COURT OF APPEALS
DECISION
DATED AND RELEASED

January 25, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-2086

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STEVEN E. BENASH,

Defendant-Appellant.

APPEAL from an order of the circuit court for Rock County: GERALD W. JAECKLE, Judge. *Affirmed*.

DYKMAN, J. This is a single-judge appeal decided pursuant to § 752.31(2)(c), STATS. Steven E. Benash appeals from an order in which the trial court found that he unlawfully refused to submit to a chemical test in violation of § 343.305(9), STATS. Benash raises the following issues on appeal: (1) whether the police officer had probable cause to believe that Benash was operating a motor vehicle while intoxicated (OMVWI); and (2) whether the trial court judge was impartial. We conclude that: (1) the officer had probable cause to believe that Benash was operating a motor vehicle while intoxicated; and (2) the judge was not biased. Accordingly, we affirm.

BACKGROUND

The following facts are taken from a refusal hearing. On March 27, 1995, Deputy Sheriff Jeffrey A. Klenz of the Rock County Sheriff's Department was called to investigate an accident on Highway 59 in Rock County. At the scene, he found a black car rolled over on its roof, lying in a ditch. The fire department had already removed the driver, later identified as Steven E. Benash, from the car and Deputy Klenz assisted in putting Benash in an ambulance. While doing so, he smelled a strong odor of alcohol or intoxicants coming from Benash and Benash appeared to be injured. Deputy Klenz examined the car and found an open one-quart bottle of whiskey that was between one-half and three-quarters empty. Deputy Klenz did not notice any obvious obstructions on the road which might have caused the accident.

Deputy Klenz accompanied Benash to the hospital and attempted to question him about the accident. Benash was uncooperative with him and the hospital staff. Benash claimed that he had swerved to avoid a squirrel and lost control of the car. Deputy Klenz again noticed a "real strong odor of intoxicants," and slurred and slowed speech. Benash was belligerent and yelled and screamed at the hospital staff about Deputy Klenz's presence.

Deputy Klenz placed Benash under arrest, issued him a citation for OMVWI, and put the citation in Benash's boot. Deputy Klenz read Benash the informing the accused form and asked him to take a blood test. Benash refused and Deputy Klenz left. Deputy Klenz did not perform field tests because of Benash's injuries and the fact that the hospital staff were treating him.

At the close of testimony, Benash argued that because the State failed to offer the informing the accused form as evidence, the trial court could not conclude that he refused a test. The court told the prosecutor that this form was necessary for the State to prove its case, and permitted the State to reopen the hearing. The State recalled Deputy Klenz and offered the form he read to Benash.

Based upon this evidence, the trial court determined that Benash unlawfully refused to submit to a chemical test, contrary to § 343.305(9), STATS. The court indicated, however, that had the State not reopened the hearing, it would have found that there was no refusal. Benash appeals.

PROBABLE CAUSE

Benash challenges the trial court's finding that Deputy Klenz had probable cause to arrest him for operating a motor vehicle while intoxicated. When a person is arrested for this offense, an officer may ask the defendant to provide a blood sample. Section 343.305(3)(a), STATS. If the person refuses, the officer issues a notice of intent to revoke the person's operating privileges. Section 343.305(9)(a). The person may then request a hearing on the revocation, also known as a refusal hearing, in which the court determines, among other things, whether the officer had probable cause to believe that the person was driving under the influence of alcohol. ***State v. Wille***, 185 Wis.2d 673, 679, 518 N.W.2d 325, 327 (Ct. App. 1994).

Probable cause is an objective standard to be determined from the totality of the circumstances facing the arresting officer. ***Illinois v. Gates***, 462 U.S. 213, 230 (1983). In determining whether the police had probable cause to arrest a defendant, we may consider the police officer's conclusions based upon his or her investigative experience. ***Wille***, 185 Wis.2d at 683, 518 N.W.2d at 329.

In ***State v. Swanson***, 164 Wis.2d 437, 453-54 n.6, 475 N.W.2d 148, 155 (1991), the supreme court concluded that unexplained erratic driving, the odor of intoxicants on the defendant's breath, an accident which occurred after the bars had closed, taken together, gave a police officer reasonable suspicion, but not probable cause, that a person was driving while intoxicated. The court explained:

> Unexplained erratic driving, the odor of alcohol, and the coincidental time of the incident form the basis for a reasonable suspicion but should not, in the absence of a field sobriety test, constitute probable cause to

> arrest someone for driving while under the influence of intoxicants.

Id. And in ***State v. Seibel***, 163 Wis.2d 164, 180-83, 471 N.W.2d 226, 233-35, *cert. denied*, 502 U.S. 986 (1991), the court determined that erratic driving which caused an accident, a strong odor of intoxicants coming from the driver's companions, an odor of intoxicants on the driver, and the driver's belligerent conduct at a hospital, together, provided the police with reasonable suspicion, but not probable cause, that the driver was operating a motor vehicle while intoxicated.

But in ***Wille***, we concluded that where a police officer and a fire fighter smelled intoxicants coming from the defendant, another police officer smelled intoxicants when near the defendant, the defendant had been involved in a car accident, and the defendant said at the hospital that he had "to quit doing this," there was probable cause to believe that the defendant was operating a motor vehicle while intoxicated. ***Wille***, 185 Wis.2d at 683-84, 518 N.W.2d at 329. In so doing, we explained that ***Swanson*** does not require field sobriety tests in all cases before deciding whether to arrest for operating a motor vehicle while under the influence of an intoxicant. ***Id.*** at 684, 518 N.W.2d at 329. But where the police have stronger grounds for believing that a defendant was operating his or her car while under the influence of an intoxicant, probable cause may still be found without such tests. ***Id.*** Thus, the defendant's statement that he had "to quit doing this," was sufficient to distinguish the case from ***Swanson*** and, with the other factors, provided sufficient evidence to give the police probable cause. ***Id.***

This case is more like ***Wille*** than ***Swanson*** or ***Seibel*** because Deputy Klenz was faced with stronger evidence of guilt. Deputy Klenz did not just notice a smell of intoxicants coming from Benash at the accident scene and at the hospital, he noticed a *very strong* smell. Benash was also involved in a one-car accident and was belligerent. Most importantly, though, Deputy Klenz found a one-half to three-quarter's empty open bottle of whiskey lying in the car. Based upon these facts, we conclude that a police officer in Deputy Klenz's position could reasonably conclude that Benash was probably driving while intoxicated.

IMPARTIAL JUDGE

Benash next argues that the trial court judge was not impartial because the judge declared that had the State not moved to reopen the case, which it did at the judge's suggestion, it would not have proved its case against Benash. Benash argues that the evidence reflects the judge's "undue friendship or favoritism towards" the State and that the judge took over the prosecution against him. We disagree.

Whether a judge is neutral and detached is a question of constitutional fact which we review *de novo*. ***State v. McBride***, 187 Wis.2d 409, 414, 523 N.W.2d 106, 109 (Ct. App. 1994), *cert. denied*, 115 S. Ct. 1796 (1995). We presume that a judge is free of bias and partiality. ***Id.*** at 414-15, 523 N.W.2d at 109. A party asserting judicial bias may only overcome this presumption by a preponderance of the evidence. ***Id.*** at 415, 523 N.W.2d at 109.

Whether a judge is biased has a subjective and objective component. ***Id.***, 523 N.W.2d at 110. The subjective component is based upon the judge's own determination of whether he or she may act impartially. ***Id.*** Under the objective component, we must determine whether there are objective facts demonstrating actual bias. ***Id.*** at 416, 523 N.W.2d at 110. Toward this end, the party asserting bias must show that the trial judge treated the party unfairly and not that there was merely an appearance of partiality or that the circumstances might lead one to speculate that the judge was partial. ***Id.***

Benash has not shown that the judge was actually biased against him because there is nothing in the record to show that the judge acted unfairly when he ruled against Benash. In fact, quite the opposite is true. Prior to making a ruling, the judge asked the State if it had evidence of the informing the accused form which Deputy Klenz read to Benash because the judge was concerned that if this evidence was not available, he could not find that Benash unlawfully refused a chemical test for intoxication. Just because the judge permitted the State to recall Deputy Klenz to obtain this evidence from him and the judge eventually ruled against Benash does not reflect partiality.

While a judge should not take an active role in trying the case for either the State or the defense, the judge is more than a mere referee. He or she may clarify questions and answers and make inquiries where obvious important evidentiary matters are ignored or inadequately covered on behalf of the State or the defendant. ***State v. Asfoor***, 75 Wis.2d 411, 437, 249 N.W.2d 529,

540-41 (1976). The judge is not just an arbiter but, as an officer of the court, he or she is charged with seeking the truth of the matter. Oftentimes, a judge will ask a witness questions, *see* RULE 906.14(2), STATS., the answers to which may be used against either party. Telling an inexperienced prosecutor[1] that certain evidence is necessary to prove a case does not give rise to a claim of partiality. The judge issued a correct ruling based upon the facts presented at the refusal hearing. Accordingly, we affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports. *See* RULE 809.23(1)(b)4, STATS.

[1] The person trying the case on behalf of the State was a legal intern.