

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 11, 2014

Diane M. Fremgen
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. 2013AP1606-CR

Cir. Ct. No. 2012CT2011

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

v.

ROSS TIMOTHY LITKE,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County:
CAROLINA STARK, Judge. *Reversed and cause remanded for further
proceedings.*

¶1 CURLEY, P.J.¹ This appeal concerns the outcome of a hearing at which the respondent, Ross Timothy Litke, argued that there was no probable

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

cause to support a police officer's decision to administer a preliminary breath test, pursuant to WIS. STAT. § 343.303, in order to determine whether there was probable cause to arrest him for operating a motor vehicle while under the influence of an intoxicant, contrary to WIS. STAT. § 346.63(1)(a). Following this hearing, the trial court determined that the police officer who administered the preliminary breath test did not have probable cause to do so. The State of Wisconsin appeals that decision, arguing that the trial court erred in refusing to consider the evidence of intoxication from the officer's administration of the Horizontal Gaze Nystagmus (HGN) test and that there was probable cause to administer the preliminary breath test if the evidence from the HGN is considered. In the alternative, the State argues that there was probable cause to administer the preliminary breath test even without the evidence from the HGN test. The State also argues that because there was probable cause to administer the preliminary breath test, the test results were admissible to show probable cause to arrest pursuant to § 343.303 and there was probable cause to arrest Litke for operating while intoxicated.

¶2 This court agrees with the State and concludes that even without the evidence from the HGN test there was probable cause to administer the preliminary breath test. This court further concludes that because there was probable cause to administer the preliminary breath test, the test results were admissible to show that there was probable cause to arrest Litke for operating while intoxicated, and that, under the totality of the circumstances, there was probable cause to arrest him. Consequently, the trial court's decision is reversed and the case is remanded for further proceedings.

BACKGROUND

¶3 At about 11:30 p.m. on Friday, July 13, 2012, Village of Brown Deer Police Officer Jill Zeise observed a car coming towards her squad without its headlights on. Officer Zeise stopped the car. Once the car had pulled over to the side of the road, Officer Zeise approached the driver, Litke, and explained why she had stopped him.

¶4 When Officer Zeise told Litke that the headlights on the car were not illuminated, Litke responded, “oh, I don’t have my lights on?” According to Officer Zeise, Litke responded “in a question as if he didn’t realize that he didn’t have his headlights on.” Litke then explained that the car was not his, at which point the person in the passenger seat leaned over and said that the car belonged to him, not to Litke.

¶5 Officer Zeise observed that Litke was slurring his words slightly, and that he would not look at her. When she asked him why he was not looking at her, Litke responded that he was nervous. Litke then turned toward Officer Zeise, and Zeise noticed that Litke’s eyes were bloodshot and glassy. Officer Zeise asked Litke if he had consumed any alcohol that evening. Litke responded that he had “had a few” beers three hours earlier.

¶6 Officer Zeise asked Litke to exit the vehicle and they continued to talk. She observed that Litke’s speech was still slightly slurred. Officer Zeise also smelled the strong odor of vinegar—which she learned was from chicken wings that Litke and his friend had just purchased—and cigarette smoke, but did not detect the odor of alcohol.

¶7 Officer Zeise administered three field sobriety tests and observed clues that, based upon her training and years of experience, indicated that Litke was intoxicated. First, Officer Zeise administered the Horizontal Gaze Nystagmus (HGN) test, during which she observed six clues of intoxication. According to Zeise, based upon the six observed clues there was a high probability that Litke was intoxicated at a blood-alcohol level of .10 or higher. Second, Officer Zeise conducted the Walk and Turn Test, during which she observed no clues. Third, Officer Zeise conducted the One-Leg-Stand test, during which Zeise observed two clues: Litke raised his arms more than six inches from his sides to keep his balance, and he “hopped on one occasion.”

¶8 At this point, Officer Zeise, believing that she had probable cause to believe that Litke was intoxicated, requested that Litke provide a breath sample into a preliminary breath test (also known as a “PBT”) device. Litke blew into the instrument, which measured his alcohol/breath concentration at .149. Officer Zeise consequently arrested Litke, and he was charged with operating a motor vehicle while under the influence (OWI) as a third offense.

¶9 Litke pled not guilty and filed a motion, which he later amended, to suppress the results of the preliminary breath test, alleging that there was no probable cause for Officer Zeise to administer the test and arguing that without the test results there was no probable cause to arrest him. Litke also filed a motion *in limine* to exclude any evidence obtained from Officer Zeise’s administration of the HGN test on the basis that it was inadmissible under WIS. STAT. § 907.02(1).

¶10 Following a hearing, at which Officer Zeise testified, and the court’s review of a DVD recording the traffic stop, the trial court granted Litke’s motions. Specifically, the trial court decided not to consider any evidence deriving from the

HGN test on the basis that the State did not present sufficient evidence “to establish the reliability of the HGN, the science or methods underlying that particular test.” Additionally, the trial court determined that, given the remaining evidence it considered, there was no probable cause for Officer Zeise to administer the preliminary breath test and that the results of the test would therefore be inadmissible to show probable cause to arrest him.

¶11 The trial court’s determination that there was no probable cause to support the administration of the preliminary breath test relied upon a number of findings:

- Officer Zeise observed a car driven by Litke at approximately 11:30 p.m. without the required illuminated headlights.
- There was another passenger in the car driven by Litke who said that he, not Litke, owned the car.
- Litke did not look at Officer Zeise, explaining that he was nervous.
- Officer Zeise observed that Litke’s eyes were bloodshot and glassy.
- Litke admitted consuming a couple of drinks earlier in the evening: first, at a fish fry about three to four hours before the stop; and more recently, while at a bowling alley a couple of blocks from the stop.
- Officer Zeise smelled a strong odor of cigarettes and vinegar but did not detect any odor of alcohol.
- Litke did not demonstrate any balance problems when exiting the auto nor during the administration of the HGN test.

- Litke did not demonstrate any clues of intoxication during the Walk-and-Turn test.
- Litke, in performing the One-Leg-Stand test, did slightly wobble without putting a foot down and did raise his arms from his side, moving them slightly.
- Litke answered all questions and followed all of the officer's instructions.

¶12 After the trial court made these findings and determined that there was no probable cause to administer the preliminary breath test, the court went on to emphasize a number of details it found persuasive in forming its decision, some of which came from the court's viewing of the DVD.² The trial court first emphasized the fact that Litke said the car was not his, and that the passenger "confirmed" this fact. The court next reiterated that Officer Zeise had not noticed any "bad driving" such as swerving or speeding. The court also noted that Litke's speech was not "significantly slurred," and that he did not show any balance problems during the time between the tests. The trial court also stated that it found Litke to have performed the One-Leg-Stand test "pretty well," although the court did acknowledge that Litke did "wobble" slightly and did raise his arms.

¶13 The State now appeals the trial court's decision. Additional facts will be developed as necessary.

² The State does not challenge the trial court's findings on appeal. Consequently, this court accepts them as true in its analysis below and the DVD in the record was not reviewed by this court.

ANALYSIS

¶14 The State makes two arguments regarding the preliminary breath test on appeal. The State first argues that the trial court erred in refusing to consider the evidence of intoxication from Officer Zeise's administration of the HGN test, and that, if the evidence from the HGN is considered, there was probable cause to administer the preliminary breath test. In the alternative, the State argues that even without the evidence from the HGN test, there was probable cause to administer the preliminary breath test. The State also argues that because there was probable cause to administer the preliminary breath test, the test results were admissible and there was consequently probable cause to arrest Litke.

¶15 Whether Officer Zeise had probable cause to give Litke a preliminary breath test is a legal issue that this court decides *de novo*, accepting the trial 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 question before the court is governed by WIS. STAT. § 343.303, which provides, as material here:

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 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).... 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....

Under this section, an officer need not have probable cause to arrest a driver for operating while intoxicated before giving that driver a preliminary breath test. *See State v. Felton*, 2012 WI App 114, ¶8, 344 Wis. 2d 483, 824 N.W.2d 871. “Rather, the statute’s phrase ‘probable cause to believe’ refers to a quantum of proof greater than the reasonable suspicion necessary to justify an investigative stop ... but less than the level of proof required to establish probable cause for arrest.” *Id.* (citation and one set of quotation marks omitted; ellipsis in *Felton*). In other words, “[a]n officer may request a PBT to help determine whether there is probable cause to arrest a driver suspected of OWI, and the PBT result will be admissible to show probable cause for an arrest, if the arrest is challenged.” *See Renz*, 231 Wis. 2d at 316.

¶16 “In determining whether probable cause exists, this court applies an objective standard.” *State v. Kutz*, 2003 WI App 205, ¶12, 267 Wis. 2d 531, 671 N.W.2d 660. “Probable cause is a flexible, common-sense measure of the plausibility of particular conclusions about human behavior.” *Felton*, 344 Wis. 2d 483, ¶9 (citation and two sets of quotation marks omitted). “The question of probable cause must be assessed on a case-by-case basis, looking at the totality of the circumstances.” *State v. Lange*, 2009 WI 49, ¶20, 317 Wis. 2d 383, 766 N.W.2d 551. The court must consider the information available to the officer from the standpoint of one versed in law enforcement, and must take the officer’s training and experience into account. *Kutz*, 267 Wis. 2d 531, ¶12. “When a police officer is confronted with two reasonable competing inferences, one justifying arrest and the other not, the officer is entitled to rely on the reasonable inference justifying arrest.” *Id.*

¶17 This court concludes that Officer Zeise had the requisite probable cause even if the evidence resulting from the HGN test is disregarded; therefore it

need not consider whether the results of the HGN test were properly considered. *See Felton*, 344 Wis. 2d 483, ¶4; *State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (cases should be decided on “narrowest possible ground”). Several facts found by the trial court support this conclusion. First, Officer Zeise observed Litke driving a car late on a Friday night without the required illuminated headlights. Second, Litke did not initially look at Officer Zeise, and when he finally did so, his eyes were bloodshot and glassy. Third, Litke admitted to consuming alcohol at a fish fry about several hours before the stop and again while at a bowling alley. Fourth, Litke, in performing the One-Leg-Stand test, wobbled slightly and raised his arms from his side in order to keep his balance. When analyzed in the context of the entire record—including the evidence not supporting probable cause—and Officer Zeise’s years of experience, including the fact that she had completed more than 1200 traffic stops and had conducted between forty and fifty field sobriety tests, *see Kutz*, 267 Wis. 2d 531, ¶12, the aforementioned facts show that Officer Zeise had probable cause to administer a preliminary breath test.

¶18 Moreover, the fact that certain factors may not have supported probable cause in these circumstances does not, as Litke argues and as the trial court wrongly determined, “subtract from the common-sense view that [Litke] may have had a blood-alcohol level that violated WIS. STAT. § 346.63(1)[] any more than innocent behavior automatically negates ... probable cause.” *See Felton*, 344 Wis. 2d 483, ¶10. For example, the trial court emphasized the fact that Litke and his friend both claimed that the car did not belong to Litke. The trial court also emphasized the sobriety tests in which Litke performed well, and also noted that Litke did not appear to have any balance problems between tests. It appears from this Court’s review of the record that the trial court did not simply

determine whether Officer Zeise had the requisite facts before her that would support probable cause, *see id.*, ¶9, but instead substituted its judgment for the officer's. This is not the correct standard.

¶19 Furthermore, this court is not convinced by Litke's argument on appeal that there was no probable cause because certain facts surrounding his arrest differ from other cases in which courts have found probable cause. Litke argues that the facts in his case are far less indicative of probable cause than those of either *Felton* or *Renz*. In *Felton*, this court determined there was probable cause to administer a preliminary breath test when the defendant's eyes were glassy and bloodshot, he smelled of alcohol, he admitted to drinking, he had stayed too long at one stop sign and then blown through another, and had prior convictions for operating while intoxicated—even though the defendant also “successfully completed all of the properly administered field-sobriety tests.” *See id.*, 344 Wis. 2d 483, ¶¶9-10. In *Renz*, the supreme court determined there was probable cause when the defendant's car smelled strongly of alcohol, the defendant admitted to drinking three beers earlier in the evening and exhibited several clues supporting intoxication during field sobriety tests but was still able to “substantially complete all of the tests” and did not exhibit slurred speech. *See id.*, 231 Wis. 2d at 316-17. While the facts of these cases differ slightly from the facts now before this court, the similarities are more striking than the differences. *See also Lange*, 317 Wis. 2d 383, ¶20 (this court analyzes the totality of the circumstances). Indeed, as the supreme court noted in *Renz*, when some factors point to probable cause and others do not, an officer faces “exactly the sort of situation in which a PBT proves extremely useful in determining whether there is probable cause for an OWI arrest.” *See id.*, 231 Wis. 2d at 316-17.

¶20 In sum, given the facts found by the trial court, Officer Zeise had probable cause to give Litke a preliminary breath test even if the results of the HGN test are not considered. Because there was probable cause to administer the PBT, the results of that test were admissible to show probable cause to arrest Litke; additionally, there was—given the totality of the circumstances—probable cause to arrest him. Therefore, the trial court’s decision finding no probable cause to administer the PBT and finding no probable cause to arrest must be reversed.

By the Court.—Order reversed and cause remanded for further proceedings.

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

