

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 23, 2001

Cornelia G. Clark
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 WIS. STAT. § 808.10 and RULE 809.62.

No. 00-2082-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS M. SLAWATYNYEC,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dunn County: WILLIAM C. STEWART, JR., Judge. *Affirmed.*

¶1 PETERSON, J.¹ Thomas Slawatyniec appeals his judgment of conviction for operating a motor vehicle while under the influence of an intoxicant, second offense, contrary to WIS. STAT. § 346.63(1)(a) and operating a

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

motor vehicle with a prohibited alcohol concentration, second offense, contrary to § 346.63(1)(b). Slawatyniec claims the arresting officer lacked probable cause to administer a preliminary breath test (PBT), and hence lacked probable cause to arrest him. As a result, he argues that the trial court erred by denying his motion to suppress the results of a blood test. We reject Slawatyniec's arguments and affirm the conviction.

BACKGROUND

¶2 At approximately 4:20 p.m. on August 31, 1999, Dunn County Sheriff's Deputy Scott McRoberts responded to a 911 emergency call from the Welsch residence regarding a disorientated man who was at the residence. The dispatch indicated that an ambulance was on the scene and that the man had been in an automobile accident. On his way to the Welsch residence, McRoberts checked the local roads for an accident but did not find one.

¶3 Upon arrival at the residence, McRoberts observed the man, later identified as Slawatyniec, lying on a cot with a cut on his left cheek. Slawatyniec was slurring his words and had a strong odor of intoxicants. Slawatyniec stated that he had been at Dean and Sue's Tavern earlier that day.

¶4 McRoberts was approached by Eugene Trask, a neighbor of the Welschs. Trask told McRoberts that he had arrived home and noticed a vehicle parked at his residence, but did not know why it was there. McRoberts then went with Trask to examine the vehicle, which did not appear to have sustained any damage. McRoberts felt the hood to determine whether it had been recently operated. The hood was "very warm."

¶5 Sheriff's Deputy Dennis Rhead was also investigating the incident. He went to Dean and Sue's Tavern and spoke with Michelle Rugland, a bartender. Rugland told Rhead that Slawatyniec had been at the tavern earlier that day. Rugland also stated that Slawatyniec left the tavern and drove away at approximately 3:30 p.m. Rhead relayed the information to McRoberts.

¶6 At approximately 5:40 p.m., McRoberts went to the hospital, where Slawatyniec had been taken. Slawatyniec told McRoberts that he driven to the Trask residence to visit. He discovered no one was home. While walking around outside, he fell down a hill. About fifteen to twenty minutes had passed between the time he parked his vehicle and when he fell down the hill. Slawatyniec then went to the Welsch residence. Slawatyniec stated that he had not had anything to drink since parking the vehicle but he had consumed ten to twelve beers that day.

¶7 Again, McRoberts noticed that Slawatyniec had a very strong odor of alcohol coming from him, his eyes were "glossy," and his speech was slurred. McRoberts administered a preliminary breath test (PBT). The result indicated a blood alcohol content of .21%. Slawatyniec was arrested and charged with operating a motor vehicle while under the influence of an intoxicant, second offense. A blood sample was taken. The test revealed a blood alcohol content of .198%.

¶8 Slawatyniec moved the trial court to suppress the blood test. He argued that McRoberts did not have probable cause to arrest him because McRoberts did not have probable cause to administer the PBT. The trial court denied the motion. A jury subsequently found Slawatyniec guilty. This appeal followed.

STANDARD OF REVIEW

¶9 When we review a trial court’s denial of a suppression motion, “we will uphold the trial court’s findings of fact unless they are against the great weight and clear preponderance of the evidence.” *State v. Andrews*, 201 Wis. 2d 383, 388, 549 N.W.2d 210 (1996). However, whether the facts satisfy constitutional guarantees is a question of law we review independently. *Id.* at 389.

BACKGROUND

¶10 The sole issue on appeal is whether McRoberts had probable cause to administer the PBT. We conclude that he did.

¶11 In *County of Jefferson v. Renz*, 231 Wis. 2d 293, 317 ¶¶51, 603 N.W.2d 541 (1999), our supreme court held that the probable cause necessary to administer a PBT is less than the probable cause required to arrest, but more than the “reasonable suspicion” necessary to justify an investigatory stop.

¶12 Slawatyniec argues that McRoberts lacked probable cause to administer the PBT because he had not determined over what period of time Slawatyniec was drinking and because no one had actually seen him drive while he was impaired. In addition, Slawatyniec argues that his reference to an accident was to his falling down the hill, not an automobile accident.

¶13 Regardless of whether Slawatyniec was referring to an automobile accident or to falling down the hill, McRoberts had multiple reasons to believe Slawatyniec had operated a motor vehicle under the influence. As to operating, Slawatyniec admitted driving to the Welsch residence and parking his car. In addition, Rugland told Rhead that Slawatyniec left the bar and drove away at approximately 3:30 p.m. McRoberts had been dispatched to the Welsch residence

at approximately 4:20 p.m., indicating that Slawatyniec had been operating the vehicle within the preceding fifty minutes.

¶14 As to being under the influence while he operated the vehicle, McRoberts reported a strong odor of intoxicants coming from Slawatyniec, “glossy” eyes and slurred speech. Slawatyniec admitted to drinking and driving. He also admitted to not drinking after he parked his car.

¶15 In this case, the indicators of intoxication observed by McRoberts support probable cause to believe Slawatyniec was operating while under the influence. Once that threshold was reached, McRoberts was justified in administering the PBT. When the PBT results were known, McRoberts had probable cause to arrest for operating a motor vehicle while under the influence of an intoxicant.²

By the Court.—Judgment and order affirmed.

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

² The State does not argue that probable cause existed to arrest Slawatyniec even without the results of the PBT.

