

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 11, 2002

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. 02-1483
STATE OF WISCONSIN

Cir. Ct. No. 01-TR-2418

**IN COURT OF APPEALS
DISTRICT II**

COUNTY OF WALWORTH,

PLAINTIFF-RESPONDENT,

V.

JASON M. AARUD,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County:
ROBERT J. KENNEDY, Judge. *Affirmed.*

¶1 SNYDER, J.¹ Jason M. Aarud appeals from a judgment of conviction for driving while intoxicated, first offense. Aarud argues that he was

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

seized without reasonable suspicion or probable cause when he was asked to take a preliminary breath test (PBT) and to perform field sobriety tests. We disagree and affirm the judgment.

FACTS

¶2 At approximately 12:15 a.m. on May 20, 2001, Walworth County Deputy Sheriff Cheryl Schmidt observed a car weaving over the fog line three separate times. Schmidt stopped the car and asked the driver, identified as Aarud, why he was weaving. Aarud said that he was tired and had just gotten off work. Schmidt felt that Aarud sounded “confused” when he tried to explain why he was tired. Schmidt asked Aarud if he had had anything to drink, which Aarud denied. She did not observe any odor of intoxicants on Aarud at that time.

¶3 Schmidt continued talking with Aarud about why he was tired and “still felt uncomfortable with him, with my liability if he drove. I wanted to make sure there would be no liability that way. So ... I asked him to submit” to a PBT. Aarud informed Schmidt that he had some tobacco in his mouth; Schmidt told him to get rid of it and “then rather than taking the P.B.T. at that time we should do field sobriety tests to give the residual mouth alcohol a chance to dissipate.” Aarud spit out the tobacco and exited the vehicle. At some point after exiting the vehicle, Aarud admitted having three beers after work.

¶4 Schmidt had Aarud perform some field sobriety tests and based upon his performance on those tests, Schmidt concluded that Aarud was under the influence of an intoxicant and asked him to submit to a PBT, which yielded a result of .16% alcohol concentration. Aarud was then arrested and cited for operating a motor vehicle while intoxicated.

¶5 On October 4, 2001, Aarud filed a motion to suppress the alcohol concentration test results, arguing that at the time Schmidt first asked him to provide a PBT, she did not have probable cause to believe he was operating a motor vehicle while intoxicated; Schmidt had not detected any odor of intoxicants and at the time of the request had not yet administered any field sobriety tests. After a hearing on this matter on December 14, 2001, the trial court denied this motion. After a bench trial on the stipulated facts, Aarud was found guilty. Aarud appeals.

DISCUSSION

¶6 Aarud argues that he was seized without reasonable suspicion or probable cause when he was asked to take a PBT and to perform field sobriety tests. He argues that asking a person to submit to a PBT is effectively an arrest. Aarud cites no authority for this proposition and, in fact, such a proposition is in direct conflict with established law.

¶7 WISCONSIN STAT. § 343.303 addresses preliminary breath tests and states, in relevant part:

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 ... 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.

Thus, this statute makes clear that a person is not yet under arrest when asked to take a PBT. This statute simply allows the officer to use the PBT as a tool to determine whether or not to arrest a suspect. *County of Jefferson v. Renz*, 231

Wis. 2d 293, 304, 603 N.W.2d 541 (1999). If the results of the PBT are to help an officer determine whether or not to arrest a suspect, a suspect is logically not under arrest when asked to provide a PBT. An officer must simply have “probable cause to believe” that a person is operating a motor vehicle while intoxicated to request a PBT. We shall assume that Aarud is arguing that Schmidt did not have probable cause to believe he was intoxicated and therefore could not ask him to take a PBT.

¶8 Aarud’s entire argument is premised on the fact that Schmidt first requested a PBT prior to the administration of field sobriety tests. Schmidt did first ask Aarud to take a breath test after pulling him over and Aarud consented to this test. However, Schmidt then changed her mind and decided to do field sobriety tests instead. In essence, Schmidt rescinded her request for a PBT and simply asked Aarud to perform field sobriety tests.

¶9 An officer may make an investigate stop if the officer “reasonably suspects” that a person is violating the traffic laws. *Id.* at 310. After stopping a car and contacting a driver, an officer’s observations of the driver may cause the officer to suspect the driver of operating while intoxicated. *Id.* If the officer’s observations of the driver are not sufficient to establish probable cause for arrest for an OWI violation, the officer may request the driver to perform various field sobriety tests. *Id.* Here, that is exactly what Schmidt did.

¶10 Schmidt had observed Aarud weave and cross the fog line several times and Aarud implicitly admits he did so. Schmidt observed Aarud’s confusion in response to questions. After rescinding her request for a PBT, Schmidt then asked Aarud to perform various field sobriety tests. In light of Aarud’s confusion and traffic violations on a major roadway at 12:15 a.m., it was appropriate and

prudent for Schmidt to ask Aarud to perform field sobriety tests. Aarud does not argue that there was insufficient evidence to ask him to perform field sobriety tests and implicitly admits that said request was appropriate. As Aarud concedes in his brief, field sobriety tests are simply a part of a traffic stop and are allowed to occur on less than probable cause. *See State v. Swanson*, 164 Wis. 2d 437, 444, 475 N.W.2d 148 (1991) (a person is not under arrest when asked to perform field sobriety tests during a routine traffic stop).

¶11 Aarud was not under arrest when initially asked for a PBT. In any event, Schmidt thereafter rescinded the PBT request and instead asked Aarud to perform field sobriety tests. Such a request was reasonable under the circumstances, as Aarud implicitly acknowledges. We therefore affirm the judgment.

By the Court.—Judgment affirmed.

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

