COURT OF APPEALS
DECISION
DATED AND FILED

June 22, 2017

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. 2016AP420-CR **Cir. Ct. No. 2014CT971**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANGELO M. REYNOLDS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: NICHOLAS MCNAMARA, Judge. *Affirmed.*

¶1 SHERMAN, J.[1] Angelo M. Reynolds appeals from a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant, third offense, contrary to WIS. STAT. § 346.63(1). Reynolds contends

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

the circuit court erred in denying his motion to suppress the results of his preliminary breath test (PBT)[2] on the basis that the officer who administered the test lacked probable cause sufficient to request the test. I affirm.

BACKGROUND

¶2 On August 31, 2014, Reynolds had an accident on his motorcycle at approximately 7:30 p.m. The individual who reported the accident in a call to 911 said that Reynolds "was conscious, was breathing, but was not coherent." Between 9 p.m. and 10 p.m. the same night, Dane County Sheriff's Deputy Robert Schiro was dispatched to the UW Hospital "to check on" Reynolds. Reynolds told Deputy Schiro that he was operating his motorcycle on Blue Mounds Road when a silver pickup was coming toward him and ran him off the road.

¶3 Deputy Schiro testified at the suppression hearing that he could smell alcohol from Reynolds' breath, and that the odor of alcohol was noticeable as soon as he walked into the room where Reynolds was being treated. Deputy Schiro also testified that Reynolds' eyes were bloodshot and that his demeanor was, at times, "loud and boisterous." Deputy Schiro testified that because it had been roughly two and one-half hours since the time of the accident, he asked Reynolds whether Reynolds had consumed any alcohol after the accident, and

[2] A preliminary breath screening test utilizes "a device approved by the [Department of Transportation]" for the purpose of screening by an officer prior to arrest. *See* WIS. STAT. § 343.303.

Reynolds replied that he had not. Deputy Schiro then performed field sobriety tests upon Reynolds.[3]

¶4 Deputy Schiro testified that Reynolds admitted to him that he had consumed four beers prior to the accident. Reynolds had also been administered Fentanyl as a pain killer in the hospital prior to speaking with Deputy Schiro. Although Deputy Schiro was aware that Reynolds had been reported as incoherent by the report at the scene, Deputy Schiro testified that Reynolds was coherent at the time that Deputy Schiro spoke with him at the hospital.

¶5 Deputy Schiro testified that he believed that there was probable cause to administer, and did administer, the PBT test. Following the PBT, Deputy Schiro read Reynolds the Informing the Accused form and placed Reynolds under arrest.

¶6 Reynolds moved the circuit court to suppress the PBT and arrest. The circuit court held a hearing on the motion at which Deputy Schiro was the only witness and denied the motion. Reynolds then pled guilty to OWI, third offense, was found guilty upon his plea, and was sentenced. Reynolds appeals.

DISCUSSION

¶7 The sole issue on appeal is whether Deputy Schiro had sufficient probable cause to administer the PBT. When reviewing a circuit court's

[3] Deputy Schiro testified that Reynolds' condition, confined as he was to a hospital bed with severe injuries, precluded the administration of the standard field sobriety tests in the manner prescribed and that he was required to both alter the standard tests and to use alternative tests. The validity of the particular field sobriety tests conducted is not raised by Reynolds as an issue in this appeal and will not be discussed in detail. The circuit court did not consider the field sobriety tests in rendering its decision and neither will I.

determination that there was or was not probable cause sufficient to administer the PBT, this court will uphold the circuit court's findings of fact unless they are clearly erroneous. ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 316, 603 N.W.2d 541 (1999). However, whether those facts satisfy the statutory standard of probable cause is a question of law that this court reviews de novo. ***Id.***

¶8 WISCONSIN STAT. § 343.303 provides that "[i]f a law enforcement officer has probable cause to believe that the person is violating or has violated [WIS. STAT.] § 346.63(1)" the officer, prior to an arrest, may request the person to provide a PBT. Probable cause is not a uniform standard, but varies with the different function of the probable cause determination at different stages of proceedings. ***County of Jefferson***, 231 Wis. 2d at 308. In the case of the requisite "probable cause to believe" sufficient to request a PBT under § 343.303, the standard requires 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.*** at 316.

¶9 As Justice Abrahamson points out in her concurrence in ***County of Jefferson***, "the varying degrees of proof are in fact very similar." ***Id.*** at 319. Thus, the continuum between reasonable suspicion for an investigative stop ("specific and articulable facts which would warrant a reasonable belief that criminal activity was afoot") and probable cause for arrest ("that quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed a crime") is so narrow that, standing alone it provides clear guidance to neither police officers nor lower courts. *See* ***id.*** at 310 n.11, 323. Thus, courts often resort to examining what quantum of facts courts have previously found to be sufficient to satisfy whichever standard is before them. Since no two fact situations are identical, this is also an exercise in

interpretation, though as with many other aspects of jurisprudence, it ultimately relies on what is called the objective standard: viewing the facts from the standpoint of the proverbial reasonable person, or in this specific case, reasonable police officer. With these limitations in mind, I turn to the facts which our supreme court in ***County of Jefferson*** found sufficient to authorize the officer in that case to request the PBT.

¶10 The supreme court noted only a few facts in support of its conclusion that there was sufficient probable cause in ***County of Jefferson***: (1) Renz's car smelled strongly of intoxicants; (2) Renz admitted to drinking three beers earlier in the evening; (3) Renz was unable to hold his leg up for thirty seconds during the one leg raise test and restarted his count at 10, although Renz had actually stopped at 18; (4) Renz appeared unsteady during the heel-to-toe test, left a space between heel and toe and stepped off of the imaginary line; and (5) Renz was not able to touch the tip of his nose with his left finger during the finger-to-nose test. ***Id.*** at 316-17. The supreme court noted, however, that Renz's speech was not slurred and that Renz was subsequently able to complete all field sobriety tests. ***Id.***

¶11 In concluding that the officer in ***County of Jefferson*** had the requisite degree of probable cause to request a PBT, the supreme court noted that the "officer was faced with exactly the sort of situation in which a PBT proves extremely useful in determining whether there is probable cause for an OWI arrest." ***Id.*** at 317.

¶12 The facts in the instant case are sufficiently similar to those in ***Renz*** to merit comparison. The circuit court made the following findings:

1. There was a crash. The court discussed the factors that have an effect on the weight to be given this factor, including Reynolds' story that a silver truck drove him off the road. Referring to the fact that the defendant has told the same story repeatedly, the court noted that it "doesn't make it more or less true." "It doesn't mean that there was a truck. It means he either believes the truck or he's willing to repeat a lie many times. If he believes the truck [it still] doesn't mean that there was a truck…. There might have been a truck operating legally innocently and he overreacted to a perceived danger." Weight and credibility are the exclusive province of the trier of fact, in this case the circuit court. *See* ***Cogswell v. Robertshaw Controls Co.***, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979) ("[T]he [circuit court] is the ultimate arbiter of the credibility of the witnesses. When more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the inference drawn by the trier of fact." (internal citation omitted)). Ultimately the court concluded the crash was "part of a reasonable explanation in the totality of all of the circumstances." In other words, it is a factor, but not the only factor.

2. The odor of intoxicants. "It's significant that an odor of intoxicants [] has lingered several hours…." It is also significant, the court found, "that the defendant has said that he did not consume alcohol between the time of the crash and the time the officer had contact with him."

3. Bloodshot and glossy eyes. The court described this as "one of the indicators in a totality of circumstances."

4. The defendant admitted to drinking. "I'll take as proven by testimony that he admitted to drinking four beers."

5. Loud and boisterous behavior. "I don't think that that should be given too much weight."

6. Time of night is a neutral factor.

7. "I don't think this officer needed to run the field sobriety tests."

¶13 The comparison between the present case and the facts in ***County of Jefferson*** is striking. In both cases officers smelled alcohol coming from the defendant. In both cases there was the admission of prior drinking, with Reynolds admitting to slightly more drinking than Renz. On the one hand, the time of night weighed against Renz, but not Reynolds. On the other hand, there was no crash in ***County of Jefferson***, but there was in ***Reynolds***. In ***County of Jefferson***, the supreme court relied on some, though not all, of the field sobriety tests, including some that were not standard tests. Although there were field sobriety tests in the present case, including nonstandard tests, the circuit court decided to ignore them, just as the ***County of Jefferson*** court decided to ignore the horizontal gaze nystagmus test. In both cases, the use of the field sobriety tests was disputed.[4] Taking all into consideration, the totality of the circumstances in the instant case is more compelling than in ***County of Jefferson***.

¶14 Deputy Schiro knew that there had been an accident, that Reynolds smelled like alcohol, that he had bloodshot and glossy eyes, that he admitted to

[4] Reynolds spent a substantial amount of time at the suppression hearing cross-examining Deputy Schiro about the non-standard nature of the field sobriety tests, but has not challenged the validity of the non-standard tests on appeal and has, therefore, abandoned any such challenge.

drinking four beers, and he observed loud and boisterous behavior from Reynolds. He also knew that Reynolds had been reported to be incoherent by a bystander at the scene. Each of these observations has a potentially innocent explanation and a competing explanation that leads to an inference of impairment due to intoxication. "[A]n officer is not required to draw a reasonable inference that favors innocence when there is also a [competing] reasonable inference that favors probable cause." ***State v. Nieves***, 2007 WI App 189, ¶14, 304 Wis. 2d 182, 738 N.W.2d 125.

¶15 Based upon either the comparison to ***County of Jefferson*** or simply a common sense interpretation of what quantum of evidence would lead a reasonable police officer to conclude that Reynolds had probably committed a crime, Deputy Schiro had sufficient probable cause to request a PBT. There might have even been sufficient evidence to amount to probable cause to arrest, or it might have been slightly less than sufficient for that purpose. To resolve such ambiguity is precisely the point of the PBT. As the supreme court noted in ***County of Jefferson***, Deputy Schiro "was faced with exactly the sort of situation in which a PBT proves extremely useful in determining whether there is probable cause for an OWI arrest." ***County of Jefferson***, 231 Wis. 2d at 317.

CONCLUSION

¶16 For all of the above reasons, I affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

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