT is not admissible at a trial to prove OMVWI, it is admissible at a proceeding to determine whether there was probable cause for an OMVWI arrest. WIS. STAT. § 343.303 ("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

[6] Wagner also argues that his decision to exercise what he asserts is a Fourth Amendment right to refuse consent for a preliminary breath test may not constitutionally be used against him for any purpose. He claims that any conclusion to the contrary "would render [WIS. STAT.] § 343.303, as construed by ***Renz*** unconstitutional." We do not address this constitutional challenge both because we conclude below that, even without considering Wagner's PBT refusal, probable cause existed for his arrest, and because there is no indication in the record that Wagner has notified the Attorney General that he is challenging the constitutionality of § 343.303 in this appeal. *See* ***Estate of Fessler v. William B. Tanner Co.***, 100 Wis. 2d 437, 441-44, 302 N.W.2d 414 (1981).

….”). Had Wagner submitted to a PBT, therefore, its result would have been admissible to establish probable cause at the hearing on Wagner’s suppression motion. The City maintains that Wagner’s refusal to submit to a PBT should similarly be admissible for that purpose at that proceeding. *See* ***Babbitt***, 188 Wis. 2d at 360 (“[A] person who performs the field sobriety test should not be placed in a worse position by virtue of his or her compliance with an officer’s request than a defendant who refuses to cooperate with police.”).

¶14 We do not decide whether the trial court erred in considering the PBT refusal. As we have explained, our review of the probable cause determination is de novo. We conclude that, even if we do not consider Wagner’s refusal to submit to a PBT, probable cause existed to arrest him for OMVWI based on the following: (1) Wagner’s erratic driving, which the trial court found caused an oncoming vehicle to slow or move over; (2) Wagner’s “red and glassy” eyes and the strong odor of intoxicants; (3) his admission to having consumed four to five beers; and (4) the presence of six out of six clues on the HGN. These facts are at least as compelling as those in ***Kasian***, where we determined that probable cause was established by the arresting officer’s observation of three indicia of intoxication: a one-vehicle accident; the odor of intoxicants emanating from the defendant; and the defendant’s slurred speech. *See* ***Kasian***, 207 Wis. 2d at 622. Here, in addition to similar indications of alcohol-impaired driving, the officer had the benefit of the clues gleaned from the HGN sobriety test to support a conclusion that Wagner was probably under the influence of an intoxicant.

¶15 We thus conclude the trial court did not err in determining that Wagner was properly arrested for OMVWI. We next consider whether Wagner was wrongly denied the statutory right to an “alternative test.” WISCONSIN STAT. § 343.305(5)(a) provides as follows:

> If the person submits to a test under this section, the officer shall direct the administering of the test.… The person who submits to the test is permitted, upon his or her request, the alternative test provided by the agency under sub. (2) or, at his or her own expense, reasonable opportunity to have any qualified person of his or her own choosing administer a chemical test for the purpose specified under sub. (2).

Additionally, § 343.305(4) requires an arresting officer to inform the OMVWI arrestee, among other things: "If you take all the requested tests, you may choose to take further tests. You may take the alternative test that this law enforcement agency provides free of charge."[7]

¶16 Wagner claims that our decision in ***State v. Renard***, 123 Wis. 2d 458, 367 N.W.2d 237 (Ct. App. 1985), applied to the present facts, requires us to reverse the trial court. We disagree. The defendant in ***Renard*** was arrested for OMVWI at a hospital while he was being treated for injuries sustained in a car accident. ***Id***. at 460. Because Renard was already at the hospital, the officer requested that he submit to a blood test. ***Id***. Renard requested that a breathalyzer test be performed but was eventually persuaded by the officer to consent to a blood test. ***Id***. Renard and his wife testified that after consenting, however, Renard continued to request a breath test. ***Id***. After the blood sample was drawn, the officer left the hospital without arranging for a breath test, and without inquiring as to when Renard would be discharged so that a breath test might be administered. ***Id***. The hospital released Renard shortly after the officer left and within two hours of the accident. ***Id***.

[7] As we have noted, Wagner acknowledged at the suppression hearing that he was so informed.

¶17 We concluded that the "duty to perform the requested additional test became mandatory after Renard submitted to a blood test," and we affirmed the trial court's suppression of the blood test result. ***Id***. at 461. Wagner asserts that the "trial court found that Mr. Wagner, like Mr. Renard, asked for a breath test after he was requested to submit to a primary blood test. As in ***Renard***, this request is all that is necessary to trigger the statutory right to an alternate test under § 343.305(5)." The problem with Wagner's assertion is that it relies on a mischaracterization of the trial court's findings. As we have explained, the trial court specifically found that Wagner did *not* properly request an alternate test, that at best there was some "discussion" between Wagner and the officer regarding a breath test versus a blood test, and the court specifically distinguished its finding from the facts of ***Renard***. See ¶7.

¶18 Wagner makes no claim that the trial court's factual findings on the alternative test issue were clearly erroneous. In fact, he argues just the opposite in his reply brief. We conclude that the record supports the trial court's finding that Wagner did not request an alternative test. Wagner testified that his discussion with the officer about a breath test took place at or about the time he was read the Informing the Accused. This occurred before his transport to the hospital for the blood draw, and thus well before he had submitted to the requested blood test. Wagner could not recall making any further mention of a breath test thereafter.

¶19 It may well be, as Wagner argues, that an earlier, clearly articulated request for a second or alternative test need not be repeated after a person has submitted to the requested test in order for it to be valid or proper. We are satisfied, however, that the trial court did not err in finding that Wagner never made a proper request at any time. Just as we did in ***Renard***, we conclude here that the trial court's finding regarding whether a request was made for "a

breathalyzer test in addition to the blood test is not contrary to the great weight and clear preponderance of the evidence." ***Renard***, 123 Wis. 2d at 460. We thus affirm the court's denial of Wagner's motion on this second ground.

CONCLUSION

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

By the Court.—Judgment affirmed.

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