

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 21, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 99-1184-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

v.

LISA K. KRAUS,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Jefferson County:
WILLIAM F. HUE, Judge. *Reversed and cause remanded with directions.*

¶1 ROGGENSACK, J.¹ The State of Wisconsin appeals from a circuit court order suppressing the results of Lisa Kraus's chemical breath test. The State argues the circuit court erred in suppressing the results because the court incorrectly concluded that our decision in *County of Jefferson v. Renz*, 222

¹ This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

Wis.2d 424, 588 N.W.2d 267 (Ct. App. 1998), *review granted*, 222 Wis.2d 673, 589 N.W.2d 628 (Wis. Dec. 17, 1998) (No. 97-3512), articulated a new standard for evidence which may be used to establish probable cause to believe a driver is operating while intoxicated. Because we conclude that the circuit court did not correctly apply *Renz*, which clarified only the timing for a probable cause determination, and because the State has made a *prima facie* showing sufficient to establish that the officer had probable cause to believe Kraus was operating a vehicle while intoxicated before he requested a preliminary breath test (PBT), we reverse the circuit court's order and remand for further proceedings.

BACKGROUND

¶2 At approximately 1:00 a.m., Wayne Wallace, a Lake Mills police officer, observed a car with a headlight burnt out. Wallace, who was travelling in a marked squad car, activated the emergency lights in order to stop Kraus, who was driving. He followed her for three blocks before she finally stopped. While speaking with Kraus, Wallace smelled the odor of intoxicants on her breath, observed that her eyes were glassy, and noticed that she was slurring her words.

¶3 Wallace then asked Kraus to exit her vehicle. Initially, she attempted to get out of her vehicle while her seat belt was still fastened. Wallace also observed Kraus grab onto the door when she did exit her vehicle, in order to steady herself. Kraus told Wallace that she had had three drinks at a restaurant nearby.

¶4 Wallace administered field sobriety tests to Kraus. Prior to beginning the alphabet test, Wallace directed Kraus to stand with her feet together and her arms at her sides while he explained the test, and he asked her to stay in that position while she performed the test. Although Kraus correctly recited the

alphabet, Wallace noted that she did not stand with her feet together and she swayed back and forth while she recited, indicating poor balance.

¶5 Wallace next asked Kraus to perform the finger dexterity test. He again directed her to stand with her feet together and her arms at her sides, while he demonstrated the test. Instead of maintaining that position, Kraus immediately began trying to touch her nose with her finger. This was not the test that Wallace wanted Kraus to perform, and he instructed her to wait until he completed his instructions before she began. He asked her to touch the tip of each of her fingers to the tip of her thumb while counting. While Wallace was demonstrating the test, Kraus began to mimic the demonstration and again had to be instructed to wait until she was told to start.

¶6 During the instructions for the finger-to-nose test, Wallace again told Kraus to stand with her feet together with her arms at her sides, while he completed the instructions. However, Kraus began touching her nose. She was also instructed to start the test with her left hand, and instead she used her right. Kraus's left forefinger missed the tip of her nose and went underneath it to the upper lip area. On the next effort, Kraus touched her nose with the first knuckle of her finger, not with the fingertip, as Wallace requested.

¶7 When he began the balance test, Wallace again directed Kraus to stand with her feet together and her arms at her sides, while he explained the test. Kraus did not comply. Instead, she brought her arms up, perpendicular to her body. And finally, during the heel-to-toe test, Kraus raised her arms approximately eight to ten inches from her sides to balance herself. Wallace also had instructed Kraus not to stop during the test. However, Kraus walked heel-to-toe for the first ten steps and then she stopped and asked, "Ten steps back, right?"

On the second set of ten steps, Wallace observed a four-inch gap between the heel and toes on at least five of the ten steps.

¶8 Wallace testified that in addition to observing a driver's balance, one of the main purposes of the field sobriety tests is to observe how well a driver follows directions. After what Wallace determined to be the unsatisfactory completion of the field sobriety tests, he asked Kraus to submit to a PBT. Kraus complied and her PBT showed an alcohol concentration of 0.17. Wallace then arrested her for operating a motor vehicle while intoxicated. Subsequent to her arrest, a chemical test of her breath was done on an intoxilyzer, which showed an alcohol concentration of 0.15.

¶9 Kraus moved to suppress the results of the intoxilyzer, arguing that Wallace did not have probable cause to request the PBT, which led him to arrest her and obtain the intoxilyzer test. The court granted Kraus's motion, even though it concluded that there was sufficient evidence for a reasonable officer in Wallace's position to reasonably believe that Kraus was under the influence of an intoxicant, prior to administering the PBT. The circuit court reasoned that *Renz* had articulated a "new definition of probable cause." According to the circuit court, *Renz* required it to find a higher quantum of proof in determining whether probable cause to believe a suspect was driving while intoxicated existed. It further stated that such things as failure to follow directions and swaying were no longer appropriate factors to consider in determining probable cause. The court then concluded that because Kraus only "marginally failed" the dexterity tests, Wallace did not have probable cause to request a PBT and as a result, it suppressed the results of Kraus's chemical breath test taken after she was arrested. The State appeals.

DISCUSSION

Standard of Review.

¶10 When a suppression motion is reviewed, the circuit court's findings of historical fact will be sustained unless they are clearly erroneous. See *State v. Roberts*, 196 Wis.2d 445, 452, 538 N.W.2d 825, 828 (Ct. App. 1995). However, whether those facts establish probable cause to arrest is a question of law, which we review *de novo*. See *State v. Richardson*, 156 Wis.2d 128, 137-38, 456 N.W.2d 830, 833 (1990).

Probable Cause to Arrest.

¶11 In deciding whether probable cause exists, we look at whether the totality of the circumstances within the officer's knowledge at the time would lead a reasonable police officer to believe that the defendant was operating a motor vehicle while under the influence of an intoxicant. See *State v. Nordness*, 128 Wis.2d 15, 35, 381 N.W.2d 300, 308 (1986). This is a practical test, based on considerations of everyday life on which reasonable and prudent persons, "not legal technicians," act. See *State v. Drogsvold*, 104 Wis.2d 247, 254, 311 N.W.2d 243, 247 (Ct. App. 1981). The objective facts before a police officer need not prove guilt beyond a reasonable doubt; but rather, they are sufficient if they lead to the conclusion that a violation of the law is more than a mere possibility. See *Richardson*, 156 Wis.2d at 148, 456 N.W.2d at 838; *Renz*, 222 Wis.2d at 439, 588 N.W.2d at 275.

¶12 The circuit court's decision to suppress the results of the intoxilyzer was based solely of its belief that *Renz* precluded using the time worn tests for the quantum of evidence necessary to establish probable cause. In deciding to

suppress the results of the test, the court stated that after *Renz*, “judges are looking for impairment of coordination,” rather than other signs of intoxication such as an odor of alcohol on the driver’s breath, glassy eyes, swaying, and failure to follow directions. Additionally, the court acknowledged that if *Renz* did not create a new standard of probable cause, then it would conclude that, under the facts before it, there was probable cause to believe Kraus was operating a vehicle while intoxicated.

¶13 In *Renz*, 222 Wis.2d at 426-27, 588 N.W.2d at 270, we considered whether law enforcement must have probable cause to arrest before requesting a PBT. In deciding what standard was required by § 343.303, STATS., we first looked to the words of the statute. In doing so, we confirmed that the statute used the words, “probable cause,” rather than reasonable suspicion or any other standard. See *id.* at 438, 588 N.W.2d at 274. Additionally, we reasoned that because the legislature chose the lessor standard, “reason to believe,” as the necessary quantum of proof to require a PBT for commercial drivers, it was reasonable to conclude that the legislature was aware of other standards that it could have employed in § 343.303. See *id.* at 440, 588 N.W.2d at 275. Additionally, the legislative history of § 343.303, shows that the legislature had originally drafted other standards such as “reason to believe” and “reasonably suspects” when § 343.303 was first being considered, but it settled on “probable cause” as the appropriate standard in the final version. See *id.* at 441-42, 588 N.W.2d at 275-76. On these bases, we concluded that § 343.303, which describes the quantum of proof necessary before a PBT can be requested, did require probable cause to believe a statutory violation has occurred. See *id.* at 443, 588 N.W.2d at 276. In so doing, we clarified the timing, in relation to requesting a PBT, that a determination of probable cause must be made.

¶14 However, in *Renz*, we did not change the types of facts upon which an officer may rely. For example, we examined whether, under the specific facts before the circuit court, the law enforcement officer had probable cause to arrest Renz before he asked him to submit to a PBT. We concluded that the arresting officer did not provide enough testimony for a circuit court to conclude that Renz was intoxicated. *See id.* at 447, 588 N.W.2d at 278. For example, there was no evidence of slurred speech, glassy eyes, swaying or unsteadiness. Additionally, although the officer testified that Renz had some difficulty performing the one-legged stand test and the walk-and-turn test, he also stated that it was the combination of these two tests and the horizontal gaze nystagmus (HGN) test that formed the basis of his determination that there was probable cause to believe Renz was driving while intoxicated. *See id.* at 446, 588 N.W.2d at 278. He testified that it was “all three put together. It’s a battery of tests. The clues mean nothing if you don’t count them all.” *See id.* However, the circuit court had disallowed testimony regarding the HGN test. *See id.* at 430, 588 N.W.2d at 271. This left the officer with test results he could not equate with probable cause because, to him, unless he could consider all of the tests, his observations meant “nothing.” Thus, given the evidence that the court permitted the officer to use in *Renz*, his own testimony cast doubt upon the existence of probable cause.

¶15 The facts of this case differ markedly from the facts of *Renz*. Here, Wallace testified that he followed Kraus for approximately three blocks with his emergency lights activated before she finally stopped. Once stopped, he observed an odor of intoxicants on Kraus’s breath; her eyes were glassy; and she was slurring her words. Wallace also observed that Kraus tried to exit her vehicle with her seat belt fastened and that she had difficulty with her balance, causing her to hold onto the car door as she exited the vehicle. Problems with balance also

caused her to sway back and forth during several of the field sobriety tests. We have previously recognized that glassy eyes and poor balance are common indicators of intoxication. See *State v. Gaudesi*, 112 Wis.2d 213, 221, 332 N.W.2d 302, 305-06 (1983) (probable cause existed where a sheriff observed that a defendant's breath had an odor of alcohol, his eyes were red and glassy, and his balance was poor). Additionally, during the heel-to-toe test, Kraus had a four-inch gap between her heel and toe, as opposed to Renz's half-inch gap; and she continued to have these large gaps in five of ten steps. Further, she stopped during the heel-to-toe test after being instructed by Wallace not to do so. Finally, Kraus consistently and repeatedly failed to follow Wallace's instructions during the tests, even after repeated reminders from Wallace to listen to his instructions. These factors are sufficient to make a *prima facie* showing that there was probable cause to believe that Kraus was operating a vehicle while intoxicated.

¶16 Because the factors which may be used for determining probable cause remain the same—it's just the timing of the probable cause determination that may be different from what the circuit court was accustomed to using—and based on our independent review of the evidence, we conclude there was sufficient proof to support a probable cause determination before Wallace asked Kraus to perform the PBT. Therefore, we reverse the circuit court's order suppressing the results of the intoxilyzer test. However, it appears from the record that the defense may not have presented all of its arguments relating to the suppression motion, due to the circuit court's decision to suppress the results because of its reading of *Renz*. Therefore, we remand this cause to the circuit court to enable it to permit defense counsel to fully present its case, if it has not already done so.

CONCLUSION

¶17 *Renz* did not create a new standard of either the type of proof which is acceptable to sustain a determination of probable cause or a new quantum of proof requirement, but merely clarified the timing for a probable cause determination in relation to a request for a PBT. Therefore, we conclude that the State made a *prima facie* showing of probable cause to believe that Kraus was driving while intoxicated prior to Wallace's requesting the PBT, and we reverse the circuit court's order and remand for further proceedings.

By the Court.—Order reversed and cause remanded with directions.

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

