

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 20, 2010

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. 2009AP1911-CR

Cir. Ct. No. 2008CT366

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRADLEY J. TADYCH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Manitowoc County: PATRICK L. WILLIS, Judge. *Affirmed.*

¶1 NEUBAUER, P.J.¹ Bradley J. Tadych appeals from a judgment of conviction for operating while under the influence, second offense, contrary to

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

WIS. STAT. § 346.63(1)(a). Tadych raises two challenges on appeal. First, Tadych contends that the trial court erred in denying his motion to suppress evidence based on lack of sufficient probable cause to believe Tadych had violated § 346.63 prior to requesting preliminary breath test (PBT). Second, Tadych contends that the results of the preliminary breath test were erroneously admitted into evidence at the motion hearing. We conclude that the arresting officer had the requisite degree of probable cause to request a PBT. We further conclude that the results of the PBT were appropriately admitted for purposes of establishing probable cause to arrest. We therefore uphold the trial court's ruling and affirm the judgment.

BACKGROUND

¶2 On May 15, 2008, the State filed charges against Tadych for operating while intoxicated and operating with a prohibited alcohol concentration, both as a second offense. Shortly thereafter, Tadych filed a motion to suppress evidence based on lack of reasonable suspicion to believe that he had committed a crime and lack of probable cause to arrest. The trial court held a motion hearing on June 25, 2008, at which the facts underlying the charges were testified to by the arresting officer, Deputy Rick Sieracki of the Manitowoc County Sheriff's Department.

¶3 Sieracki testified that on April 26, 2008, shortly after 4:30 a.m., he was dispatched to a rollover accident. Sieracki arrived at around 5:00 a.m., and found a truck overturned in a ditch. There were no occupants in the vehicle or at the scene, but the registration plates on the vehicle indicated that it belonged to Tadych. After determining Tadych's address, Sieracki went to his residence which was located one-quarter mile south of the accident scene. Sieracki spoke to Tadych's sister who indicated that Tadych was at Aurora hospital being treated.

¶4 Sieracki arrived at the hospital at approximately 5:15 a.m. and located Tadych. Sieracki asked Tadych whether he was the driver of the vehicle in question and what had caused his vehicle to enter the ditch. Tadych responded that he had swerved to avoid a deer. During this exchange, Sieracki noted a “slight odor of intoxicant” on Tadych’s breath and asked whether Tadych had been drinking. According to Sieracki, Tadych responded that he had been drinking but “had stopped drinking by 1:30” in the morning, Sieracki did not request field sobriety testing because of the medical treatment Tadych was receiving. Sieracki informed Tadych that “he would be requesting him to take a PBT, a preliminary breath test, to kind of gauge where he was at.” Tadych complied and the result indicated a PBT of .10. Sieracki then made the decision to arrest Tadych for operating under the influence of an intoxicant.

¶5 At the close of the motion hearing, the court requested briefing from the parties on the issue of whether there was sufficient probable cause to justify the administration of the PBT under *County of Jefferson v. Renz*, 231 Wis. 2d 293, 603 N.W.2d 541 (1999). After reviewing the briefs, the court notified the parties that it would be reopening the motion hearing to permit the State the opportunity to submit evidence as to whether the device used for the PBT was a device approved by the department of transportation (DOT). At the continued motion hearing on August 12, 2008, the State produced testimony from Sieracki that he had used an Intoxilyzer SD-2, and a list of approved devices from the DOT Web site which includes the SD-2.

¶6 After hearing arguments, the trial court issued an oral ruling on September 22, 2008, finding that Sieracki had probable cause to administer the PBT and that the results of the PBT were properly admitted for purposes of determining whether the officer had probable cause to arrest. Tadych later pled

guilty to OWI, second offense. He now challenges on appeal the trial court's order denying his motion to suppress.

DISCUSSION

¶7 When reviewing the denial of a motion to suppress evidence, we will uphold the circuit court's findings of fact unless they are clearly erroneous. *State v. Eckert*, 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996); WIS. STAT. § 805.17(2). Whether those facts satisfy the statutory standard of probable cause is a question of law we review de novo. *State v. Ellenbecker*, 159 Wis. 2d 91, 94, 464 N.W.2d 427 (Ct. App. 1990).

¶8 Tadych's first argument stems from WIS. STAT. § 343.303, which states that before an officer administers a PBT, the officer must have "probable cause to believe that the person" has operated while intoxicated in violation of WIS. STAT. § 346.63.² Tadych contends that Sieracki administered the PBT

² WISCONSIN STAT. § 343.303 provides in relevant part:

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 s. 346.63(2) ... 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) ... 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)

without the requisite “probable cause” to administer a PBT under § 343.303, which he correctly identifies as “a quantum of proof greater than the reasonable suspicion necessary to justify an investigative stop, and greater than the ‘reason to believe’ that is necessary to request a PBT from a commercial driver, but less than the level of proof required to establish probable cause for arrest.” See *Renz*, 231 Wis. 2d at 316. “An officer may request a PBT to help determine whether there is probable cause to arrest a driver suspected of OWI, and the PBT result will be admissible to show probable cause for an arrest, if the arrest is challenged.” *Id.*

¶19 Tadych contends that the facts in this case do not rise to the requisite level of proof under WIS. STAT. § 343.303. In issuing its ruling, the trial court made specific findings as to the facts relevant to its determination of probable cause to administer the PBT: (1) there was a single vehicle rollover accident resulting in injury to the driver requiring hospitalization, (2) although Tadych indicated that the accident was caused by a deer crossing the road, there was no other evidence of the cause of the accident, (3) Sieracki observed a slight odor of alcohol on Tadych, and (4) Tadych admitted consuming alcohol shortly before the accident—Sieracki testified that Tadych stated he had “stopped drinking” at 1:30 a.m. Tadych points out that Sieracki failed to notice any speech impairment, bloodshot eyes, incoherence, and lacked any knowledge as to how much alcohol

he had consumed. Tadych argues that when compared to the facts in *Renz*, the facts here fall short.³ We disagree.

¶10 In *Renz*, the defendant was stopped because of loud exhaust coming from his vehicle. *Renz*, 231 Wis. 2d at 296. During the initial conversation, the officer noted a strong odor of alcohol coming from inside the vehicle. *Id.* The defendant admitted to drinking three beers earlier in the evening and, when asked, agreed to perform field sobriety tests. *Id.* at 296-97. The defendant recited the alphabet correctly, his speech was not slurred, and he exhibited only one of four possible clues of intoxication in the one-legged stand test and two of eight possible clues of intoxication in the heel-to-toe test. *Id.* at 297-98. However, he was not able to touch the tip of his nose with his left finger during the finger-to-nose test.⁴ *Id.* at 316-17. Based on these observations, the officer administered a PBT, the results of which were later challenged on grounds of lack of probable cause. *Id.* at 299.

¶11 In addressing the defendant's argument, the supreme court addressed the purpose of the PBT, which is "to help determine whether there are grounds for arrest." *Id.* at 304. Given the defendant's mixed results and because the defendant "was able to substantially complete all of the tests," the officer was in

³ Tadych additionally points us to the facts presented in *State v. Colstad*, 2003 WI App 25, 260 Wis. 2d 406, 659 N.W.2d 394, and *State v. Begicevic*, 2004 WI App 57, 270 Wis. 2d 675, 678 N.W.2d 293, in support of his argument that Sieracki needed more "indicators of intoxication" to reach the level of probable cause necessary to administer a PBT. Our review of these cases and the facts therein does not alter our conclusion that the facts in this case provided Sieracki with sufficient probable cause under *County of Jefferson v. Renz*, 231 Wis. 2d 293, 603 N.W.2d 541 (1999), to administer a PBT.

⁴ The *Renz* court found sufficient probable cause to request a PBT even without the results of the horizontal gaze nystagmus test during which the defendant exhibited all six clues for intoxication. *Renz*, 231 Wis. 2d at 317 n.15.

an ambiguous area between reasonable suspicion to stop and probable cause for an arrest which justified giving the PBT. *Id.* at 316-17. The court observed that “[t]he officer was faced with exactly the sort of situation in which a PBT proves extremely useful in determining whether there is probable cause for an OWI arrest.” *Id.* at 317.

¶12 Tadych essentially argues that he was not in that ambiguous area—that the quantum of proof was not greater than needed for reasonable suspicion, that there were not sufficient facts to give rise to the required degree of probable cause for a PBT. However, we conclude that the rollover accident and odor of intoxicants coupled with Tadych’s admission that he had consumed alcohol but “stopped drinking” at 1:30 a.m. were sufficient to provide an officer with not only reasonable suspicion to believe that Tadych may have committed a crime, but also a quantum of proof greater than that. *See id.* at 317 (probable cause to administer a PBT refers to a quantum of proof greater than reasonable suspicion). Any doubt fostered by the lack of speech impairment and the officer’s inability to request field sobriety testing was properly resolved by the administration of the PBT. *See id.*

¶13 Tadych next argues that the numerical results of the PBT (.10) were improperly admitted at the motion hearing because it is only approved for

qualitative testing (the presence or absence of alcohol).⁵ Tadych relies on WIS. ADMIN. CODE § Trans 311.03(12) and (13) for the proposition that because a PBT is a qualitative testing device, as opposed to a quantitative testing device, the “result” is defined in terms of “the presence or absence of alcohol.”⁶ Tadych argues that the use of the word “result” in WIS. STAT. § 343.303 is constrained by the definition set forth in § Trans 311.03(12). Again, we disagree.

¶14 WISCONSIN STAT. § 343.303 governs the use of PBTs. It provides that “[t]he 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

⁵ Tadych implies in his brief that the Intoxilyzer SD-2 is not a DOT-approved qualitative or quantitative testing device. However, the State introduced as evidence at the motion hearing a printout from the DOT Web site entitled “List of Approved Preliminary Breath Test Instruments,” which included the SD-2. Tadych objected based on lack of authentication and the trial court took his objection under advisement. The trial court subsequently ruled that the listing was admissible under WIS. STAT. § 909.02(5), which provides that extrinsic evidence of authentication as a condition to admissibility is not required with respect to official publications or publications purporting to be issued by public authority. Because Tadych does not develop any argument with respect to the listing or the trial court’s ruling, we need not address the issue further. *See State v. Gulrud*, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987) (proper appellate argument contains the contention of the party, the reasons therefore, with citation of authorities, statutes and that part of the record relied on; inadequate argument will not be considered).

⁶ WISCONSIN ADMIN. CODE § Trans 311.03(12) and (13) provide:

(12) “Qualitative breath alcohol analysis” means a test of a person’s breath, the results of which indicate the presence or absence of alcohol.

(13) “Quantitative breath alcohol analysis” means a chemical test of a person’s breath which yields a specific result in grams of alcohol per 210 liters of breath.

Insofar as the parties disagree as to whether a PBT is a qualitative or quantitative test, this court has stated that a PBT “is a ‘qualitative test.’” *See State v. Fischer*, 2008 WI App 152, 314 Wis. 2d 324, 761 N.W.2d 7, *review granted*, 2009 WI 23, 315 Wis. 2d 721, 764 N.W.2d 531 (No. 2007AP1898-CR).

is challenged.” (Emphasis added.) Here, the result was admitted for purposes of establishing probable cause to arrest—the result was not admitted as proof of blood alcohol concentration for purposes of guilt or innocence of the charged offense. While Tadych challenges the use of the specific numeric result, the fact remains that the PBT does yield a specific numeric result, and it is precisely that number which aids the officer in determining whether there is probable cause to arrest.⁷ Although the numeric result is not as reliable as the quantitative test and thus is not admissible except on the question of probable cause, the statute nevertheless authorizes a law enforcement officer to consider a PBT result in making the arrest determination. It follows that in assessing the officer’s probable cause determination, the trial court is also permitted to consider that numeric result and determine the weight accorded to it.⁸ See *Lellman v. Mott*, 204 Wis. 2d 166, 172, 554 N.W.2d 525 (Ct. App. 1996) (the weight to be attached to evidence is a matter uniquely within the discretion of the finder of fact).

CONCLUSION

¶15 We conclude that there was sufficient probable cause under *Renz* to administer a PBT to Tadych. We further conclude that the numeric result of that PBT was properly admitted for purposes of showing probable cause to arrest. We

⁷ For example, if Tadych’s result had been a .01 as opposed to a .10, Sieracki (or the trial court) might have made a different determination in weighing the existence of probable cause.

⁸ *Renz* supports the conclusion that a PBT may be used for more than simply determining the presence or absence of alcohol. In that case, the facts suggest that the police already knew that some amount of alcohol was present in the defendant’s blood, both by the defendant’s own admission to having consumed alcohol and the odor of intoxicants in the vehicle. *Renz*, 231 Wis. 2d at 296. Yet, in considering the defendant’s challenge to the administration of the PBT, which yielded a result of .178, the supreme court observed that “[t]he officer was faced with exactly the sort of situation in which a PBT proves extremely useful in determining whether there is probable cause for an OWI arrest.” *Id.* at 317.

therefore uphold the trial court's order denying Tadych's motion to suppress and affirm the judgment.

By the Court.—Judgment affirmed.

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

