

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 8, 2006

Cornelia G. Clark
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2005AP2145

Cir. Ct. No. 2004CT147

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN THE MATTER OF THE REFUSAL OF SEAN R. HAVERTY:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

SEAN R. HAVERTY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Green Lake County:
WILLIAM M. MCMONIGAL, Judge. *Affirmed.*

¶1 BROWN, J.¹ Sean R. Haverty appeals a circuit court order that revoked his operating privileges for two years for refusing to submit to a chemical test. Haverty claims that the arresting officer did not have probable cause to arrest him for operating while intoxicated because the facts adduced do not rule out the

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

possibility that he became intoxicated after he parked his vehicle. We disagree. Based on the totality of the circumstances, a reasonable officer could have concluded that Haverty was intoxicated even before he stopped his vehicle. Therefore, we affirm.

¶2 The following are the undisputed facts of this case. At approximately 1:20 a.m. on October 2, 2004, a vehicle pulled into the driveway of a Green Lake county resident. It made a U-turn in the driveway and then parked on the edge of the lawn. The resident waited some time for the vehicle to leave her property. When the vehicle did not leave, the resident called the Green Lake County Sheriff's Department. The sheriff's department received the call and dispatched an officer to the scene at approximately 2:57 a.m. The officer approached the vehicle and found two men sleeping inside. He attempted to get their attention and eventually was able to awaken the defendant, Haverty.

¶3 The officer requested Haverty to show him identification. In response, Haverty gave the officer a credit card. The officer advised him he needed a driver's license and, after some rummaging, Haverty eventually produced an Illinois driver's license. At that time, Haverty told the officer that he was the driver of the parked vehicle.

¶4 The officer asked Haverty to exit the vehicle and inquired whether he knew where he was. Haverty informed the officer that his vehicle was parked at the Lawsonia Golf Course. When the officer told him that the golf course was six to seven miles away, Haverty still insisted he was parked at the golf course. In response to the officer's question about how many people were in the vehicle, Haverty told the officer that there were three. The officer asked Haverty how much he had had to drink, and Haverty replied, "[M]ore than I should have." The

officer observed that Haverty had watery, bloodshot and glassy eyes, slurred speech, and a strong odor of intoxicants on his breath.

¶5 The officer then administered field sobriety tests to determine if Haverty was intoxicated. Haverty was unable to recite the alphabet properly, did not count as instructed, and manifested all six clues for intoxication on the horizontal gaze nystagmus test. After Haverty failed all three sobriety tests, the officer performed a preliminary breath test on Haverty. The result of the preliminary breath test was 0.19.

¶6 Based on his observations and the field sobriety tests, the officer arrested Haverty for operating a motor vehicle while intoxicated under WIS. STAT. § 346.63(1)(a). Upon his arrest, Haverty refused to take a chemical test that would have determined his blood alcohol concentration. Haverty was then charged with refusing to submit to a chemical test, contrary to WIS. STAT. § 343.305.

¶7 Haverty challenged the probable cause for his arrest at a May 25, 2005 refusal hearing. Haverty contended that the officer lacked probable cause to believe he had driven the vehicle in an intoxicated state because the officer did not rule out the possibility that Haverty became intoxicated while parked on the Green Lake county resident's lawn. The circuit court rejected Haverty's arguments and revoked his license.

¶8 This court reviews de novo whether undisputed facts constitute probable cause. *State v. Babbitt*, 188 Wis. 2d 349, 356, 525 N.W.2d 102 (Ct. App. 1994). When a court determines probable cause at a refusal hearing, it does not weigh the State's evidence against the defendant's evidence. *State v. Nordness*, 128 Wis. 2d 15, 36, 381 N.W.2d 300 (1986). It merely assesses the "totality of the facts and circumstances faced by the officer at the time of the arrest

to determine whether he or she reasonably believed that the defendant had committed an offense.” *County of Dane v. Sharpee*, 154 Wis. 2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990). The officer’s observations “need only be sufficient to lead a reasonable officer to believe that guilt is more than a possibility.” *Village of Elkhart Lake v. Borzyskowski*, 123 Wis. 2d 185, 189, 366 N.W.2d 506 (Ct. App. 1985). Thus, the trial court “simply must ascertain the plausibility of a police officer’s account.” *Nordness*, 128 Wis. 2d at 36; *see also State v. Higginbotham*, 162 Wis. 2d 978, 995, 471 N.W.2d 24 (1991) (probable cause may exist notwithstanding a possible innocent explanation for defendant’s conduct).

¶9 The arresting officer here did indeed have probable cause to arrest Haverty based on the totality of the circumstances. The officer observed that Haverty, who had admitted that he was the driver, had stopped his vehicle at the residence of a complete stranger in the wee hours of the morning and believed he was parked at a golf course several miles away. A reasonable officer could have concluded that the golf course was Haverty’s intended destination and that Haverty ended up somewhere else because he was too drunk to know where he was. Moreover, the fact that Haverty drove off of the driveway and onto the lawn suggests that alcohol had impaired his control over the vehicle. The foregoing inferences were supported by several other indicia of intoxication. Haverty’s eyes appeared bloodshot, watery and glassy, his speech was slurred, and he smelled strongly of alcohol. He also mistook his credit card for a driver’s license and failed three sobriety tests, two of which included such simple cognitive tasks as counting and reciting the alphabet. In addition, Haverty admitted to drinking “more than I should have.” He did not offer an innocent explanation that he was drinking in the car after it was stopped. The 0.19 reading on his preliminary

breath test further supported the officer's belief that Haverty had been operating his vehicle in an intoxicated state.

¶10 Based on the wealth of facts discussed above, a reasonable police officer could have believed that it was "more than a possibility" that Haverty committed the offense of operating while intoxicated. His arrest was therefore proper and his refusal to submit to the chemical test improper. We affirm.

By the Court.—Order affirmed.

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