

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 12, 2015

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. 2015AP298

Cir. Ct. No. 2014CV307

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

VILLAGE OF FREDONIA,

PLAINTIFF-RESPONDENT,

V.

BRUCE A. GOSSETT,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Ozaukee County:
PAUL V. MALLOY, Judge. *Affirmed.*

¶1 NEUBAUER, C.J.¹ Bruce Gossett appeals from an order finding him guilty of operating a motor vehicle while intoxicated and operating a

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

commercial motor vehicle with a prohibited blood alcohol concentration, contrary to WIS. STAT. § 346.63(1)(a) and (b). Gossett’s sole argument on appeal is that the trial court erred in denying his motion to suppress evidence because the arresting officer lacked a reason to believe that Gossett was operating his commercial vehicle while having an alcohol concentration above zero before requesting a preliminary breath test (PBT). We reject Gossett’s argument and affirm the trial court’s order and the subsequent conviction.

BACKGROUND

¶2 Village of Fredonia Deputy Marshal Christopher Erickson testified at the suppression hearing that on March 5, 2013, he responded to a report of a semi tractor-trailer driving erratically on a highway in Fredonia. A citizen driver had called dispatch to report a semi tractor-trailer driving northbound on Highway 57 that was “all over the road.” The caller gave dispatch his name and was willing to make a statement. The caller indicated that the semi had a blue cab with Minnesota trailer tags.

¶3 Erickson turned on his lights and siren immediately, as he was rushing up to find the semi. He was able to locate a blue cab semi heading north on Highway 57. He caught up with it and got right behind it, still with his red and blue flashing lights and siren on. Erickson noticed that the semi “was operating in the right lane, and it was drifting over the white dotted line into the left lane.” Erickson testified that the semi was drifting over “about halfway” and “was coming back into its ... right lane, normal lane of traffic; and then it had drifted over again and came back.” Erickson also noticed that the semi was travelling about forty-five miles per hour in a fifty-five mile-per-hour zone. Erickson did testify that it was “quite windy” that day.

¶4 When the semi pulled over, Erickson approached the cab and told the driver to get out of the vehicle. The driver initially verbally identified himself as Gossett and later produced a photo driver's license. When Gossett exited the cab, Erickson observed Gossett place his hand on the vehicle as if to steady himself while walking. After telling Gossett of the 911 call, Erickson asked Gossett if he had been drinking. Gossett claimed that he had not been drinking, stating windy conditions were the cause of his driving behavior, and agreed to submit to a PBT. Erickson had Gossett spit out the gum he was chewing and administered the PBT once a back-up officer arrived. The PBT indicated a positive result for the presence of alcohol, and Erickson arrested Gossett after he failed field sobriety tests.

¶5 Gossett moved to suppress the PBT results, and the trial court denied his motion. The case was tried to the court on stipulated facts, and the trial court found Gossett guilty of operating a commercial motor vehicle under the influence of an intoxicant and with a prohibited alcohol concentration. Gossett appeals.

DISCUSSION

¶6 When reviewing the trial court's denial of a motion to suppress evidence, we uphold fact-finding done by the trial court unless clearly erroneous. *State v. Goss*, 2011 WI 104, ¶9, 338 Wis. 2d 72, 806 N.W.2d 918. Whether those facts fulfill the standard to request a PBT is a question of law we review de novo. *Id.*

¶7 WISCONSIN STAT. § 343.303 sets forth the standards for requesting a PBT. The standards are different for commercial and noncommercial drivers. For

a noncommercial driver, the officer must have “probable cause to believe” that the person is operating while intoxicated. *Id.* For a commercial driver,

the statute eliminates the requirement of probable cause and permits a PBT request “if the officer detects any presence of alcohol ... on a person driving ... a commercial motor vehicle or has reason to believe that the person is violating or has violated [WIS. STAT. §] 346.63(7) or a local ordinance in conformity therewith....” [Sec.] 343.303 (emphasis added). These two alternatives for commercial drivers are commonly referred to as the “any presence” standard and the “reason to believe” standard to distinguish these standards from the probable cause standard required for non-commercial drivers. See [*County of Jefferson v. Renz*, 231 Wis. 2d [293, 299,] 603 N.W.2d 541 [(1999)]. If either the “any presence” or the “reason to believe” standard is satisfied, the officer may request a PBT breath sample from a commercial driver. [Sec.] 343.303.

Goss, 338 Wis. 2d 72, ¶12 (emphasis omitted). Section 346.63(7) provides:

(7) (a) No person may drive or operate or be on duty time with respect to a commercial motor vehicle under any of the following circumstances:

1. While having an alcohol concentration above 0.0.
2. Within 4 hours of having consumed or having been under the influence of an intoxicating beverage, regardless of its alcohol content.
3. While possessing an intoxicating beverage, regardless of its alcohol content. This subdivision does not apply to possession of an intoxicating beverage if the beverage is unopened and is manifested and transported as part of a shipment.

Under these provisions, police officers are authorized “to request a commercial driver to submit to a PBT with a minimum of suspicion.” *Renz*, 231 Wis. 2d at 309. We look at the totality of the circumstances when determining if “reason to believe” existed. *Goss*, 338 Wis. 2d 72, ¶25.

¶8 Gossett contends that Erickson did not have sufficient “reason to believe” Gossett was operating his commercial vehicle while having an alcohol concentration above zero before asking Gossett to take a PBT. Gossett argues that, in light of the windy conditions known to both Gossett and Erickson, the evidence Erickson had before requesting Gossett take a PBT did not reach the “reason to believe” threshold warranting Erickson’s administration of the test. We disagree.

¶9 The facts of this case support the trial court’s determination that at the time Erickson administered the PBT to Gossett, Erickson had sufficient reason to believe that Gossett was operating his commercial vehicle with an alcohol concentration above zero. First, Erickson had received a tip about Gossett’s driving behavior from a 911 caller, who identified himself to the 911 dispatcher, indicated he was willing to give a statement, and reported that the semi was all over the road. Second, Erickson personally observed Gossett’s semi swerve between lanes and travel at a slower speed than the posted speed limit. Finally, Erickson observed Gossett use his hand against the cab to steady himself as he walked. These factors, considered in totality, are sufficient to show that Erickson had reason to believe, before administering the PBT, that Gossett was operating his commercial vehicle while having an alcohol concentration above zero.

¶10 Considering the totality of the circumstances in this case and the low level of proof required for requesting a PBT from a commercial driver, Erickson had ample evidence showing reason to believe that Gossett was operating his commercial vehicle while having an alcohol concentration above zero before giving Gossett the PBT. The trial court made no error in denying Gossett’s motion to suppress evidence. We affirm.

By the Court.—Order affirmed.

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

