COURT OF APPEALS
DECISION
DATED AND FILED

December 26, 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. 02-1625

Cir. Ct. No. 02-TR-1098
02-TR-1099

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

VILLAGE OF FONTANA,

PLAINTIFF-RESPONDENT,

V.

LYNN M. ZAIS,

DEFENDANT-APPELLANT.

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

¶1 BROWN, J.[1] Lynn M. Zais appeals from her conviction for operating a motor vehicle while intoxicated (OWI) on grounds that the trial court erred in denying her motion to suppress evidence. WISCONSIN STAT. § 343.303

[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.

allows officers to use the results of a preliminary breath test (PBT) to help determine probable cause to arrest provided that the officer first "requests" that such a test be conducted. We agree with Zais that because no request was made, any review of probable cause must be made without reference to the PBT results. However, we also determine that, even without the PBT, there was ample evidence of probable cause to arrest. We therefore affirm.

¶2 The pertinent facts are as follows. Zais was speeding. She was clocked by radar going forty-six miles per hour in a twenty-five mile per hour zone. She was driving a pickup truck that went over the center line. She was stopped and the officer approached the car. He immediately noticed the presence of alcohol coming from the vehicle. The officer noticed her bloodshot eyes. The officer asked if she had been drinking. She replied that she had. The trial court had a videotape of the incident and found that she admitted to drinking at least three drinks, maybe as many as five. The officer then told Zais, "Because you have been consuming alcoholic beverages and I can smell it on your breath, I'm going to test you on a preliminary breath tester." The result of the PBT was .11 grams alcohol/210 L of breath. After the PBT, the officer administered field sobriety tests. Zais performed poorly and was then arrested for OWI.

¶3 The first question is whether the PBT was obtained contrary to law. This requires the construction of WIS. STAT. § 343.303 and is therefore a question of law. *See* ***Truttschel v. Martin***, 208 Wis. 2d 361, 364-65, 560 N.W.2d 315 (Ct. App. 1997). We review questions of law de novo without deference to the trial court. ***Id.*** The statute provides, in pertinent part:

> If a law enforcement officer has probable cause to believe that the person … has violated s. 346.63(1) … 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 …. 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 …. The result of the [PBT] shall not be admissible in any … proceeding except to show probable cause for an arrest ….

Sec. 343.303 (emphasis added).

¶4 The statute clearly and unambiguously requires that the officer must "request" the person to submit to the test. Contrary to the arguments of the Village of Fontana and the conclusions reached by the trial court, by no stretch of the imagination did the officer make a "request." The Village equates acquiescence with a request and consent. But the cases relied upon by the Village focus on the person's response after first being requested to consent to something—like a search. Logically, if after being asked to consent to a search or its equivalent and the person allows it, consent can be inferred regardless of whether the consent was actually voiced. But, in every one of those cases, the person who was found to have consented was given a choice. Here, no choice was given. The officer did not follow the statute. The officer made a determination that there was going to be a test and that was that. The PBT results may not be used to show probable cause for the arrest.

¶5 But even absent the PBT results, there was substantial probable cause to arrest. Zais was speeding and she crossed the center line. Therefore, the officer could infer that she was driving erratically. She admitted drinking at least three drinks in the past hour. She failed her field sobriety tests. She had bloodshot eyes. This was more than enough for probable cause to arrest for OWI.

¶6 Zais tries to take issue with the odor of alcohol. But this falls flat because of her admission that she had been drinking. She says that the bloodshot eyes could be from any number of things. But officers are not required to rule out

plausibly innocent explanations. *See* ***State v. Waldner***, 206 Wis. 2d 51, 60, 556 N.W.2d 681 (1996). She says that with the PBT results cast out, the field sobriety tests are the "fruit of the poisonous tree." She cites no law in support because there is none. Officers may conduct field sobriety tests any time they have reasonable suspicion of OWI. The officer here had more than enough reasonable suspicion to conduct field sobriety tests even without the PBT. He had a person who he had caught speeding, who was driving erratically, whose car smelled of alcohol and who had admitted drinking. Surely, even without the PBT results, he had evidence to suspect that Zais had been driving in an impaired condition induced by alcohol when he decided to conduct the field sobriety tests. All of the evidence, taken together, produced probable cause to arrest, absent the PBT. This case is affirmed.

By the Court.—Judgment affirmed.

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