COURT OF APPEALS
DECISION
DATED AND FILED

February 3, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2760-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MARK G. BARGENQUAST,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: WILLIAM H. CARVER, Judge. *Affirmed.*

SNYDER, P.J. Mark G. Bargenquast appeals from his conviction for operating a motor vehicle while intoxicated (OWI) contrary to § 346.63(1)(a), STATS. He contests the trial court's denial of his motion to suppress blood alcohol evidence, contending that the arresting officer erroneously administered a preliminary breath test (PBT) because the requisite probable cause that Bargenquast had violated the OWI statute as required by § 343.303, STATS., was

lacking. He further contends that the subsequent arrest was illegal and that the evidentiary blood test result must be suppressed because the PBT could not be considered by the officer. We disagree and affirm.

The relevant facts are undisputed. At approximately 1:06 a.m. on March 29, 1998, City of Oshkosh Police Officer Timothy Skelton was driving westbound on a four-lane road when he observed a vehicle traveling eastbound "at a speed consistent with above the posted speed limit." The oncoming vehicle was crowding the center line to the extent that it "came very close to striking [Skelton's] driver's side mirror." Skelton followed the eastbound vehicle, observed it cross over the center line and initiated a traffic stop.

Skelton identified the driver as Bargenquast, who admitted to Skelton that he had drunk approximately two beers. Skelton detected an odor of intoxicants on Bargenquast and requested that he submit to field tests. Bargenquast, who spoke with a "distinct slur," was unable to complete the alphabet test. During the Horizontal Gaze Nystagmus (HGN) test, Skelton observed "all six clues." Skelton then asked whether Bargenquast had any physical defects that would impair his ability to complete the walk-and-turn and the one-leg stand tests. Bargenquast replied that he had been in therapy for a hip injury. Skelton then administered a § 343.303, STATS., PBT which provided a 0.17% reading. Skelton arrested Bargenquast and obtained an evidentiary blood sample that reported a blood alcohol concentration of 0.148%.

Bargenquast argues that the information available to the officer at the time of the PBT was insufficient to establish probable cause for that test. He further contends that the officer should have administered other field tests prior to requesting the PBT and that the trial court erred in denying the motion to suppress

the evidentiary blood test result because without the PBT result there was no probable cause to arrest. We are not persuaded.

We review a probable cause determination de novo. *See* ***State v. Babbitt,*** 188 Wis.2d 349, 356, 525 N.W.2d 102, 104 (Ct. App. 1994). In OWI cases, probable cause will be found "where the totality of the circumstances within the arresting officer's knowledge at the time of the arrest would lead a reasonable police officer to believe … that the defendant was operating a motor vehicle while under the influence of an intoxicant." ***State v. Nordness,*** 128 Wis.2d 15, 35, 381 N.W.2d 300, 308 (1986). This is a commonsense test. It is based on probabilities. The facts need only be sufficient to lead a reasonable officer to believe that guilt is more than a possibility. *See* ***County of Dane v. Sharpee,*** 154 Wis.2d 515, 518, 453 N.W.2d 508, 510 (Ct. App. 1990).

Section 343.303, STATS., governing the administration of PBTs, provides in relevant part:

> If a law enforcement officer has probable cause to believe that the person is violating or has violated s. 346.63(1) … the officer, prior to an arrest, may request the person to provide a sample of his … breath for a preliminary breath screening test …. The result of this preliminary breath screening test may be used by a law enforcement officer for the purpose of deciding whether or not the person shall be arrested for a violation of s. 346.63(1) … [but] shall not be admissible in any action or proceeding except to show probable cause for an arrest, if the arrest is challenged ….

The totality of the circumstances known to Skelton when he requested the PBT included several signs of intoxicated driving: erratic driving, admission of alcohol consumption, slurred speech, an odor of alcohol on Bargenquast's person and the results of the HGN and alphabet field tests. Bargenquast had difficulty reciting the alphabet properly, which he does not

contest. However, he disputes that the HGN test supports probable cause for an OWI violation because Skelton did not specifically explain his HGN observations at the suppression hearing. Skelton testified as follows:

> Q And what [field] tests did you administer to [Bargenquast]?
>
> A The initial one was I performed a horizontal gaze nystagmus.
>
> Q How did [Bargenquast] perform on that test?
>
> A I saw all six clues for HGN.

Bargenquast objected to the "six clues" response based upon a lack of foundation. The trial court overruled the objection based upon its familiarity with the HGN test and advised defense counsel that he could cross-examine as to the admissibility and weight of the officer's six clues observations. On cross-examination, defense counsel inquired into Skelton's training and experience in administering HGN tests, and in response to a trial court inquiry, Skelton established that he had "eight hours of vertical nystagmus training related to drug impairment … by the Wisconsin State Patrol" which trained and certified him to conduct the HGN test.

Our scope of review concerning an evidentiary ruling is limited to whether the trial court erroneously exercised its discretion. *See* ***State v. Pharr,*** 115 Wis.2d 334, 342, 340 N.W.2d 498, 501 (1983). An officer can testify regarding his or her training and observations, and as to what the officer concluded when conducting a test covered by that training. Skelton testified that he was properly trained in utilizing the HGN as part of a probable cause determination for OWI, and that he observed and considered "six clues" as to that determination from the HGN. We conclude that the admission into evidence of the HGN test results and their consideration by the officer as to probable cause of an OWI

violation was not an erroneous exercise of discretion.[1] Based upon our independent review of the facts known to the arresting officer, we conclude that Skelton had probable cause to believe that Bargenquast had operated a motor vehicle while under the influence of an intoxicant. Skelton had the requisite knowledge "to believe that guilt is more than a possibility" in determining probable cause for an OWI violation. *See* ***Sharpee,*** 154 Wis.2d at 518, 453 N.W.2d at 510. Because the trial court properly denied suppression of the blood alcohol evidence, we affirm the judgment of conviction.

By the Court.—Judgment affirmed.

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

[1] Bargenquast also argues that Skelton should have administered other field tests independent of Bargenquast's physical inability to perform the walking and balancing tests before requesting the PBT. He does not, however, present any argument or authority in support of his position. We need not consider arguments broadly stated but not specifically argued. *See* ***Fritz v. McGrath,*** 146 Wis.2d 681, 686, 431 N.W.2d 751, 753 (Ct. App. 1988).