

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 26, 2009

David R. Schanker
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. 2008AP3083-FT

Cir. Ct. No. 2008TR374

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MATTHEW J. SCHLIEVE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Portage County:
JOHN V. FINN, Judge. *Affirmed.*

¶1 VERGERONT, J.¹ Michael Schlieve appeals the judgment entered after a jury verdict finding him guilty of operating a motor vehicle with a

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(g) and (3) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

prohibited alcohol concentration, in violation of WIS. STAT. § 346.63(1)(b). He contends the circuit court erred in two ways in denying his motion to suppress. First, he asserts, the court erred in concluding that the statute that provided the asserted basis for the traffic stop, WIS. STAT. § 347.13(3), requires that the license plate lamp actually be lighted and, second, the circuit court erred in concluding that the arresting officer had probable cause within the meaning of WIS. STAT. § 343.303 to obtain a preliminary breathalyzer test (PBT) from him. For the following reasons, we affirm.

BACKGROUND

¶2 The arresting officer, Wisconsin State Patrol Trooper Joseph Mulrooney, was on duty on Interstate 39 at approximately midnight when he observed Schlieve's car without a lighted license plate lamp. The trooper testified at the hearing on Schlieve's motion to suppress evidence. A video recording that was automatically activated when the trooper turned on his emergency lights to make the stop was also presented at the hearing. The video showed the trooper examining the license plate after he stopped the vehicle and the trooper testified that he looked at the license plate to see if the light was working and it did not appear that the light was working.

¶3 The trooper also testified that he had a discussion with Schlieve about the fact that he had stopped Schlieve's vehicle for the same reason the week before and this is confirmed by the video. The trooper testified that, because he could smell the odor of intoxicants and because Schlieve had slurred speech, he asked Schlieve how much he had to drink that evening. The video shows this conversation and shows that the defendant admitted to consuming "a couple" of drinks with his dinner.

¶4 The trooper testified that he told Schlieve that he wanted to make sure that Schlieve was “okay to drive and wanted to see how much he had to drink” and he administered a PBT. The result of the PBT was .125. The trooper then conducted field sobriety tests—the Horizontal Gaze Nystagmus, the walk-and-turn, and the one-leg stand. Based on these tests the trooper determined that Schlieve was operating while intoxicated. The trooper arrested Schlieve and gave him a warning for the defective license plate lamp.

¶5 The circuit court concluded that the stop was lawful because the trooper observed a violation of WIS. STAT. § 347.13(3), which provides as follows:

No person shall operate on a highway during hours of darkness any motor vehicle upon the rear of which a registration plate is required to be displayed unless such motor vehicle is equipped with a lamp so constructed and placed as to illuminate with a white light the rear registration plate and render it clearly legible from a distance of 50 feet to the rear. Such lamp may be incorporated as part of a tail lamp or may be a separate lamp.

The circuit court rejected Schlieve’s proposed construction of the statute—that the statute did not require that the lamp be actually lighted as long as the lamp was the type specified in the statute. According to the circuit court the plain meaning of the statute is that the lamp has to actually provide the illumination specified in the statute during hours of darkness.

¶6 The circuit court also concluded that the slurred speech, smell of intoxicants, PBT result of .125, and failing the field sobriety tests established probable cause for the trooper to believe that Schlieve was under the influence of an intoxicant and therefore the arrest was lawful. The court did not expressly rule on whether the PBT was lawful, stating only that before giving this test the trooper

had smelled intoxicants on the defendant's breath, observed his slurred speech, and had asked how many drinks Schlieve had consumed.

DISCUSSION

¶7 On appeal, Schlieve renews his argument that there was no reasonable suspicion for the stop because WIS. STAT. § 347.13(3) does not require that a registration plate lamp actually be lighted during the hours of darkness as long as there is a lamp of the type specified in the statute. He also contends that the standard of probable cause required before giving a PBT, as established in *County of Jefferson v. Renz*, 231 Wis. 2d 293, 603 N.W.2d 541 (1999), was not met on the facts of this case.

¶8 We first consider Schlieve's argument on the lawfulness of the stop.

¶9 A police officer may make an investigative stop if he or she reasonably suspects the person is violating or is about to violate civil traffic regulations. *State v. Colstad*, 2003 WI App 25, ¶9, 260 Wis. 2d 406, 659 N.W.2d 394. The issue of whether the officer's suspicion is reasonable is a common sense test: whether the suspicion is grounded in specific articulable facts and reasonable inferences from those facts. *Id.*, ¶8.

¶10 When we review an order denying a motion to suppress, we accept the circuit court's findings of fact unless they are clearly erroneous. *State v. Sumner*, 2008 WI 94, ¶17, 312 Wis. 2d 292, 752 N.W.2d 783. We review de novo whether the facts as found by the circuit court, and the undisputed facts, meet the constitutional standard. *Id.*

¶11 Schlieve's argument that the initial stop did not meet the reasonable suspicion standard is based entirely on his construction of WIS. STAT. § 347.13(3).

The construction of a statute and its application to a given set of facts presents a question of law, which we review de novo. *Cambier v. Integrity Mut. Ins. Co.*, 2007 WI App 200, ¶12, 305 Wis. 2d 337, 738 N.W.2d 181. When we construe a statute, we begin with the language of the statute and give it its common, ordinary, and accepted meaning, except that technical or specially defined words are given their technical or special definitions. *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. We interpret statutory language in the context in which it is used, not in isolation but as part of a whole, in relation to the language of surrounding or closely related statutes, and we interpret it reasonably to avoid absurd or unreasonable results. *Id.*, ¶46. If, employing these principles, we conclude the statutory language has a plain meaning, then we apply the statute according to that plain meaning. *Id.*

¶12 We agree with the circuit court that WIS. STAT. § 347.13(3) plainly requires that during the hours of darkness the registration plate lamp “illuminate with a white light” as specified in the statute. It is not reasonable to read this language to require that a motor vehicle have a lamp with the specified capacity to illuminate during hours of darkness, but not to require the lamp to be actually functioning to this capacity during the hours of darkness. Three related statutes reinforce this plain meaning of § 347.13(3). Section 347.13(4) provides that “registration plate lamps shall be so wired as to be lighted whenever the head lamps or auxiliary driving lamps are lighted.” WISCONSIN STAT. § 347.06(1) provides that “[with certain exceptions not applicable here] no person may operate a vehicle upon a highway during hours of darkness unless all head lamps ... are lighted.” Together these two statutes plainly require registration plate lamps to be lighted during hours of darkness. In addition, § 347.06(3) requires that an operator

of a motor vehicle “shall keep all lamps and reflectors with which such vehicle is required to be equipped ... in proper working condition at all times.”

¶13 We next consider Schlieve’s challenge to the PBT. WISCONSIN STAT. § 343.303 provides that an officer may ask a person to submit to a PBT prior to an arrest if the officer “has probable cause to believe that the person ... has violated s. 346.63(1)...” The court in *Renz* held that “probable cause to believe” as used in this statute means “a quantum of proof greater than the reasonable suspicion necessary to justify an investigatory stop ... but less than the level of proof required to establish probable cause for arrest.” 23 Wis. 2d at 316. Schlieve asserts that this level of probable cause did not exist before the trooper administered the PBT, and therefore the results of the PBT, as well as the results of the field sobriety tests, must be suppressed.

¶14 The State responds that the late hour, the odor of intoxicants, the slurred speech, and the admission of consuming alcohol were sufficient to establish the *Renz* “probable cause to believe” standard. In the alternative, the State contends that, even if those circumstances were not sufficient and the PBT results therefore may not be utilized to demonstrate probable cause for the arrest, there is nonetheless probable cause to arrest. This is so, according to the State, because an officer may lawfully conduct field sobriety tests if an officer reasonably suspects the person of operating a motor vehicle while under the influence of an intoxicant. *See County of Dane v. Campshure*, 204 Wis. 2d 27, 32, 552 N.W.2d 876 (Ct. App. 1996). In the State’s view, the late hour, the odor of intoxicants, the slurred speech, and the admission that Schlieve had consumed alcohol establish reasonable suspicion that he was operating while under the influence of an intoxicant and therefore the field sobriety tests were permissible. The State asserts that Schlieve’s performance on the field sobriety tests, in

conjunction with the preceding four identified factors, constituted probable cause to arrest him for operating while under the influence of an intoxicant.

¶15 Schlieve did not file a reply brief and his main brief provides no authority for his request that, if the requisite standard for the PBT was not met, the court must suppress not only the results of the PBT, but also the results of the field sobriety tests. When an appellant does not reply to a proposition asserted in the responsive brief, we may take it as a concession. See *Schlieper v. DNR*, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994). Accordingly, we take Schlieve's failure to file a reply brief as a concession that, even if the PBT is disregarded because the requisite probable cause standard under WIS. STAT. § 343.303 was not met, the field sobriety tests were properly considered in determining whether there was probable cause to arrest, and there was therefore probable cause to arrest.

CONCLUSION

¶16 We conclude the circuit court properly construed WIS. STAT. § 347.13(3) and correctly decided that there was reasonable suspicion that Schlieve was violating this statute. Based on Schlieve's concession implicit in failing to file a reply brief, we conclude that the circuit court did not err in deciding that there was probable cause to arrest Schlieve for operating while under the influence of an intoxicant.

By the Court.—Judgment affirmed.

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

