

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 7, 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. 2013AP2521

Cir. Ct. No. 2013CV227

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

VILLAGE OF GRAFTON,

PLAINTIFF-RESPONDENT,

V.

CARL J. SCHLEGEL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Ozaukee County:
JOSEPH W. VOILAND, Judge. *Affirmed.*

¶1 REILLY, J.¹ Carl Schlegel appeals his conviction for operating a motor vehicle while under the influence of an intoxicant (OWI), arguing that the

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

arresting officer did not have probable cause to have him submit to a preliminary breath test (PBT) or arrest him. We disagree and affirm.

BACKGROUND

¶2 Village of Grafton Police Officer Jarrod Ray was dispatched to a car accident at 1:39 a.m. on January 8, 2012. When he arrived at the location, he observed a car that had come to rest about 120 feet from the roadway in a field. Ray drove out to the smoking, heavily damaged vehicle and attempted to speak to the driver, later identified as Schlegel. Schlegel's answers were largely "incomplete or incoherent," and Ray noticed that Schlegel's speech was slurred and that his eyes were glassy and bloodshot. Ray smelled intoxicants on Schlegel's breath.

¶3 Concerned for Schlegel's safety, Ray removed Schlegel from his vehicle and laid him on his back about twenty to thirty feet from the smoking car. Schlegel admitted he had been drinking. Ray did not ask Schlegel to perform field sobriety tests, given Schlegel's possible injuries, but did ask Schlegel to submit to a PBT. The PBT indicated that Schlegel was above the legal limit, and Ray placed Schlegel under arrest for OWI.

¶4 Schlegel moved to suppress the results of the PBT and any evidence gained subsequent to his arrest on the ground that police did not have the requisite suspicion to ask him to submit to the PBT. The circuit court concluded there were more than sufficient facts to justify the request for the PBT and denied Schlegel's

motion. Schlegel was subsequently found guilty in a trial to the court.² Schlegel appeals.

STANDARD OF REVIEW

¶5 When reviewing a circuit court’s determination of whether an officer had the requisite probable cause to request a PBT, we uphold the court’s findings of fact unless clearly erroneous. *County of Jefferson v. Renz*, 231 Wis. 2d 293, 316, 603 N.W.2d 541 (1999). “Whether those facts satisfy the statutory standard of probable cause is a question of law we review de novo.” *Id.*

DISCUSSION

¶6 Schlegel argues that absent his failure on field sobriety tests, police did not have probable cause to administer a PBT and, without the PBT, did not have probable cause to arrest him. Schlegel concedes that field sobriety tests are not necessary to establish probable cause to arrest and, therefore, “clearly should not be required to meet the lower level of proof necessary to request a PBT.” He argues, however, that without having him perform field sobriety tests, the police did not have probable cause to meet the lower standard of proof necessary for a PBT—i.e., “probable cause to believe” he had driven while intoxicated. WIS. STAT. § 343.303. We disagree.

¶7 “The question of probable cause must be assessed on a case-by-case-basis, looking at the totality of the circumstances. Probable cause is a ‘flexible, common-sense measure of the plausibility of particular conclusions about human

² The Honorable Neal P. Nettesheim presided over the suppression hearing. The Honorable Joseph W. Voiland presided over trial and entered the judgment of conviction.

behavior.”” *State v. Felton*, 2012 WI App 114, ¶9, 344 Wis. 2d 483, 824 N.W.2d 871 (quoted source omitted). The probable cause necessary for a PBT requires “a quantum of proof greater than the reasonable suspicion necessary to justify an investigatory stop ... but less than the level of proof required to establish probable cause for arrest.” *Renz*, 231 Wis. 2d at 316.

¶8 Schlegel drove his car 120 feet into an open field before hitting a grassy berm at 1:39 a.m.; his eyes were bloodshot and glassy; he smelled of intoxicants; and he admitted that he had been drinking. The officer was justified in skipping field sobriety tests prior to requesting a PBT, given concerns that Schlegel may have been injured or, at least, affected by the accident to the extent that such tests would not have aided his probable-cause determination. Regardless, police had probable cause to believe that Schlegel had operated his vehicle while intoxicated such that they could ask him to submit to a PBT and consider the PBT results in deciding whether to arrest him for OWI.

¶9 Given all the facts, the police had probable cause to ask Schlegel to submit to a PBT and had probable cause to arrest him for OWI after the results of the PBT. The circuit court properly denied Schlegel’s motion to suppress.

By the Court.—Judgment affirmed.

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

