

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 26, 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. 98-2463

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

COUNTY OF MARINETTE,

PLAINTIFF-RESPONDENT,

V.

ROBERT A. GREENE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Marinette County:
TIM A. DUKET, Judge. *Affirmed.*

MYSE, P.J. Robert A. Greene appeals a judgment of conviction for operating a motor vehicle while intoxicated based on the trial court's denial of his motion to suppress evidence gathered following the administration of a preliminary breath test (PBT). Greene contends the officer lacked probable cause to administer the PBT and that even if the officer had probable cause to administer the test, the 0.09% PBT result compelled the officer to stop his investigation.

Greene also contends the trial court erred by refusing to submit Greene's challenge to the reliability and accuracy of the Intoxilyzer 5000 to the jury. This court concludes there was probable cause to administer the PBT, the officer was not required to stop his investigation after a 0.09% PBT result, and the trial court properly exercised its discretion by relying upon the presumption of accuracy and reliability accorded recognized methods of testing authorized by §343.305(6)(b), STATS. Accordingly, the judgment of conviction is affirmed.

Deputy Michael Sievert was investigating a reported car/deer accident. As Sievert was removing the deer from Highway 141, Greene pulled his pickup truck behind Sievert's squad car. Greene's truck was equipped with lifts, making it taller than a normal pickup truck. As Greene stepped out of the truck, Sievert observed Greene stumble into the lane of traffic. Greene told Sievert that he had just struck the deer. Sievert also observed Greene lean forward and then step backwards as he attempted to show Sievert the damage to his vehicle resulting from his collision with the deer. Sievert intentionally got closer to Greene to see if he could make any further observations. He noted the odor of intoxicants and observed that Greene's eyes were half-closed, red and glassy. He also noted that, while not slurred, Greene's speech was "real slow." Sievert asked Greene if he had been drinking and Greene admitted he had. At that point, Sievert administered a preliminary breath test which resulted in a 0.09% reading. Sievert then asked Greene to perform various field sobriety tests. After administering the field sobriety tests, Sievert arrested Greene for operating his vehicle while intoxicated.

Following his arrest, Greene was administered a breath test on an Intoxilyzer 5000 machine. A jury convicted Greene of operating his motor vehicle

while under the influence of an intoxicant, but acquitted him of operating a motor vehicle with a prohibited alcohol concentration.

Greene first contends the trial court erred by refusing to suppress the evidence of intoxication gathered following the administration of the PBT because the officer lacked probable cause to administer the PBT. In this case, the question of probable cause requires the application of undisputed facts to principles of law. Whether the established facts constitute probable cause presents a question of law this court decides without deference to the trial court's determination. *State v. Babbitt*, 188 Wis.2d 349, 356, 525 N.W.2d 102, 104 (1986).

An officer may request an individual to submit to a PBT if the officer has probable cause to believe that the individual has been driving while intoxicated in violation of § 346.63(1)(a), STATS. *See* § 343.303, STATS. This court has recently concluded that the probable cause standard required to administer a PBT under § 343.303 is the same standard as probable cause to arrest for a violation of § 346.63(1)(a). *County of Jefferson v. Renz*, 1998 WL 751239 (Ct. App. 1998).¹ In the context of arrest, probable cause refers to that quantum of evidence that would lead a reasonable police officer to believe that a person probably committed a crime. *County of Dane v. Sharpee*, 154 Wis.2d 515, 518, 453 N.W.2d 508, 510 (Ct. App. 1990). Probable cause is a question of probability and plausibility and is a common sense test based on “considerations of everyday life on which reasonable and prudent persons, not legal technicians, act.” *State v. Truax*, 151 Wis.2d 354, 360, 444 N.W.2d 432, 435 (Ct. App. 1989). The objective facts before the officer need only lead to the conclusion that guilt is more

¹ This court of appeals decision was ordered published on November 18, 1998. A petition for review was granted December 17, 1998.

than a possibility. *State v. Richardson*, 156 Wis.2d 128, 148, 456 N.W.2d 830, 838 (1990). The quantum of information constituting probable cause to arrest is measured by the facts of the particular case. *State v. Wilks*, 117 Wis.2d 495, 502, 345 N.W.2d 498, 501 (Ct. App. 1984). In making that measurement, this court considers all the facts and circumstances within the officer's knowledge at the time. *State v. Paszek*, 50 Wis.2d 619, 625, 184 N.W.2d 836, 840 (1971).

Section 346.63(1)(a), STATS., prohibits driving “[u]nder the influence of an intoxicant ... to a degree which renders [one] incapable of safely driving.” Therefore, to determine whether Sievert had probable cause to administer the PBT, this court considers the evidence prior to the PBT that would lead Sievert to believe that Greene probably was driving under the influence of alcohol to a degree that affected his ability to drive safely. In this case, Sievert observed Greene stagger into the traffic lane as he stepped out of his vehicle. Sievert also observed Greene lean forward and then step backward as he attempted to demonstrate the damage to his truck resulting from his collision with a deer. Sievert described this motion as if Greene “was losing his balance.” This is evidence Greene was unsteady. It is common knowledge that unsteadiness is one symptom of intoxication and may impair a person's ability to drive safely. *Renz*, 1998 WL 751239 at *8. In addition, upon approaching Greene more closely, Sievert detected an “obvious” odor of intoxicants, observed Greene's speech to be slow and noticed that Greene's eyes were half-closed, red and glassy. When questioned, Greene admitted he had been drinking. Considering the totality of these circumstances, this court concludes the evidence is sufficient to establish that Sievert had probable cause to believe Greene was probably violating § 346.63(1)(a) and therefore had probable cause to administer the PBT.

The PBT resulted in a 0.09% reading. Greene maintains that even if Sievert had probable cause to administer the PBT, the recording of a result less than 0.10% dispelled Sievert's probable cause and compelled Greene's release. This court disagrees. The test result does not require that the officer stop his investigation because the PBT is not the sole determinant of probable cause to arrest. *Sharpee*, 154 Wis.2d at 520, 453 N.W.2d at 511. A low test result does not void grounds for an arrest. *Id.* Rather, the PBT becomes part of the totality of circumstances the officer considers in determining whether to effectuate arrest. *Id.* This court concludes, therefore, that Sievert had probable cause to administer the PBT and that the result did not compel that Sievert's investigation stop. Accordingly, the trial court properly denied Iversen's motion to suppress evidence obtained following the administration of the PBT.

Greene next claims that the court erred in applying the presumption of reliability and accuracy to the breath analysis obtained from an Intoxilyzer 5000 machine. This court has previously stated that a recognized method of testing authorized by statute is afforded a prima facie presumption of accuracy and reliability. *State v. Disch*, 119 Wis.2d 461, 475, 351 N.W.2d 492, 499 (1984); *see also* § 343.305(6)(b), STATS. Greene contends that the presumption does not attend the Intoxilyzer 5000 because of various software changes made in the machine after its initial certification.

In *State v. Busch*, 217 Wis.2d 429, 576 N.W.2d 904 (1998), our supreme court concluded that an Intoxilyzer 5000 was entitled to the presumption if the machine retained its analytical process despite alterations made in the machine following its initial certification. *Id.* at 435, 576 N.W.2d at 906. In *Busch*, changes made to the Intoxilyzer 5000 were determined not to have changed the machine's analytical process. The court concluded that the machine

was entitled to the presumption of accuracy and reliability notwithstanding the changes that had been made. *Id.* at 438, 576 N.W.2d at 907.

Here, Greene contends that software changes made to the Intoxilyzer 5000 preclude the presumption of accuracy and reliability. The senior electronics technician for the Wisconsin State Patrol Chemical Test Section testified that the software changes did not alter the machine's analytical process. No evidence was received that suggested the software changes did alter the machine's analytical process. Accordingly, and consistent with our supreme court's conclusion in *Busch*, the trial court did not err by applying the presumption of accuracy and reliability to this Intoxilyzer 5000 notwithstanding the software changes made.

Because Sievert had probable cause to administer the PBT and was not compelled to halt his investigation, the trial court did not err by refusing to suppress the evidence obtained following the administration of the PBT. Further, the trial court properly accorded the Intoxilyzer 5000 test results the presumption of reliability and accuracy. Accordingly, the judgment of conviction is affirmed.

By the Court.—Judgment affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.

