**COURT OF APPEALS**
**DECISION**
**DATED AND RELEASED**

August 16, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**No. 95-0061**

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

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**STEPHEN PRITCHARD,**

**Defendant-Appellant.**

APPEAL from an order of the circuit court for Waukesha County: KATHRYN W. FOSTER, Judge. *Affirmed.*

SNYDER, J. Stephen Pritchard appeals from an order finding that he refused to submit to a chemical test in violation of § 343.305, STATS. Pritchard contends that the arresting officer did not have probable cause to arrest him for operating a motor vehicle while under the influence of intoxicants (OWI) or to request that he submit to the chemical test. We disagree and affirm the order.

Officer Michael J. Brasch of the Menomonee Falls Police Department was dispatched to investigate a vehicle in a field about 50 to 100 feet from the road. He observed Pritchard lying behind the driver's seat with his head on the passenger side. The vehicle was locked and Pritchard was unresponsive. Brasch and a police aide knocked on the vehicle window and shook the car for about five minutes, finally awakening Pritchard.

After Pritchard opened the car door, Brasch smelled the odor of intoxicants, observed that Pritchard's balance was unsteady as he exited the car and noted that Pritchard's eyes were very red, glassy and somewhat bloodshot. The car keys were located on the passenger side floor rather than in the ignition. Brasch testified to the following conversation with Pritchard prior to the arrest:

Q [District Attorney] What if any conversation did you have with the defendant upon your initial contact with him?

A I asked him why he was in -- parked in the middle of this field. He stated he was listening to the radio. I showed him that the vehicle was not on and the radio was not on. I ones [sic] again asked him why he was parked in the middle of the field and he stated I was driving and stopped to pee which he stated and he wanted to listen to the radio.

Q ... Did you ask the defendant where he had come from?

A Yes, I did. He stated somewhere in Sussex. I asked him where in Sussex and his comment was the Country Club on Silver Spring. Stated he was golfing there.

Pritchard admitted that he had previously consumed beer and Brasch requested that he submit to field sobriety tests and to a preliminary breath test (PBT).[1] Pritchard failed to successfully perform the field tests[2] and the PBT registered 0.17% blood alcohol content (BAC). Brasch then placed Pritchard under arrest for OWI in violation of § 346.63(1), STATS.

There is no dispute as to the material facts. When facts are undisputed and only a question of law is at issue, the appellate court owes no deference to the findings of the lower court. ***Doe v. Roe,*** 151 Wis.2d 366, 373, 444 N.W.2d 437, 441 (Ct. App. 1989). Whether Pritchard's refusal to submit to a blood test was reasonable requires the application of § 343.305(9)(a)5a.-c., STATS., to the facts.

Section 343.305(9)(a)5a.-c., STATS., limits the issues to be addressed at a refusal hearing. Those issues are: (1) whether the officer had probable cause to believe that the person was operating a motor vehicle while under the influence of an intoxicant; (2) whether the officer adequately informed the person of his or her rights pursuant to § 343.305(4); and (3) whether the person refused the test.

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[1] Section 343.303, STATS., authorizes a roadside preliminary breath test where "a law enforcement officer has probable cause to believe that the person" is or has operated a motor vehicle while intoxicated.

[2] The following field tests were administered and results obtained: (1) alphabet—speech slurred, cadence unsteady, stopped at letter "T" and continued with "W"; (2) finger to nose—failed to follow directions, missed nose and touched upper lip with left index finger, touched tip of nose with right index finger but was unsteady and unable to keep his head tilted back; (3) heel to toe—unable to walk a straight line; and (4) leg balance—unable to keep heel from touching ground.

Pritchard erroneously equates a refusal hearing with an OWI prosecution. A refusal hearing is separate and distinct from a prosecution for violating § 346.63(1)(a), STATS.[3] ***City of Madison v. Bardwell,*** 83 Wis.2d 891, 902, 266 N.W.2d 618, 623 (1978) (construing former § 343.305(3)(b)5, STATS.).

Pritchard's argument that the State must prove the threshold issue of his operating a motor vehicle on a highway or premises held out for public use is similar to an argument expressly rejected in ***State v. Nordness,*** 128 Wis.2d 15, 381 N.W.2d 300 (1986). In ***Nordness***, the supreme court held that the determination of whether a defendant was the actual driver of the car is not an issue, nor material to the inquiry, of whether probable cause existed for the arresting officer to request a chemical test. ***Id.*** at 26-27, 381 N.W.2d at 304-05. The supreme court held that there was no threshold issue based upon statutory grounds. ***Id.*** at 29, 381 N.W.2d at 305-06.

Therefore, Pritchard's argument that the State failed to establish that he was operating the vehicle either on a public highway or on premises held out for public use as required by § 346.61, STATS., fails. Compliance with § 346.61 is not an issue to be determined at a refusal hearing, and we reject Pritchard's claim of error.

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[3] Section 346.61, STATS., reads:

> In addition to being applicable upon highways, ss. 346.62 to 346.64 are applicable upon all premises held out to the public for use of their motor vehicles, whether such premises are publicly or privately owned and whether or not a fee is charged for the use thereof.

We now turn to Pritchard's argument that the trial court erred in finding that the arresting officer had sufficient probable cause that Pritchard operated the vehicle or that he did so while intoxicated. According to Pritchard, the probable cause determination fails because the keys were not in the ignition, the car was not running, he was asleep and there is no hard evidence as to how the car got into the field.

Where the underlying facts are undisputed, the issue of whether probable cause exists is a question of law that we review independently of the trial court's determination. *See* ***State v. Williams***, 104 Wis.2d 15, 21-22, 310 N.W.2d 601, 604-05 (1981).

The issue at a refusal hearing is not whether the evidence establishes that a defendant was actually operating a motor vehicle while intoxicated, but whether the evidence demonstrates that the officer had probable cause to believe that the defendant was operating a motor vehicle while intoxicated. ***Nordness,*** 128 Wis.2d at 28, 381 N.W.2d at 304-05. To prove probable cause, it is only necessary to prove that the information available leads a reasonable officer to believe the individual's guilt is more than a possibility. ***Browne v. State,*** 24 Wis.2d 491, 503-04, 129 N.W.2d 175, 180 (1964), *cert. denied*, 379 U.S. 1004 (1965). Thus, at a refusal hearing "[t]he trial court need only determine a plausible account of the occurrence which would support a finding of probable cause." ***Nordness,*** 128 Wis.2d at 37 n.6, 381 N.W.2d at 309.

Pritchard does not dispute that he was intoxicated at the time he was arrested. Nor does he dispute that he was alone in his vehicle at the time

the officer arrived. There was no evidence of any intoxicants within the area of the car. He admitted to drinking beer in Sussex earlier. His vehicle was not in Sussex but in a field in Menomonee Falls at the time of his arrest. His explanation of why he was parked in the field (to relieve himself and listen to the car radio which was not on) supports the arresting officer's belief as being reasonable.

That Pritchard drove the car from the public roadway into the field while under the influence of an intoxicant is both reasonable and plausible. We conclude that the officer had sufficient probable cause to request that Pritchard submit to a chemical test.

*By the Court.*—Order affirmed.

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