

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

April 1, 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. 98-2614**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

---

**IN THE MATTER OF THE REFUSAL OF JUSTUS C.  
BURGWEGER:**

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JUSTUS C. BURGWEGER,**

**DEFENDANT-APPELLANT.**

---

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

VERGERONT, J.<sup>1</sup> Justus Burgweger appeals an order revoking his operating privileges pursuant to § 343.305(10), STATS., upon a determination that

---

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

he refused to submit to chemical tests as provided in § 343.305(2) and (3).<sup>2</sup> He contends the arrest was unlawful because it was not supported by probable cause and the evidence did not support the conclusion that he refused to submit to an intoxilyzer test. We reject his arguments and affirm.

## BACKGROUND

Burgweger was stopped for speeding on April 30, 1998, at approximately 2:00 a.m. on County Highway PD. Donovan Jarstad, a City of Fitchburg police officer stopped Burgweger's vehicle after radar indicated that he was traveling at sixty-one miles per hour in an area with a posted speed limit of

---

<sup>2</sup> Section 343.305(2) and (3), STATS., provide in part:

(2) IMPLIED CONSENT. Any person who is on duty time with respect to a commercial motor vehicle or drives or operates a motor vehicle upon the public highways of this state, or in those areas enumerated in s. 346.61, is deemed to have given consent to one or more tests of his or her breath, blood or urine, for the purpose of determining the presence or quantity in his or her blood or breath, of alcohol, controlled substances, controlled substance analogs or other drugs, or any combination of alcohol, controlled substances, controlled substance analogs and other drugs, when requested to do so by a law enforcement officer under sub. (3) (a) or (am) or when required to do so under sub. (3) (b). Any such tests shall be administered upon the request of a law enforcement officer. The law enforcement agency by which the officer is employed shall be prepared to administer, either at its agency or any other agency or facility, 2 of the 3 tests under sub. (3) (a) or (am), and may designate which of the tests shall be administered first.

(3) REQUESTED OR REQUIRED. (a) Upon arrest of a person for violation of s. 346.63 (1), (2m) or (5) or a local ordinance in conformity therewith, or for a violation of s. 346.63 (2) or (6) or 940.25, or s. 940.09 where the offense involved the use of a vehicle, a law enforcement officer may request the person to provide one or more samples of his or her breath, blood or urine for the purpose specified under sub. (2). Compliance with a request for one type of sample does not bar a subsequent request for a different type of sample.

forty-five miles per hour. Officer Jarstad subsequently arrested Burgweger for driving while under the influence of an intoxicant and, after some events that are the subject of this appeal, gave Burgweger a notice of intent to revoke operating privileges for a refusal to submit to a test for intoxication under § 343.305(3), STATS. Burgweger requested a hearing on the revocation. At that hearing before the trial court, Officer Jarstad was the only witness, and he testified as follows.

He has been employed as a police officer with the City of Fitchburg since March of 1997. He received 450 hours of training at the police academy and, specifically, he has been trained in giving field sobriety tests and is certified to give them. He has made one hundred stops in which he has suspected the person was driving under the influence.

When he spoke to Burgweger after stopping his vehicle, he was about two feet away from Burgweger; he noticed that Burgweger's eyes were bloodshot and detected "a pretty strong odor of intoxicants coming from [Burgweger]." After looking at Burgweger's driver's license, and explaining he stopped Burgweger for speeding, Officer Jarstad asked if Burgweger had been drinking. Burgweger said he "had a couple." Officer Jarstad said Burgweger might as well tell the truth because he was going to test him.<sup>3</sup> Burgweger said he had three drinks that were mixed drinks. Officer Jarstad asked Burgweger to get out of the vehicle and noticed, as he was escorting Burgweger to the rear of the squad car, that Burgweger was swaying slightly from his right to his left.

---

<sup>3</sup> On direct examination, Officer Jarstad testified he referred to "field sobriety tests" in making this statement but on cross-examination acknowledged that his report stated he said: "You might as well tell me the truth because I am going to test you." The court found that the statement as expressed in the report was the best evidence of what the officer said.

Officer Jarstad then administered the horizontal gaze nystagmus test which, he testified, measures the jerkiness of one's eyes, which correlates to alcohol consumption. He observed five of the "six" clues he was looking for—distinct jerkiness at maximum deviation and lack of smooth pursuit in both eyes and onset of jerkiness prior to a forty-five degree angle in the left eye. The more clues a person has out of the potential six, the more alcohol they have consumed. He could not explain why jerkiness of the eyes occurs, but from his training and experience he has learned that a person is impaired when they have these clues.

The walk-and-turn test was next. Officer Jarstad explained this test to Burgweger, asked if he understood, and Burgweger said "yes." Burgweger left the starting position before the officer told him to start the test and did not do the turn as instructed. On the one-leg-stand test, Jarstad gave Burgweger the instructions, asked if he understood, and Burgweger said "yes." While performing this test, Burgweger raised his hands at approximately a forty-five degree angle from his body. Officer Jarstad next gave Burgweger a preliminary breath test [PBT] with a portable device to measure blood alcohol concentration. He is certified to conduct this test. However, Burgweger did not produce an adequate breath sample, even though Officer Jarstad gave him three opportunities to do so. Although Officer Jarstad testified that the machine nevertheless did record a result, he also testified that he did not know if the device he was using for the PBT was approved by the Department of Transportation for that purpose. The results of the test were not admitted into evidence.

Officer Jarstad then told Burgweger he was under arrest, put him in the squad car and drove to the police department. Upon arriving, Officer Jarstad began the twenty-minute observation period and issued citations for driving while under the influence of intoxicants, speeding, and operating with a suspended

registration. Officer Jarstad read the informing the accused form to Burgweger, asked him if he understood each paragraph, and initialed each paragraph as Burgweger indicated that he understood.<sup>4</sup> Burgweger said he would submit to an evidentiary chemical test of his breath. After the twenty-minute observation period was over, Officer Nitzsche administered an intoxilizer test. Burgweger gave three breath samples but the machine accepted only one. The machine registered a refusal and printed out a form stating “subject test refused.”

Officer Jarstad went through the same process with a second informing the accused form as he had with the first and Burgweger said he would submit to another evidentiary chemical test. However, when Officer Jarstad told Burgweger they were going to the hospital for a blood test, Burgweger said he would not give a blood test and repeated this after the officer again read him the form and asked Burgweger again if he would submit to the test. Officer Jarstad asked Burgweger if he was sure he did not want to give a blood test and Burgweger, for the third time, said he was not going to do so. Officer Jarstad took Burgweger back into the police station, permitted him to make a phone call, and completed the notice of intent to revoke form. After Burgweger finished his phone call, he said he would give a blood test. Officer Jarstad said he had already refused three times and it was too late.

After the presentation of the evidence, counsel presented arguments on whether a refusal had occurred and on Burgweger’s pre-hearing suppression motion. Burgweger moved the court to suppress all evidence obtained after the

---

<sup>4</sup> Officer Jarstad did not initial the paragraphs in section B, which pertain to commercial motor vehicle operators/drivers and commercial driver license holders. The trial court found this section was not read and concluded it was not required to be read in this case.

officer said “you might as well tell me the truth because I am going to test you,” on the ground that that was an arrest and it was unlawful because the officer did not have probable cause at that time. Burgweger also argued to the court that even if an arrest did not occur until Officer Jarstad stated that he was placing Burgweger under arrest, there was no probable cause at that time.

The trial court concluded that Officer Jarstad’s statement that Burgweger might as well tell the truth because he was going to test him did not transform the lawful *Terry* stop into an arrest. The court found Burgweger made a conscious decision not to give an adequate sample for the PBT. The court also concluded that at the point when Officer Jarstad asked Burgweger to submit to a PBT, he had probable cause as required by § 343.303, STATS., which, in the court’s view, was a slightly lower standard than the probable cause to arrest. However, as we understand the court’s comments, in its view whether there was probable cause at the time of the request to submit to a PBT did not matter because the results of the PBT were not admitted. Finally, the court concluded that there was probable cause to arrest at the point in time that Officer Jarstad said he was arresting Burgweger. On the issue of refusal, the court found that Officer Jarstad had complied with the requirements of § 343.305(4), STATS., concerning informing Burgweger and the State had met its burden of establishing by a preponderance of the evidence that Burgweger had refused to submit to a chemical test by his failure to provide an adequate sample of his breath. The court concluded it was unnecessary to make any findings with respect to the blood test since it had determined that Burgweger had already refused.

## DISCUSSION

### *Arrest*

On appeal, Burgweger argues that an arrest occurred when Officer Jarstad made the statement that he better tell the truth because he was going to be tested, and that there was no probable cause at that time. He also argues that probable cause is required before requesting submission to a PBT and there was no probable cause at that time.

The moment of arrest in a constitutional sense is determined by asking whether a reasonable person in the defendant's position would have considered himself or herself to be "in custody," given the degree of restraint under the circumstances. See *State v. Swanson*, 164 Wis.2d 437, 446-47, 475 N.W.2d 148, 152 (1991). The circumstances of the situation, including what has been communicated by the police officers, either by their words or actions, shall be controlling under this objective test. *Id.* at 447, 475 N.W.2d at 152. The officers' unarticulated plan is irrelevant in determining the question of custody. *Id.* Whether an arrest has occurred is a question of law. *Id.* at 445, 475 N.W.2d at 152.

In order for an arrest to be constitutionally permissible, there must be probable cause, *Molina v. State*, 53 Wis. 2d 662, 670, 193 N.W.2d 874, 878 (1972), meaning, in this case, probable cause to believe that Burgweger violated § 346.63(1)(a), STATS., which prohibits driving while under the influence of an intoxicant. See *State v. Babbitt*, 188 Wis.2d 349, 356, 525 N.W.2d 102, 104 (Ct. App. 1994). The inquiry is whether, considering the totality of circumstances, the arresting officer's knowledge at the time of arrest would lead a reasonable police officer to believe that the defendant was operating a motor vehicle while under the influence of an intoxicant. *Id.* The evidence giving rise to probable cause need not

be sufficient to prove guilt beyond a reasonable doubt, nor sufficient to prove that guilt is more probable than not; it is only necessary that the information lead a reasonable officer to believe that guilt is more than a possibility. *County of Jefferson v. Renz*, 222 Wis.2d 424, 439, 588 N.W.2d 267, 275 (Ct. App. 1998). Whether undisputed facts constitute probable cause is a question of law, which we decide de novo. *Babbitt*, 188 Wis.2d at 356, 525 N.W.2d at 104.

We agree with the trial court's conclusion that Officer Jarstad's statement—that Burgweger might as well tell the truth because he was going to test him—did not transform the lawful detention into an arrest. A reasonable person detained in a routine traffic stop and asked to perform field sobriety tests would not believe he or she was under arrest; in such a situation a reasonable person would believe he or she was free to leave if he or she passed the test, in the absence of particular circumstances indicating to the contrary. *Swanson*, 164 Wis.2d at 448, 475 N.W.2d at 153. There are no circumstances here that might even arguably indicate to the contrary at the time Officer Jarstad made this statement. He did not impose restraints on Burgweger, did not tell him he was under arrest, did not make any threats, did not use any force, and did not draw a weapon. Burgweger attaches significance to the officer's use of the word "test" rather than "field sobriety tests" and argues that a reasonable person would understand this meant an evidentiary test of his breath by intoxilyzer or of his blood in a hospital. There is no evidence to support such a construction of Officer Jarstad's comments. He testified that after he informed Burgweger that he was going to be doing the tests, he asked Burgweger to step out of his vehicle, escorted him to the rear of the squad car, and began administering the field sobriety tests.

Burgweger also argues that the trial court erred in deciding that there is a slightly lower standard for the probable cause required for requesting



submission to a PBT under § 343.303, STATS.,<sup>5</sup> than is required for an arrest. It is true that shortly after the trial court made its decision in this case, we held in *Renz*, 222 Wis.2d at 439, 588 N.W.2d at 275, that “probable cause” in the first sentence of § 343.303 (if an officer has “probable cause to believe that the person is violating or has violated s. 346.63(1),” the officer may request the person to provide a breath sample for a PBT) has the same meaning as the probable cause that is constitutionally required for an arrest.<sup>6</sup> We therefore concluded that the results of the PBT could not be considered in deciding whether there was probable

---

<sup>5</sup> Section 343.303, STATS., provides:

**Preliminary breath screening test.** If a law enforcement officer has probable cause to believe that the person is violating or has violated s. 346.63 (1) or (2m) or a local ordinance in conformity therewith, or s. 346.63 (2) or (6) or 940.25 or s. 940.09 where the offense involved the use of a vehicle, or if the officer detects any presence of alcohol, a controlled substance, controlled substance analog or other drug, or a combination thereof, on a person driving or operating or on duty time with respect to a commercial motor vehicle or has reason to believe that the person is violating or has violated s. 346.63 (7) or a local ordinance in conformity therewith, the officer, prior to an arrest, may request the person to provide a sample of his or her breath for a preliminary breath screening test using a device approved by the department for this purpose. The result of this preliminary breath screening test may be used by the law enforcement officer for the purpose of deciding whether or not the person shall be arrested for a violation of s. 346.63 (1), (2m), (5) or (7) or a local ordinance in conformity therewith, or s. 346.63 (2) or (6), 940.09 (1) or 940.25 and whether or not to require or request chemical tests as authorized under s. 343.305 (3). The result of the preliminary breath screening test shall not be admissible in any action or proceeding except to show probable cause for an arrest, if the arrest is challenged, or to prove that a chemical test was properly required or requested of a person under s. 343.305 (3). Following the screening test, additional tests may be required or requested of the driver under s. 343.305 (3). The general penalty provision under s. 939.61 (1) does not apply to a refusal to take a preliminary breath screening test.

<sup>6</sup> Our interpretation of “probable cause” in the first sentence of § 343.303, STATS., was based on the rules of statutory construction, not on constitutional requirements. *County of Jefferson v. Renz*, 222 Wis.2d 424, 443 n.18, 588 N.W.2d 267, 276 (Ct. App. 1998).

cause to arrest Renz. In this case, Burgweger did not provide an adequate breath sample and, as the trial court pointed out, there were no PBT test results in evidence to consider. Under these circumstances, we do not see the relevance of the statutory standard required before an officer may request a person to submit to a PBT. It may be that Burgweger is interpreting the trial court's analysis of probable cause for arrest to include a negative inference drawn from the inadequacy of the breath sample and is arguing that this negative inference may not be considered because the officer did not have probable cause as required by *Renz* at the time he requested a PBT. We do not address this possible argument further because, excluding any inference drawn from the inadequate breath sample for the PBT, and focusing on the time at which the officer requested that Burgweger submit to a PBT, we conclude there was probable cause to arrest Burgweger for driving while under the influence of an intoxicant.

At that point in time the officer had observed that Burgweger had bloodshot eyes, smelled of alcohol, and swayed slightly from left to right when he walked. He admitted having three mixed drinks. These circumstances alone indicate that Burgweger had consumed enough alcohol to have his balance affected, which indicates that he was probably under the influence of an intoxicant "to a degree which renders [one] incapable of driving safely." Section 346.63(1)(a), STATS. We agree with Burgweger that the evidence of impairment from two of the three field sobriety tests—the walk-and-turn test and the one-leg-stand test—was sketchy because the officer did not fully describe what Burgweger was instructed to do, and what he did and did not do. However, we do not agree with Burgweger's assessment of the results of the HGN. The officer's observation of Burgweger's performance on this test was admitted into evidence; Burgweger explained that he was looking for six clues based on the jerkiness of

Burgweger's eye movements, that he observed five of the six clues, and that, based on his experience, the clues indicated impairment due to alcohol consumption. The officer's testimony on the HGN, together with the information from Burgweger and his observations of Burgweger before he administered the HGN are sufficient to lead a reasonable officer to believe that Burgweger was probably driving while under the influence of an intoxicant.<sup>7</sup>

### *Refusal*

Burgweger argues that the court erred in determining that he refused to submit to the breath test because the evidence does not support this. We conclude the trial court's finding that Burgweger made a conscious decision not to provide an adequate breath sample is supported by the evidence<sup>8</sup> and this constitutes a refusal under § 343.305(3), STATS.

---

<sup>7</sup> Contrary to Burgweger's argument, the facts in this case are not the same as those in *County of Jefferson v. Renz*, 222 Wis.2d 424, 443-48, 588 N.W.2d 267, 277-78 (Ct. App. 1998). There we concluded that, without consideration of the PBT test results, there was no probable cause to believe Renz, who was stopped for a loud muffler, was driving while under the influence of an intoxicant. The officer there did not testify that Renz had bloodshot eyes or swayed when walking before taking the fields sobriety tests. Also in *Renz*, the results of the HGN were not admitted into evidence. Although the results of the walk-and-turn test and one-leg-stand test were admitted, with the officer testifying that there were two "clues" of intoxication on the former and one on the latter, the officer also testified that the HGN and these tests were "a battery of tests [and] [t]he clues mean nothing if you don't count them all." *Id.* at 446, 588 N.W.2d at 278. We therefore concluded that the instances of unsteadiness indicated by those two field sobriety tests, when considered in the context of all the evidence that Renz was not under the influence of an intoxicant, was minimal and did not demonstrate that there was more than a possibility that he was under the influence of an intoxicant as required by § 346.63(1)(a), STATS. *Id.* at 447, 588 N.W.2d at 278.

<sup>8</sup> The trial court first directly described the standard for a refusal as including not only a statement of refusal but also "a lack of cooperation, a conscious decision to provide an inadequate sample." See *Village of Elkhart Lake v. Borzyskowski*, 123 Wis.2d 185, 192, 366 N.W.2d 506, 510 (Ct. App. 1985). It then determined that a preponderance of the evidence established that Burgweger "refused to permit the test by his failure to provide an adequate breath sample." We consider this to be a finding that Burgweger consciously decided to provide an inadequate sample.

We do not reverse a trial court's findings of fact unless they are clearly erroneous. Section 805.17(2), STATS. Whether the facts as found by the trial court constitute a refusal under § 343.305, STATS., is a question of law, which we decide de novo. *State v. Rydeski*, 214 Wis.2d 101, 106, 571 N.W.2d 417, 419 (Ct. App. 1997).

Burgweger argues that the court could have drawn other inferences from the record, namely, that the machine was not working properly. That is irrelevant under our standard of review for factual findings. If there are conflicting reasonable inferences to be drawn from the evidence, it is the role of the trial court, sitting as fact-finder, not this court, to choose which reasonable inferences to draw. *See State v. Friday*, 147 Wis.2d 359, 370-71, 434 N.W.2d 85, 89 (1989).

The trial court drew an inference from all the evidence presented by Officer Jarstad that Burgweger intentionally provided inadequate breath samples for the intoxilyzer test. That is a reasonable inference. The case law is clear that even when an individual agrees to submit to a breathalyzer test, if the trial court finds he or she intentionally provided an inadequate breath sample, that conduct constitutes a refusal under the statute. *See Village of Elkhart Lake v. Borzyskowski*, 123 Wis.2d 185, 192, 366 N.W.2d 506, 510 (Ct. App. 1985).

*By the Court.*—Order affirmed.

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

