COURT OF APPEALS
DECISION
DATED AND FILED

September 7, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-0393-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

WADE T. JONES,

DEFENDANT-APPELLANT.

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

¶1 DEININGER, J.[1] Wade Jones appeals a judgment convicting him of operating a motor vehicle while under the influence of an intoxicant (OMVWI). He claims that the trial court erred in denying his motion to suppress evidence on

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c)(1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

the grounds that the deputy did not have probable cause to arrest him for OMVWI. He also contends that WIS. STAT. § 343.303 is unconstitutional as interpreted by the Wisconsin Supreme Court in ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 603 N.W.2d 541 (1999). We reject Jones's arguments and affirm the appealed judgment.

BACKGROUND

¶2 A Jefferson County sheriff's deputy was dispatched at 3:58 a.m. to the scene of a one-car accident. As the deputy arrived at the scene, Jones, holding a cell phone, flagged him down. The deputy observed that the road was "slippery, icy," but noted that no other accidents had occurred in that area. The deputy asked Jones what had happened, but Jones did not answer directly because he was preoccupied with the injured passenger. Jones did admit, however, that he had been driving the car. The deputy noted a strong odor of intoxicants on Jones and that he had bloodshot, glassy eyes and slurred speech. Jones subsequently admitted to drinking "a couple of beers" earlier that evening. Based on these observations, the deputy asked Jones to perform field sobriety tests.

¶3 The deputy administered the alphabet test, the one-legged stand test, the walk-and-turn test, and the finger-to-nose test. Although Jones had no problems with the one-legged stand test and the finger-to-nose test, his speech was slightly slurred during the alphabet test and he did not correctly perform the walk-and-turn test. The deputy then requested Jones to submit to a Preliminary Breath Test (PBT), which yielded a result of .13. The deputy then arrested Jones for OMVWI.

¶4 Jones moved to suppress the results of the subsequent blood test, asserting that the deputy, prior to obtaining the PBT result, did not have probable

cause to arrest him for OMVWI. The trial court denied defendant's motion, concluding that the deputy had probable cause to arrest Jones, even without the results of the PBT. Jones then pled guilty and now appeals the judgment convicting him of OMVWI.[2]

ANALYSIS

¶5 Jones's motion to suppress was based in part on this court's holding in ***County of Jefferson v. Renz***, 222 Wis. 2d 424, 426, 588 N.W.2d 267 (Ct. App. 1998), *rev'd,* 231 Wis. 2d 293, 603 N.W.2d 541 (1999). We held in ***Renz*** that a law enforcement officer must have probable cause to arrest an individual for OMVWI before asking him or her to submit to a PBT under WIS. STAT. § 343.303.[3] In reversing our decision, the supreme court explained that the legislature intended that probable cause to request a PBT is less than that required

[2] A defendant may appeal the denial of a motion to suppress evidence following a plea of guilty. *See* WIS. STAT. § 971.31(10).

[3] 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) … or a local ordinance in conformity therewith … 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) … or a local ordinance in conformity therewith … 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).

to arrest, but more than the "reasonable suspicion" necessary to justify an investigatory stop. *See* ***Renz***, 231 Wis. 2d at 317.

¶6 Jones contends that the supreme court's interpretation of WIS. STAT. § 343.303 is unconstitutional because the level of probable cause required for a warrantless search cannot constitutionally be lowered by legislative action. Thus, Jones is essentially asking this court to alter or overrule the supreme court's holding in ***Renz***. This we cannot do. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189, ¶51, 560 N.W.2d 246 (1997) ("The supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case."). Because we are bound by the supreme court's holding in ***Renz***, our duty is to apply it to the present facts. *See* ***State v. Thorstad***, 2000 WI App ___, ¶11, No. 99-1765-CR.

¶7 Whether undisputed facts constitute probable cause is a question of law which we review de novo. *See* ***State v. Babbitt***, 188 Wis. 2d 349, 356, 525 N.W.2d 102 (Ct. App. 1994). Thus, even though the trial court did not consider the results of the PBT in assessing whether the deputy had probable cause to arrest Jones for OMVWI, there is no bar to our doing so, provided the deputy's request was proper under ***Renz***. There can be no question that the deputy had probable cause to arrest Jones for OMVWI after obtaining the .13 PBT result from him, and Jones does not argue otherwise. *See* WIS. STAT. § 885.235(1g)(c) (an alcohol concentration of 0.1 or more is "prima facie evidence" that a person was under the influence of an intoxicant). Thus, we consider whether the deputy had probable cause under ***Renz*** to request Jones to submit to a PBT. If he did, our inquiry is at an end.

¶8 The facts in ***Renz*** are strikingly similar to those before us now. There, a Jefferson County sheriff's deputy pulled the defendant over at approximately 2 a.m. for a traffic violation. *See* ***id***. at 296, ¶3. During an initial conversation, the deputy noticed a strong odor of intoxicants emanating from the defendant's car. *See* ***id***., ¶4. He asked the defendant if he had been drinking, and the defendant admitted to consuming "three beers earlier in the evening." *See* ***id***., ¶5. The deputy then requested the defendant to perform a series of field sobriety tests to which the defendant consented. Defendant passed the alphabet test, but had some problems with the one-legged stand, the walk-and-turn and the finger-to-nose tests. *See* ***id***. at 297-98, ¶¶7-10. After these tests, the defendant consented to the deputy's request for a PBT. *See* ***id***. at 298, ¶12. Upon obtaining a PBT result of .18, the deputy arrested the defendant for OMVWI. *See* ***id***. at 298-99, ¶12. On these facts, the supreme court determined that the arresting officer in ***Renz*** had the requisite probable cause to request a PBT. *See* ***id***. at 317, ¶50.

¶9 As in ***Renz***, Jones's encounter with the deputy began in the early hours of the morning; the deputy immediately detected a strong odor of intoxicants; and he noted that Jones had bloodshot, glassy eyes and slurred speech. Like the defendant in ***Renz***, Jones performed some parts of his field sobriety testing adequately, but failed others. To this, we would add the fact that Jones had driven his car off the road and into a tree, albeit on a road that was described by the deputy as "slippery, icy." *Cf.* ***State v. Wille***, 185 Wis. 2d 673, 683-84, 518 N.W.2d 325 (Ct. App. 1994) (driving one's car into an object adjacent to the highway is a factor in assessing probable cause to arrest for OMVWI). The supreme court had little difficulty concluding that the deputy in ***Renz*** was justified in requesting a PBT. *See* ***Renz***, 231 Wis. 2d at 316-17, ¶50 ("The officer was faced with exactly the sort of situation in which a PBT proves extremely useful

…."). Accordingly, we similarly conclude here that the arresting deputy's observations prior to requesting a PBT also amounted to "a quantum of proof that is greater than the reasonable suspicion necessary to justify an investigative stop, and greater than the 'reason to believe' necessary to request a PBT from a commercial driver." *See* ***id***. at 317, ¶51.

¶10 Thus, the deputy was justified in requesting the PBT, even if he did not have probable cause to arrest Jones for OMVWI at the time of the request.[4] And, as we have noted, Jones does not dispute that once the deputy obtained the PBT result, he had probable cause to arrest Jones for OMVWI.

CONCLUSION

¶11 For the reasons discussed above, we conclude that the trial court did not err in denying Jones's motion to suppress.

By the Court.—Judgment affirmed.

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

[4] We note again that the trial court concluded that probable cause to arrest did exist at the time of the PBT request, but as we have discussed, under ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 603 N.W.2d 541 (1999), which was decided after the trial court had so ruled, it is not necessary for us to decide that question.