

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 18, 2012

A. John Voelker
Acting 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. 2011AP2021

Cir. Ct. No. 2010CV5295

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN THE MATTER OF THE REFUSAL OF JOHN J. UTTKE:

TOWN OF MUKWONAGO,

PETITIONER-RESPONDENT,

V.

JOHN J. UTTKE,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County:
WILLIAM DOMINA, Judge. *Affirmed.*

¶1 REILLY, J.¹ John J. Uttke appeals from an order of the circuit court affirming his municipal court revocation for refusing to submit to a blood test after he was arrested for operating a motor vehicle while intoxicated. Uttke argues that the officer did not have probable cause to arrest him, and that regardless, his refusal was lawful because it was due to a head injury he sustained when he crashed his motorcycle. We disagree on both counts and affirm his revocation.

BACKGROUND

¶2 Uttke crashed his motorcycle on the evening of November 21, 2009. Town of Mukwonago police officer Christopher Heckman responded to the dispatch call. When Heckman arrived at the scene of the crash, Officer Chet Wilson informed Heckman that Uttke was the operator of the motorcycle and that Wilson smelled alcohol on Uttke. Uttke was already in an ambulance being treated for injuries. Heckman briefly investigated the scene and noted skid marks and blood marks near where Uttke's motorcycle lay. The ambulance took Uttke to the hospital and Heckman followed.

¶3 When Heckman first made contact with Uttke at the hospital he noted the smell of alcohol emanating from Uttke. As Uttke was in a neck brace, Heckman was unable to perform a field sobriety test on him. Heckman, however, placed Uttke under arrest for operating while intoxicated based on the accident scene and the fact that Uttke smelled like alcohol. Heckman then read the informing the accused form to Uttke and asked if Uttke would submit to a blood

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(b) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

test. Uttke refused and Heckman issued him a notice of intent to revoke his operating privileges.

¶4 When a person is arrested for operating while intoxicated an officer may ask the person to provide a blood test. WIS. STAT. § 343.305(3)(a). If the person refuses, the officer shall issue a notice of intent to revoke the person's operating privileges. Sec. 343.305(9)(a). The person may request a "refusal hearing" under § 343.305(9). The four issues considered at the refusal hearing are: (1) whether the officer had probable cause to believe that the person was driving under the influence of alcohol; (2) whether the officer properly read the informing the accused form per § 343.305(4); (3) whether the person refused the test; and (4) whether the refusal was due to a physical disability unrelated to the person's consumption of alcohol. Sec. 343.305(9)(a)5.

¶5 A refusal hearing was held in municipal court. Uttke contested parts one and four of the test, arguing that there was not probable cause to support his arrest for operating while intoxicated and that regardless, because of a head injury he suffered in the crash he did not knowingly refuse to take the blood test. The municipal court found that there was probable cause to support the arrest and that nothing in the record indicated that Uttke was physically unable to take the test. The court thus found that Uttke unlawfully refused to take the blood test.

¶6 Uttke appealed and requested a new refusal hearing before the circuit court. The circuit court conducted a de novo review and affirmed the municipal court. The circuit court first found that there was probable cause to arrest Uttke, as Uttke smelled of alcohol and was involved in a one-vehicle accident. Next, the court found that there was not enough evidence to support Uttke's argument that his refusal to take the blood test stemmed from a physical

ailment. While Uttke was treated for a head injury, the court found that he was still lucid enough to understand that he was refusing a blood test.

¶7 Uttke now appeals to this court.

STANDARD OF REVIEW

¶8 To arrest someone for operating a motor vehicle while intoxicated, an officer must have probable cause. *Washington Cnty. v. Smith*, 2008 WI 23, ¶14, 308 Wis. 2d 65, 746 N.W.2d 243. In the context of a refusal hearing, probable cause refers to the amount of evidence that would lead a reasonable police officer to believe that the person was operating a motor vehicle while intoxicated. *Id.*, ¶15. Whether there was probable cause to arrest is a question of law that we review de novo. *Id.*, ¶16. Additionally, whether a person's refusal to submit to a blood test was due to a physical inability unrelated to the use of alcohol is a question of law that we review de novo. *State v. Hagaman*, 133 Wis. 2d 381, 383-85, 395 N.W.2d 617 (Ct. App. 1986). Finally, we defer to the factual findings of the circuit court. *See* WIS. STAT. § 805.17(2).

DISCUSSION

¶9 We first address whether Officer Heckman had probable cause to arrest Uttke. In *State v. Kasian*, 207 Wis. 2d 611, 622, 558 N.W.2d 687 (Ct. App. 1996), the arresting officer came upon the scene of a one-vehicle accident. The officer observed a damaged van next to a telephone pole with its engine still running. *Id.* The injured driver was lying next to the van and smelled like alcohol. *Id.* Later at the hospital, the officer observed that the driver's speech was slurred. *Id.* We held that this evidence constituted probable cause that the driver was operating while intoxicated. *Id.*

¶10 As the facts of *Kasian* are similar to this case, we hold that Heckman had probable cause to arrest Uttke for operating while intoxicated. Heckman came upon a one-vehicle accident and noted that there were skid marks and blood marks where Uttke crashed his motorcycle. As Heckman arrived at the scene of the accident, he was informed by another officer that Uttke smelled like alcohol. When Heckman first made contact with Uttke at the hospital, he confirmed for himself that Uttke smelled like alcohol. A reasonable police officer in this position would conclude that Uttke was operating while intoxicated.

¶11 We next address whether Uttke's refusal to take the required blood test was due to a physical ailment and not Uttke's consumption of alcohol. WISCONSIN STAT. § 343.305(9)(a)5.c. provides that a person is deemed not to have refused a blood test "if it is shown by a preponderance of evidence that the refusal was due to a physical inability to submit to the test due to a physical disability or disease unrelated to the use of alcohol." Uttke has not met this burden. The only evidence Uttke submits of his physical inability to refuse to take the test was that he had a head injury and that he thought the year was 2001. Uttke did not, however, offer any medical evidence as to the extent of his head injury. Furthermore, his confusion about the current year could have easily stemmed from inebriation. We hold that the circuit court properly found that Uttke did not establish by a preponderance of the evidence that his refusal stemmed from a physical disability unrelated to the use of alcohol.

CONCLUSION

¶12 Uttke's revocation for refusing to submit to a blood test is affirmed.

By the Court.—Order affirmed.

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

