

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 25, 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. 98-2174

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

COUNTY OF DANE,

PLAINTIFF-RESPONDENT,

V.

RUSSELL A. WILLIAMS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: PATRICK J. FIEDLER, Judge. *Affirmed.*

ROGGENSACK, J.¹ Russell Williams appeals from his convictions for one count of operating a motor vehicle while intoxicated (OMVWI), contrary to § 346.63(1)(a), STATS.; one count of operating a motor vehicle with a prohibited alcohol concentration (PAC), contrary to § 346.63(1)(b); and one count

¹ This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

of hit and run—property adjacent to a highway, contrary to § 346.69, STATS. Williams also appeals from the circuit court’s order denying his motion to suppress his preliminary breath test (PBT) on the grounds that the police officer did not have probable cause to arrest at the time she requested Williams submit to the test. We conclude that an officer must have probable cause to arrest for a violation of § 346.63(1), before the officer may request a PBT; however, because the facts of record establish that the officer had probable cause to arrest Williams for OMVWI prior to administering the PBT, we affirm.

BACKGROUND

On November 2, 1997, at 8:44 p.m., Deputy Gwen Ruppert was dispatched to a hit and run accident. When Ruppert arrived at the scene, she observed that a stop sign, mailbox, and election sign had been run over. Two residents of the area told Ruppert that they had discovered fresh oil spots on the roadway where the stop sign had been hit. One of the residents had followed the oil spots to Williams’s house, two blocks south of the accident site, and had made contact with Williams. The resident told Ruppert that at that time, Williams was stumbling, had slurred speech and fumbled with the key pad to his garage.

Ruppert went to Williams’s house and when he came to the door, Ruppert noted that Williams fumbled with the screen door latch even though it appeared to be unlocked, stepped outside without his shoes, slurred his speech and smelled of intoxicants. Williams also stumbled as he and Ruppert walked toward his garage. Ruppert observed that Williams’s car had damage to the right front quarter panel, a missing panel piece over the right front wheel, a missing right front directional lens, and grass and dirt on the right front hubcap.

Williams originally told Ruppert that he had come from McFarland that night; however, when Ruppert asked where in McFarland, Williams admitted that he had come from the VFW on Cottage Grove Road in Madison and that he had consumed four or five Bloody Marys. Williams told Ruppert that his girlfriend had told him that he hit something on the way home, but that he did not think he had. Williams was also confused about the time, telling Ruppert that he had arrived home at 11:00 p.m., and then telling her he had arrived home at 1:15 p.m., when the actual time at which Ruppert and Williams were speaking was approximately 10:05 p.m. After talking with Williams for ten or fifteen minutes, Ruppert administered a PBT. She then placed him under arrest for OMVWI.

Williams moved to suppress the PBT on the grounds that Ruppert did not have probable cause to arrest him for OMVWI at the time she administered the test. On May 11, 1998, following a suppression hearing, the circuit court denied the suppression motion, concluding that § 343.303, STATS., requires a showing of probable cause for administering a PBT that is less than probable cause to arrest and that the State had established facts meeting this lower burden of proof. Accordingly, the court denied the motion to suppress and convicted Williams of OMVWI, PAC, and hit and run. This appeal followed.

DISCUSSION

Standard of Review.

Whether Williams's arrest was based on probable cause presents a mixed question of fact and law. The circuit court's findings on disputed factual issues will be upheld unless clearly erroneous. Section 805.17(2), STATS. Whether those facts establish probable cause is a question of law which we review *de novo*. *State v. Babbitt*, 188 Wis.2d 349, 356, 525 N.W.2d 102, 104 (Ct. App.

1994). Likewise, the level of suspicion required to fulfill the statutory prerequisite necessary to requesting that a driver submit to a PBT is a question of law, reviewed without deference to the circuit court. *See State v. Nordness*, 128 Wis.2d 15, 36, 381 N.W.2d 300, 308-09 (1986).

Probable Cause.

Taking a breath test from a suspected drunk driver constitutes a search and seizure under the United States and Wisconsin constitutions. *Milwaukee County v. Proegler*, 95 Wis.2d 614, 623, 291 N.W.2d 608, 612 (Ct. App. 1980). However, any person who operates a motor vehicle in Wisconsin is deemed to have consented to a blood, urine or breath test under statutorily determined circumstances. *Id.*; § 343.305(4), STATS. By virtue of Wisconsin's regulatory scheme, a law enforcement officer also may request that an individual submit to a PBT, if the officer has probable cause to believe that the individual has violated § 346.63(1), STATS. The results of that test then become part of the totality of circumstances which the officer considers in determining whether to arrest. Section 343.303, STATS.; *State v. Beaver*, 181 Wis.2d 959, 969, 512 N.W.2d 254, 258 (Ct. App. 1994); *County of Dane v. Sharpee*, 154 Wis.2d 515, 520, 453 N.W.2d 508, 511 (Ct. App. 1990).

Williams argues that the facts of this case are insufficient to sustain the probable cause necessary for Ruppert to have requested a PBT, and that without the PBT, there was insufficient proof to sustain probable cause to arrest. Therefore, the breath test which was taken subsequent to his arrest and which was used to convict him must be suppressed. His argument requires this court to examine the quantum of proof required for an officer to believe that a driver has

violated § 346.63(1), STATS., because that is the predicate required before a PBT can be requested.

In *County of Jefferson v. Renz*, 222 Wis.2d 424, 588 N.W.2d 267 (Ct. App. 1998),² we addressed the amount of evidence required to sustain the probable cause which § 343.303, STATS., requires prior to requesting a PBT. After considering the purpose, context and history of the statute, we concluded that the same level of proof is required for probable cause to conduct a PBT as is required for probable cause to arrest for a violation of § 346.63(1), STATS. *Renz*, 222 Wis.2d at 439, 588 N.W.2d at 275.

Because an officer must have probable cause to arrest a person for OMVWI before the officer may request a PBT, we apply the standard for probable cause to arrest to the facts of record. A police officer has probable cause to arrest when the totality of the circumstances within that officer's knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant probably drove while intoxicated. See *State v. Koch*, 175 Wis.2d 684, 701, 499 N.W.2d 152, 161 (1993). This is a practical test, based on "considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *State v. Drogsvold*, 104 Wis.2d 247, 254, 311 N.W.2d 243, 247 (Ct. App. 1981) (citation omitted). The objective facts before the police officer need only lead to the conclusion that guilt is more than a mere possibility. *State v. Richardson*, 156 Wis.2d 128, 148, 456 N.W.2d 830, 838 (1990).

Prior to administering the PBT, Ruppert observed that Williams slurred his speech, smelled of intoxicants, and stumbled as he walked. Williams

² A petition for review was granted December 17, 1998.

also admitted that he had been drinking and gave inconsistent and contradictory information concerning where he had been and when he returned home. Further, after observing the oil spot patterns, damage to the stop sign and mailbox, and corresponding damage to Williams's car, Ruppert concluded that Williams had not maintained proper control of his vehicle. Based on these facts, Ruppert had probable cause to arrest Williams for a violation of § 346.63(1), STATS., before she administered the PBT.

CONCLUSION

Although the circuit court incorrectly applied a lower standard of proof in determining whether Ruppert had probable cause to administer a PBT, the facts of record establish that Ruppert had probable cause to arrest Williams for OMVWI, before she administered the PBT. Accordingly, we conclude that the motion to suppress was properly denied, and we sustain Williams's convictions.

By the Court.—Judgment and order affirmed.

This opinion will not be published in the official reports. *See* RULE 809.23(1)(b)4, STATS.

