

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 11, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 98-1200-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RANDALL R. ROSENBAUM,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sauk County:
JAMES EVENSON, Judge. *Affirmed.*

Before Eich, Vergeront and Roggensack, JJ.

PER CURIAM. Randall Rosenbaum appeals from a judgment convicting him of third-offense driving while intoxicated, with a child in the car. Section 346.63(1)(a), STATS. Rosenbaum entered a no contest plea after the trial court denied his motion to suppress evidence of the crime obtained after an officer

administered a preliminary breath test. We affirm the trial court's decision on that issue.

At Rosenbaum's suppression hearing, Sheriff's Deputy Jon Hanson offered the following testimony. While on duty he was called to investigate an accident involving Rosenbaum and another driver, Allen Jordan. According to Jordan, Rosenbaum struck him from behind when he stopped at a stop sign. Jordan and his passenger also stated that they believed Rosenbaum had been drinking.

About thirty minutes or so after the accident, Hanson went to Rosenbaum's home and spoke with him there. According to Hanson, Rosenbaum's eyes were red and bloodshot, his speech was "thick and slurred," and he had a strong odor of intoxicants on his breath. Hanson asked if Rosenbaum had been drinking, and Rosenbaum said he had two beers some time before the accident, and part of one since returning home afterwards.

At that point Hanson administered a preliminary breath test, and subsequently arrested Rosenbaum when the sample measured .14 percent. Rosenbaum's argument, in both the trial court and on appeal, is that Hanson lacked probable cause to conduct the preliminary breath test that led to his arrest and a subsequent blood test confirming his intoxication.

Section 343.303, STATS., authorizes a preliminary breath test when an officer has probable cause to believe that the person violated certain listed statutes, including § 346.63(1), STATS. Probable cause under this section is equivalent to probable cause to arrest the person for violating that statute. *County of Jefferson v. Renz*, No. 97-3512, slip op. (Wis. Ct. App. Oct. 15, 1998). Probable cause to arrest is that amount of evidence that would lead a reasonable

police officer to have more than a suspicion that the defendant committed the crime in question; the evidence need not reach the level of proof beyond a reasonable doubt and the officer need not believe that guilt is more likely than not. *State v. Mitchell*, 167 Wis.2d 672, 681-82, 482 N.W.2d 364, 367-68 (1992). Whether probable cause exists is judged by the particular facts of the case. *Id.* at 682, 482 N.W.2d at 368. As the facts here are not in material dispute, whether they constitute probable cause is solely a question of law that we review *de novo*. *State v. King*, 175 Wis.2d 146, 150, 499 N.W.2d 190, 191 (Ct. App. 1993).

Deputy Hanson had probable cause to arrest Rosenbaum for driving while intoxicated, and therefore had probable cause to administer the preliminary breath test. Section 346.63(1)(a), STATS., prohibits driving under the influence of an intoxicant to a degree rendering one incapable of safely driving. The following evidence reasonably indicated to Hanson that Rosenbaum was intoxicated to the necessary degree: He struck a stationary car at a stop sign in good weather; the occupants of that car believed that Rosenbaum had been drinking; less than one hour later, Rosenbaum appeared to Hanson to be heavily intoxicated, although Rosenbaum denied consuming any significant amount of alcohol either before or after the accident; and Rosenbaum did not offer any other explanation for his seemingly intoxicated state, and Hanson observed none. Under those circumstances, Hanson reasonably had much more than a mere suspicion that Rosenbaum operated his vehicle while incapable of safely driving.

Rosenbaum contends that Hanson's "subjective" observations were not sufficient to establish probable cause. He contends, in effect, that Hanson could not have determined Rosenbaum's driving capabilities without "objective" evidence of incapacity obtained from the various field sobriety tests involving balance, coordination, judgment and so forth. We reject this distinction between

objective and subjective evidence. Field sobriety tests are one means to gather evidence of intoxication. They involve, as does much of the other evidence an officer may have, the officer's observations and evaluations of the defendant's conduct. The standard for probable cause, however, does not depend on a particular officer's subjective assessment of what he or she observes, but rather on whether the circumstances within the particular officer's knowledge would lead a reasonable officer to believe a person is driving under the influence of an intoxicant. *State v. Kasian*, 207 Wis.2d 611, 621, 558 N.W.2d 687, 691 (Ct. App. 1996). This court has previously held that field sobriety tests are not always necessary to establish probable cause for driving while intoxicated. *Id.* at 622. Such tests were not necessary in this case because, as we have already concluded, the circumstances within Deputy Hanson's knowledge were sufficient to permit a reasonable officer to conclude there was probable cause.

By the Court.—Judgment affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.

