

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

March 17, 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. 98-2899**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**LEONARD E. WILLE,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Ozaukee County:  
WALTER J. SWIETLIK, Judge. *Affirmed.*

NETTESHEIM, J. Leonard E. Wille appeals from an order suspending his operating privileges following the trial court's determination that he had wrongfully refused to submit to a chemical test under the implied consent law, § 343.305, STATS. Wille contends that the trial court erred when it held that probable cause existed to support his arrest. We uphold the trial court's ruling and affirm the order.

The relevant facts are straightforward, brief and not in dispute. While on routine patrol on November 28, 1997, during the early morning hours, Ozaukee County Deputy Sheriff Demaine Milbach observed a truck parked on Highway 60 with its front passenger-side tire up on a curb. Upon further investigation, Milbach noted that the vehicle was not running, but the emergency lights were on.

Milbach approached the vehicle and made contact with a person, later identified as Wille, seated in the driver's seat. Milbach asked Wille if he was experiencing any medical problems. Wille responded that he was okay and that his vehicle had stalled. During this conversation, Milbach detected a strong odor of intoxicants and also noticed that Wille had bloodshot eyes. Milbach did not observe any keys in the ignition or any likely containers of alcoholic beverages in the vehicle.

Milbach then asked Wille to step out of the car. Wille complied. Milbach asked Wille where the keys to the vehicle were. Wille responded that they were in his right front pants pocket. Milbach asked Wille where he was coming from. Wille responded "that bar" and he gestured in the direction of a nearby tavern. Milbach then asked Wille to perform some field sobriety tests. Wille refused. Milbach arrested Wille for operating a motor vehicle while intoxicated. Wille protested that he was not intoxicated and that he had not been driving the vehicle. A search of Wille at the scene produced the vehicle's keys in his right front pants pocket.

Later, Wille refused to submit to an Intoxilyzer chemical test at the Ozaukee county jail. Based on this refusal, Wille was issued a notice of intent to revoke his operating privileges pursuant to § 343.305(9)(a), STATS. In response,

Wille requested a hearing. At the hearing, Wille defended on the sole ground that Milbach did not have probable cause to arrest him. Specifically, Wille contended that the officer did not have probable cause to believe that he had operated the vehicle. The trial court rejected this argument and entered an order suspending Wille's operating privileges. Wille appeals.

One of the issues properly litigated at a refusal hearing is “[w]hether the officer had probable cause to believe the person was driving or operating a motor vehicle while under the influence of alcohol.” Section 343.305(9)(a)5.a, STATS. As noted, Wille rested his defense on this ground, contending that Milbach did not have sufficient basis to believe that Wille had operated the vehicle.

Probable cause refers to that quantum of evidence which would lead a reasonable police officer to believe that the defendant has probably committed a crime. *See State v. Nordness*, 128 Wis.2d 15, 35, 381 N.W.2d 300, 308 (1986). The evidence in support of probable cause need not reach the level of proof beyond a reasonable doubt or even that guilt is more likely than not. *See id.* In an implied consent setting, the question is probable cause, not probable cause to a reasonable certainty. *See id.* at 36, 381 N.W.2d at 308. The trial court must simply ascertain the plausibility of the police officer's account. *See id.* Moreover, a defendant's refusal to submit to field sobriety tests is a factor which supports probable cause because it reflects a “consciousness of guilt.” *See State v. Babbitt*, 188 Wis.2d 349, 359, 525 N.W.2d 102, 105-06 (Ct. App. 1994). Finally, and most importantly, we note that probable cause is to be judged by the factual and practical considerations of everyday life on which reasonable and prudent persons, not legal technicians, act. *See State v. Wilks*, 117 Wis.2d 495, 502, 345 N.W.2d 498, 501 (Ct. App.), *aff'd*, 121 Wis.2d 93, 358 N.W.2d 273 (1984).

With these probable cause principles in mind, we readily affirm the trial court's determination that probable cause existed to support Milbach's belief that Wille had operated the vehicle. Milbach observed Wille seated in the driver's seat of the vehicle. While the engine was not running, the emergency lights were operating. No other person who might have operated the vehicle was on the scene. Wille himself acknowledged that the vehicle had stalled, suggesting that he was the operator. He stated that he came from a nearby tavern. Wille also acknowledged possession of the keys to the vehicle.

Based on these observations, a reasonable person employing the practical considerations of everyday life, not the nuances of legal technicalities, would reasonably conclude, as did Milbach, that Wille had operated the vehicle to the site where he was found. While none of Milbach's observations directly revealed that Wille had operated the vehicle, such direct evidence is not always necessary. Circumstantial evidence may support a finding of probable cause. *See State v. Kerr*, 181 Wis.2d 372, 380, 511 N.W.2d 586, 589 (1994). Indeed, in some cases, circumstantial evidence may be as strong as or more convincing than direct evidence. *See WIS J I—CRIMINAL 170*. This is such a case.<sup>1</sup>

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<sup>1</sup> Wille also argues that since Milbach did not investigate further to determine whether his vehicle was truly inoperable, probable cause did not exist to support the arrest. But even if Milbach had done so and established that the vehicle was *then* inoperable, such would not have eliminated the legitimate probable cause to believe that Wille had operated the vehicle to the location where Milbach found it.

*By the Court.*—Order affirmed.

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

