COURT OF APPEALS
DECISION
DATED AND FILED

April 9, 2003

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. 02-2453 **Cir. Ct. No. 02-TR-4220**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL V. NORTON,

DEFENDANT-APPELLANT.

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

¶1 ANDERSON, J.[1] This is a review of a refusal hearing arising out of an operating while intoxicated arrest (OWI). At the refusal hearing, the State presented plausible evidence that the arresting deputy had probable cause to

[1] This is a one-judge appeal pursuant to WIS. STAT. § 752.31(2)(c) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

believe that Michael V. Norton was driving while intoxicated and that he refused to submit to a chemical test of his blood. Therefore, we affirm.

¶2 On May 25, 2002, Norton was stopped for OWI. He refused to submit to a chemical test of his blood and, as a result, a refusal hearing under WIS. STAT. § 343.305 was conducted. At the conclusion of the hearing, the trial court found the arresting officer had probable cause to believe that Norton was driving while intoxicated, the informational requirements of § 343.305 had been met and Norton's refusal was unreasonable. Accordingly, the court ordered Norton's driving privileges revoked for one year. Norton appeals.

¶3 Norton's first complaint is that "[t]he circuit court erroneously functioned as a partisan and advocate by assisting the state to meet its burden of proof." Norton criticizes the trial court for expanding the scope of redirect examination to permit the law student intern representing the State to introduce evidence to establish probable cause for the traffic stop; he also criticizes the court for asking questions of the arresting officer. Norton did not make a timely objection to the trial court's expanding the scope of redirect examination to permit the law student intern to establish probable cause for the traffic stop nor did he make a timely objection to the trial court's questioning of the arresting officer.[2]

> Objections to [the trial court questioning witnesses] must be timely made. A failure to make a timely objection constitutes a waiver of objection. The objection must be made as soon as the objectionable nature of the testimony is reasonably apparent. The Wisconsin Supreme Court has

[2] Granted, Norton did make an objection to a question from the law student intern on redirect that precipitated the trial court's ruling expanding the scope of redirect, but he failed to object to the court's ruling. The previous objection was not a "standing objection"; the objection that the question on redirect was outside of the scope of cross-examination is not sufficient to serve as an objection to the court's expansion of the scope of redirect examination.

> consistently held that they will not consider issues raised for the first time on appeal.

State v. Wolter, 85 Wis. 2d 353, 373, 270 N.W.2d 230 (Ct. App. 1978).[3]

¶4 The purpose of the "waiver rule" is to promote timely objections.

> The waiver rule serves several important objectives. Raising issues at the trial court level allows the trial court to correct or avoid the alleged error in the first place, eliminating the need for appeal. It also gives both parties and the trial judge notice of the issue and a fair opportunity to address the objection. Furthermore, the waiver rule encourages attorneys to diligently prepare for and conduct trials. Finally, the rule prevents attorneys from "sandbagging" errors, or failing to object to an error for strategic reasons and later claiming that the error is grounds for reversal. For all of these reasons, the waiver rule is essential to the efficient and fair conduct of our adversary system of justice.

State v. Huebner, 2000 WI 59, ¶12, 235 Wis. 2d 486, 611 N.W.2d 727 (citations omitted). The lack of a timely objection prevents our review of this issue.

¶5 As part of this complaint, Norton disapproves of the trial court's apparent reason for expanding the scope of redirect examination and questioning

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[3] In ***State v. Wolter***, 85 Wis. 2d 353, 372-73, 270 N.W.2d 230 (Ct. App. 1978), we outlined the parameters for judicial involvement in trials authorized by WIS. STAT. §§ 906.11(1) and 906.14(2). After a careful review of the record, we are satisfied that in this case the trial court did not stray from those restrictions.

> A trial court is expressly authorized to question witnesses. It must be careful not to function as a partisan or advocate. The judge should not take any active role in trying the case either for the state or for the defense. *It does have a responsibility to clarify questions and answers where obvious important evidentiary matters are ignored or inadequately covered on behalf of the state or the defendant.*

Wolter, 85 Wis. 2d at 372-73 (emphasis added).

the arresting officer. Norton asserts that the trial court had assumed responsibility for the law student intern who represented the State without the direct and immediate supervision of an attorney licensed to practice law in the State of Wisconsin. Yet again, Norton failed to make a timely objection to the participation of the law student intern without the direct and immediate supervision of a licensed attorney. A timely and specific objection bringing to the trial court's attention the requirements of SCR § 50.06[4] could have allowed the

[4] **SCR 50.06. Activities authorized**

(1) A student may engage in the following activities only under direct and immediate supervision and with the approval of a supervising lawyer and only if the client on whose behalf he or she acts shall have approved in writing the performance of those acts by the student. Such activities must be part of the clinical program of the law school.

(2) In this rule:

(a) "Client" means any ultimate recipient of legal services.

(b) "Direct and immediate supervision" means (except as to matters tried under chapter 799 of the statutes) that the lawyer shall be present with the student at each time during the trial, hearing or proceeding in which the student engages in activities which would be unauthorized but for this chapter, except for those times when very routine actions take place (including when representing one charged with a misdemeanor, such action as a request for continuance or a plea of not guilty on first appearance, but not including, when representing one charged with a felony, such actions as an arraignment or a bail argument) if the judge or other presiding officer and the client agree with the lawyer beforehand the lawyer's presence is unnecessary.

(3) The following activities are authorized:

(a) Appearing on behalf of the client in the name of the supervising lawyer in any public trial or hearing or proceeding pertaining thereto in a court, a tribunal or before any public agency, referee, commissioner or hearing officer.

(continued)

court to delay the hearing until a licensed attorney was present to adequately supervise the law student intern.[5] The "waiver rule" operates to also preclude our consideration of this issue.

¶6 Norton's complaint that the arresting officer lacked reasonable suspicion to stop him pursuant to WIS. STAT. § 968.24 is also a nonstarter. The only issues at a refusal hearing are: (1) whether the officer had probable cause to believe that the person was driving while under the influence of alcohol; (2) whether the officer complied with the informational provisions of WIS. STAT. § 343.305(3)(a); (3) whether the person refused to permit a blood, breath or urine test; and (4) whether the refusal to submit to the test was due to a physical inability unrelated to the person's use of alcohol. ***State v. Nordness***, 128 Wis. 2d 15, 28, 381 N.W.2d 300 (1986). While the issue of reasonable suspicion to conduct a traffic stop is an issue at a hearing to suppress the results of a chemical test, it is not an issue at a hearing on the refusal to submit to a chemical test.

¶7 "The State's burden of persuasion at a refusal hearing is substantially less than at a suppression hearing." ***State v. Wille***, 185 Wis. 2d 673,

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> (b) Counseling with and giving legal advice to a client in the presence of the supervising attorney, except as otherwise provided in this rule.

[5] This is a question of first impression in Wisconsin; unfortunately, a definitive answer as to the scope of a law student intern's unsupervised appearances in court must wait until the issue is properly presented on appeal because of Norton's failure to timely object. Until a definitive answer is available, this court is constrained to caution licensed attorneys, court commissioners and trial courts that adversarial hearings of any nature are *not* "very routine matters" at which a law student intern can appear without the "direct and immediate supervision" of a licensed attorney. *See* SCR § 50.06(2)(b). From the examples provided in SCR § 50.06(2)(b), it is evident that law student interns can only make unsupervised appearances in housekeeping proceedings; but where they will speak for the legal interests of others, they must be under the "direct and immediate supervision" of a licensed attorney. *See* ***id.***; ***Jadair, Inc. v. U.S. Fire Ins. Co.***, 209 Wis. 2d 187, 204, 562 N.W.2d 401 (1997).

681, 518 N.W.2d 325 (Ct. App. 1994). At the refusal hearing, all the State must establish is that the arresting officer had probable cause to believe the person was driving or operating a motor vehicle while under the influence of an intoxicant. ***Nordness***, 128 Wis. 2d at 35. The State need only show that the arresting officer's account is plausible, and the court will not weigh the evidence for and against probable cause or determine the credibility of the witnesses. ***Id.*** at 36. "Indeed, the court need not even believe the officer's account. It need only be persuaded that the State's account is plausible." ***Wille***, 185 Wis. 2d at 681. The ***Nordness*** court explains the limited nature of a refusal hearing:

> We view the [refusal] hearing as a determination merely of an officer's probable cause, not as a forum to weigh the state's and the defendant's evidence. Because the implied consent statute limits the [refusal] hearing to a determination of probable cause—as opposed to a determination of probable cause to a reasonable certainty—we do not allow the trial court to weigh the evidence between the parties. The trial court, in terms of the probable cause inquiry, simply must ascertain the plausibility of a police officer's account.

Nordness, 128 Wis. 2d at 36 (citation omitted).

¶8 We will summarize the undisputed testimony of Deputy Todd Neumann, the arresting officer, presented at the refusal hearing. Neumann stopped Norton after watching him weaving while driving a Dodge pickup truck.[6] When the deputy approached the truck, he immediately noticed that Norton had

[6] In his brief, Norton asserts that "[t]he hearing record further developed to show that Mr. Norton neither weaved outside his lane of traffic nor touched either the fog-line or centerline." The record cite Norton provides does not support the assertion. The record cite is to argument by Norton's counsel made when he was seeking a clarification of the trial court's bench decision. "[I]t is a black letter principle that a lawyer's argument is not evidence." ***State v. Eugenio***, 210 Wis. 2d 347, 358, 565 N.W.2d 798 (Ct. App. 1997), *aff'd*, 219 Wis. 2d 391, 579 N.W.2d 642 (1998).

only rolled the driver's side window down approximately one and one-half to two inches. Norton was the only occupant of the truck and the deputy noticed the odor of intoxicants coming from the truck. Neumann requested Norton to roll down the window; Norton stared straight ahead and with slow and deliberate speech he responded that "he would rather not." The deputy requested that Norton get out of the vehicle and Norton "continued to look straight ahead and stated that he would rather not." After twenty minutes of this "standoff," the deputy received permission from his sergeant to forcibly remove Norton from the truck. With the assistance of his partner, Neumann broke out the passenger side window, unlocked the door and removed Norton. Because Norton refused to walk to the squad car, he was assisted by officers; even with assistance, he was "having trouble maintaining his balance." While Norton was in the squad car, the deputy attempted to perform the horizontal gaze nystagmus test, but Norton complained that it hurt his eyes and he refused to perform several balance tests. Based upon his experience, the deputy concluded that Norton had operated a motor vehicle while under the influence of an intoxicant and placed him under arrest.

¶9 Eventually, Neumann drove Norton to a local hospital for a blood draw. At the hospital the deputy read Norton the statutorily required Informing the Accused form and asked him "to submit to an evidentiary chemical test of his blood." On cross-examination, Norton's counsel asked Neumann what happened when Norton was asked to submit to a blood draw. Neumann testified:

> I asked Mr. Norton if he would consent to a legal blood draw. Mr. Norton stated that he would like to have his attorney present.
>
> And I explained to him that that was not an option at this point in our OWI procedures, as we were not going to ask him any questions in regard to what he was doing tonight, until later. I explained to him that I needed a "yes"

> or "no" answer from him, at which point he stated "I would rather not," and "You guys do what you have to do."

After getting this response from Norton, the deputy concluded that Norton had refused to submit to a chemical test of his blood and completed the necessary paperwork.

¶10 Norton challenges the trial court's conclusions that the deputy had probable cause to believe that Norton was driving while under the influence of alcohol and that Norton refused to submit to a chemical test of his blood. We will uphold the trial court's findings of fact if the findings are not clearly erroneous. ***State v. Roberts***, 196 Wis. 2d 445, 452, 538 N.W.2d 825 (Ct. App. 1995). Whether a set of facts constitutes probable cause is a question of law that the court of appeals will review de novo. ***State v. Babbitt***, 188 Wis. 2d 349, 356, 525 N.W.2d 102 (Ct. App. 1994). To determine if probable cause exists, the court must consider whether "the totality of the circumstances … would lead a reasonable police officer to believe … that the defendant was operating a motor vehicle while under the influence of an intoxicant." ***Nordness***, 128 Wis. 2d at 35. The threshold to establish probable cause is low; it is only necessary that the evidence "lead a reasonable officer to believe that guilt is more than a possibility." ***State v. Paszek***, 50 Wis. 2d 619, 625, 184 N.W.2d 836 (1971).

¶11 After reviewing the undisputed evidence presented at the refusal hearing, we, like the trial court, conclude that Neumann's account of his encounter with Norton is plausible and that a reasonable officer, when considering all of the circumstances of that encounter, would believe that Norton was driving while under the influence of an intoxicant. Moreover, like the trial court, we conclude that Norton refused to submit to a chemical test of his blood. This court in ***Village of Elkhart Lake v. Borzyskowski***, 123 Wis. 2d 185, 192, 366 N.W.2d 506 (Ct.

App. 1985), has acknowledged that a refusal results because "it is the reality of the situation that must govern, and a refusal in fact, regardless of the words that accompany it, can be as convincing as an express verbal refusal." Norton's statements that he would rather not submit to a blood draw and "[y]ou guys do what you have to do" constitute a refusal in fact. Further, Norton's request for an attorney can amount to a refusal as long as the deputy informs him that there is no right to an attorney at that point. ***State v. Reitter***, 227 Wis. 2d 213, 235, 595 N.W.2d 646 (1999). Neumann did so inform Norton.

¶12 Therefore, the order entered suspending Norton's driving privileges as a result of his refusal to submit to a chemical test of his blood is affirmed.

By the Court.—Order affirmed.

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