

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 9, 2009

David R. Schanker
Clerk of Court of Appeals

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.

Appeal No. 2008AP2539

Cir. Ct. No. 2007CV4080

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN THE MATTER OF THE REFUSAL OF JESSICA A. SCHROEDER:

CITY OF MIDDLETON,

PLAINTIFF-RESPONDENT,

v.

JESSICA A. SCHROEDER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County:
DANIEL R. MOESER, Judge. *Affirmed.*

¶1 HIGGINBOTHAM, P.J.¹ Jessica A. Schroeder appeals an order revoking her operating privileges for refusing to submit to a chemical breath test requested pursuant to WIS. STAT. § 343.305(2007-08).² She argues that the circuit court erred in concluding that the arresting officer had probable cause to believe that she had operated a motor vehicle while under the influence of alcohol. She further argues that the court erred in finding that she failed to prove by a preponderance of the evidence that her refusal to submit a breath sample was due to a physical disability or disease. We affirm.

BACKGROUND

¶2 The following facts are unchallenged on appeal. At about 3:00 a.m. on January 31, 2007, Middleton Police Officer Matthew Sherry was dispatched to a vehicle that had spun off of U.S. Highway 12 into the median. The officer discovered upon arrival that the vehicle was abandoned. He determined that the

¹ This appeal is decided by one judge pursuant to WIS. STAT. 752.31(2)(d) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

² WISCONSIN STAT. § 343.305(3)(a) provides, in relevant part:

[u]pon arrest of a person for violation of s. 346.63(1) ... or a local ordinance in conformity therewith ... a law enforcement officer may request the person to provide one or more samples of his or her breath ... for the purpose specified under sub. (2). Compliance with a request for one type of sample does not bar a subsequent request for a different type of sample.

WISCONSIN STAT. § 343.305(2) provides, in relevant part:

[a]ny person who ... operates a motor vehicle upon the public highways of this state ... is deemed to have given consent to one or more tests of his or her breath, ... for the purpose of determining the presence or quantity in his or her ... breath, of alcohol

road was dry, free of debris and not icy. He estimated that the vehicle was approximately 25 feet from the road, and had traveled approximately 100-120 yards off-road. The officer determined that, after running off the road, the vehicle had hit a steel culvert grate, which caused the vehicle to go airborne for 20-25 feet before coming to a rest.³ He observed that the vehicle was locked and there were footprints from the vehicle towards the westbound lanes of the highway.

¶3 A records check indicated the vehicle was registered to Sharon A. Schroeder. The dispatcher at the station contacted Schroeder's sister who confirmed Jessica Schroeder was the driver. She stated that the accident occurred at approximately 1:30 a.m. and that Schroeder was currently sleeping. This information was conveyed to the officer.

¶4 Shortly thereafter, the officer arrived at Schroeder's residence and spoke with her. She admitted to being the driver of the vehicle and stated that the car slid on ice and ended up in the median. According to the officer, Schroeder reported that she did not consume any alcoholic beverages that night, either before or after the accident.⁴

¶5 The officer observed that Schroeder had glassy and "somewhat bloodshot" eyes and detected a moderate odor of intoxicants. He requested that she perform field sobriety tests on the front porch and sidewalk in front of the

³ Schroeder testified that the rear passenger tire was still on the shoulder, just off the road.

⁴ At the refusal hearing, Schroeder testified that she drank three shots of raspberry vodka after she got home from the accident. She also testified that Officer Sherry never asked her about consuming alcohol after the accident. However, Schroeder does not challenge the circuit court's factual findings with regard to the probable cause determination.

house. She agreed and, based on the results, the officer concluded that Schroeder was impaired. He asked Schroeder to take a preliminary breath test (PBT). She refused and declared that she had not been drinking.

¶6 The officer arrested Schroeder for operating a motor vehicle while under the influence of an intoxicant (OWI) contrary to WIS. STAT. § 346.63⁵ and transported her to the Middleton Police Station. At the station, Schroeder refused a second request to provide a breath sample. The officer issued Schroeder citations for failing to control her vehicle, failing to notify police about her accident and for OWI. Additional facts are provided in the discussion section as required.

¶7 This case was first heard in municipal court, which found Schroeder not guilty of failing to keep her vehicle under control and of failing to notify police about her accident, but guilty of OWI. Schroeder requested a refusal hearing before the circuit court. Following the refusal hearing, the circuit court found that the officer had probable cause to arrest Schroeder for OWI, and determined that Schroeder's refusal was unreasonable. Schroeder appeals.

DISCUSSION

¶8 This case presents two issues. The first is whether there was probable cause to arrest Schroeder for OWI. The second issue is whether

⁵ WISCONSIN STAT. § 346.63(1)(a) provides, in relevant part that “[n]o person may drive or operate a motor vehicle while [u]nder the influence of an intoxicant ... to a degree which renders him or her incapable of safely driving”

Schroeder's refusal to submit to a breath test at the police station was unreasonable. We address each issue in turn.

Probable Cause to Arrest

¶9 In reviewing a circuit court's determination of probable cause, we do not disturb the circuit court's findings of fact unless they are clearly erroneous. *See County of Jefferson v. Renz*, 231 Wis. 2d 293, 316, 603 N.W.2d 541 (1999). The application of constitutional principles to the historical facts is a question of law subject to de novo review. *State v. Popke*, 2009 WI 37, ¶10, ___ Wis. 2d ___, 765 N.W.2d 569. Schroeder does not challenge the circuit court's findings of fact; he argues only that the court erred in concluding that the facts as found satisfied the probable cause standard.

¶10 Probable cause to arrest for OWI is that quantum of evidence "within the arresting officer's knowledge at the time of the arrest that would lead a reasonable law enforcement officer to believe that the defendant was operating a motor vehicle while under the influence of an intoxicant." *State v. Lang*, 2009 WI 49, ¶19, No. 2008AP882; *see also State v. Nordness*, 128 Wis. 2d 15, 35, 381 N.W.2d 300 (1986). The determination of probable cause is measured by the totality of the circumstances and is assessed on a case-by-case basis. *Lang*, 2009 WI 49, ¶20.

¶11 At a refusal hearing held under WIS. STAT. § 343.305(9),⁶ the State has the burden of showing probable cause to arrest. *See Nordness*, 128 Wis. 2d at

⁶ WISCONSIN STAT. § 343.305(9)(a)5.a. provides, in relevant part:

[t]he issues of the hearing ... [include] [w]hether the officer had probable cause to believe the person was driving or operating a

(continued)

35. “The State’s burden of persuasion at a refusal hearing is substantially less than at a suppression hearing.” *State v. Wille*, 185 Wis. 2d 673, 681, 518 N.W.2d 325 (Ct. App. 1994). The State “need only show that the officer’s account is plausible, and the court will not weigh the evidence for and against probable cause or determine the credibility of the witnesses.” *Id.*

¶12 The defendant’s refusal to submit to a PBT, while not sufficient to give probable cause to make an arrest, may nonetheless indicate consciousness of guilt and, therefore, may be a relevant factor in a probable cause determination. *See State v. Babbitt*, 188 Wis. 2d 349, 359-60, 525 N.W.2d 102 (Ct. App. 1994).

¶13 Schroeder argues that the officer lacked probable cause to believe she operated a motor vehicle while under the influence of alcohol because he did not observe her operating the motor vehicle, she denied drinking any alcohol before operating the motor vehicle, he did not observe the accident as it occurred and he did not contemporaneously observe Schroeder’s conduct to determine her physical abilities or mental acuity at the time she operated the motor vehicle. Schroeder contends that, in short, the officer had no independent knowledge or information regarding whether Schroeder had any alcohol in her system at the time of the accident, and therefore lacked probable cause to believe she was operating a motor vehicle while under the influence of an intoxicant.

motor vehicle while under the influence of alcohol ... which renders the person incapable of safely driving, having a restricted controlled substance in his or her blood, or having a prohibited alcohol concentration ... and whether the person was lawfully placed under arrest

¶14 We conclude that the totality of the circumstances within the officer's knowledge at the time of the arrest would lead a reasonable officer to believe that Schroeder was under the influence of an intoxicant while operating her motor vehicle. We base this conclusion on the following facts found by the circuit court and the undisputed facts of record.

¶15 Schroeder was the driver in a single-car accident that occurred around bar time. Her vehicle did not simply go into the highway median, as Schroeder explains it. Her vehicle had veered off the highway, was driven 100 to 120 feet off-road, hit a steel culvert and became airborne for 20 to 25 feet before coming to a rest 25 feet from the side of the road. Schroeder did not stay with the vehicle after the accident and did not report the accident to the police or call for a tow truck for over an hour after the accident, facts from which a reasonable officer could infer that Schroeder was trying to avoid detection of being under the influence of an intoxicant.

¶16 Schroeder told the officer the road was icy, which caused her vehicle to slide off the road into the median. However, the officer observed that the road surface was dry, free of debris and not icy. Based on this conflicting information, a reasonable officer could believe that Schroeder was attempting to cover up the fact that she was operating her vehicle while under the influence of an intoxicant.

¶17 Moreover, upon contacting Schroeder, the officer observed that Schroeder's eyes were glassy and bloodshot. He also detected a moderate odor of alcohol emanating from Schroeder despite her reported denial that she had been drinking before or after the accident. Schroeder failed most of the field sobriety tests. She also refused the officer's request to submit to a PBT, which a reasonable officer could view as further evidence of consciousness of guilt. Taken

together, these facts, and the reasonable inferences drawn from them, are sufficient to support a reasonable officer's belief that Schroeder had operated a motor vehicle while under the influence of alcohol.

¶18 Under these circumstances, the fact that the officer did not observe Schroeder operating her motor vehicle does not diminish the significance of the facts observed or known by the officer at the time of arrest that supported probable cause. Contemporaneous observation of an accused operating her motor vehicle is not required in all cases for an officer to have probable cause to arrest for OWI. *See State v. Kasian*, 207 Wis. 2d 611, 621-22, 558 N.W.2d 687 (Ct. App. 1996) (officer had probable cause to arrest for OWI upon finding an injured person smelling strongly of intoxicants lying outside of a van that had struck a telephone pole, and observing slurred speech later at hospital).

¶19 Schroeder contends the officer lacked probable cause because she denied drinking any alcohol prior to the accident and had no independent basis for determining that she had operated her vehicle while under the influence of an intoxicant.⁷ The problem with this argument is that the officer testified that she told him she did not consume any alcohol *after* the accident, which is belied by the officer's observations of an odor of alcohol emanating from Schroeder and of her glassy bloodshot eyes, as well as Schroeder's poor performance on the field sobriety tests. Based on these observations, a reasonable officer could reject Schroeder's assertion that she had not consumed alcohol prior to the accident and

⁷ In an undeveloped argument, Schroeder appears to suggest that the sleeping medicine she took after returning home from the auto accident, Lamictal, affected her motor skills. To the extent that she is arguing that the Lamictal affected her performance on the field sobriety tests, we do not consider this argument because it is not fully developed. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

draw the reasonable inference that Schroeder was under the influence of an intoxicant at the time of the accident.

¶20 Schroeder maintains that the officer's testimony regarding the field sobriety tests was inconsistent. At first the officer testified that Schroeder passed the tests, and then corrected himself by saying she had failed the tests. We disagree that the officer's testimony was inconsistent. The officer was obviously clarifying his testimony regarding Schroeder's performance on the field sobriety tests. In any event, the officer's incident report supports the officer's testimony that Schroeder had failed the tests.

Refusal to Take the Breath Test

¶21 Under WIS. STAT. § 343.305(9)(a)5.c.,⁸ a “person shall not be considered to have refused [a chemical] test if it is shown by a preponderance of evidence [at the refusal hearing] that the refusal was due to a physical inability to submit to the test due to a physical disability or disease unrelated to the use of alcohol” See *Village of Elkhart Lake v. Borzyskowski*, 123 Wis. 2d 185, 191, 366 N.W.2d 506 (Ct. App. 1985). Schroeder contends that she satisfied this test in establishing that her refusal to submit to the breath test was due to her asthma. We disagree.

⁸ WISCONSIN STAT. § 343.305(9)(a)5.c. provides:

Whether the person refused to permit the test. The person shall not be considered to have refused the test if it is shown by a preponderance of evidence that the refusal was due to a physical inability to submit to the test due to a physical disability or disease unrelated to the use of alcohol, controlled substances, controlled substance analogs or other drugs.

¶22 The circuit court’s determination that Schroeder failed to meet her burden of establishing that she was physically unable, due to a disease or disability, to provide a sample of her breath is a question of fact, which we will not disturb unless it is clearly erroneous. See WIS. STAT. § 805.17(2); *Noll v. Dimiceli's, Inc.*, 115 Wis. 2d 641, 643, 340 N.W.2d 575 (Ct. App. 1983). In determining that Schroeder’s refusal to submit to a breath test was unreasonable, the court relied primarily on its assessment of witness credibility and weight of the evidence calculations. It is for the trier of fact, and not this court, to assess witness credibility. *Rohl v. State*, 65 Wis. 2d 683, 695, 223 N.W.2d 567 (1974).

¶23 We conclude that the court’s finding that Schroeder failed to meet her burden is supported by the record and is not clearly erroneous. The record does not indicate that Schroeder was experiencing asthma-like symptoms at the time of the refusal. The officer did not report that Schroeder exhibited shortness of breath. Schroeder did not tell the officer that she was unable to provide a breath sample because she was suffering from asthma-like symptoms. The medical records produced by Schroeder at the hearing call into question her claims of suffering from asthma. At her last appointment prior to the accident, her doctor wrote that he “reassured Ms. Schroeder that she appeared to have no underlying allergic disease, nor ... appear to have obvious asthma.” Finally, Schroeder’s own testimony fails to prove her case. At the refusal hearing, Schroeder testified that she was upset at points during the investigation, and that her asthma gets worse when she is upset. However, she did not testify that asthma was the reason for her refusal. Rather, she testified that the refusal was the result of having been taught to say nothing to police without a lawyer being present.

CONCLUSION

¶24 We conclude the circuit court properly determined that the officer had probable cause to arrest Schroeder for OWI and correctly found that Schroeder's refusal to submit to a chemical breath test under WIS. STAT. § 343.305(9)(a)5.c. was not based on a physical inability to take the test due to a physical disability or disease unrelated to the use of alcohol. We therefore affirm.

By the Court.—Order affirmed.

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

