COURT OF APPEALS
DECISION
DATED AND FILED

August 1, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP15-CR **Cir. Ct. No. 2011CT313**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RAYLENE A. BRINKMEIER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: JULIE GENOVESE, Judge. *Affirmed*.

¶1 LUNDSTEN, J.[1] Raylene Brinkmeier appeals her conviction for operating a motor vehicle with a prohibited alcohol concentration, as a second

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

offense. Brinkmeier argues that the circuit court erred by failing to suppress evidence derived from the administration of a preliminary breath test (PBT) because the officer who stopped Brinkmeier lacked the requisite probable cause to request the PBT. Brinkmeier also argues that the circuit court erred by permitting the State to elicit evidence at trial that Brinkmeier had refused to submit to the PBT. I conclude that there was probable cause to request the PBT, and that the circuit court did not err by allowing the State to elicit testimony about Brinkmeier's refusal to submit to the PBT. I therefore affirm the decision of the circuit court.

Background

¶2 On February 16, 2011, at 8:48 p.m., an officer with the McFarland Police Department received a call from a McFarland deputy fire marshal that a vehicle was being operated erratically near the Village of McFarland. The fire marshal told the officer that the vehicle was "all over the road" and had made a left turn in violation of a red turn arrow.

¶3 The officer responded to the call and began following the vehicle, which was driven by Brinkmeier. The officer saw the vehicle briefly cross the centerline and initiated a traffic stop. When the officer initiated contact with Brinkmeier, he noticed that her eyes were bloodshot and glassy, and that there was a strong odor of intoxicants coming from the vehicle. Brinkmeier informed the officer that she had consumed one drink that evening. The officer asked where Brinkmeier was headed, and Brinkmeier gave differing accounts as to her destination.

¶4 The officer had Brinkmeier perform standard field sobriety tests. Brinkmeier exhibited six clues on the horizontal gaze nystagmus test, four clues

on the walk and turn test, and no clue on the one leg stand test. The officer asked Brinkmeier to submit to a PBT, which Brinkmeier refused. The officer then put Brinkmeier under arrest and transported her to the McFarland Police Department, and later to a hospital for a blood draw to test her blood alcohol content. Brinkmeier was charged with operating a vehicle while under the influence of an intoxicant, as a second offense, and operating a vehicle with a prohibited alcohol concentration, as a second offense.

¶5 Brinkmeier moved to suppress the evidence arising from the officer's request that she submit to a PBT and the evidence arising from her arrest, arguing that the officer lacked probable cause both to request a PBT and to arrest her. The circuit court denied Brinkmeier's motion.

¶6 Prior to trial, Brinkmeier moved in limine to prohibit the State from introducing evidence of her decision to refuse the PBT. The circuit court granted this motion, determining that the admission of this evidence was a discretionary decision and that the evidence's prejudicial effect outweighed its probative value. The circuit court also opined that, because the result of a PBT is not admissible evidence at trial, the State should also not be permitted to use evidence of Brinkmeier's refusal to take the PBT.

¶7 During trial, Brinkmeier introduced evidence showing that she was fully cooperative with the officer during the stop and subsequent arrest. The State then requested the circuit court's permission to introduce Brinkmeier's refusal to take the PBT to rebut the inference that Brinkmeier had fully cooperated with the officer. The court determined that Brinkmeier had opened the door to the PBT refusal evidence and, thus, allowed the State to ask the officer about Brinkmeier's refusal to submit to the PBT on redirect.

¶8 The jury found Brinkmeier guilty of operating a motor vehicle with a prohibited alcohol concentration, as a second offense, and not guilty of operating a motor vehicle while under the influence of an intoxicant, as a second offense.

¶9 Brinkmeier appeals the circuit court's decision not to suppress evidence derived from the officer's request that she submit to a PBT and the court's decision to allow testimony regarding Brinkmeier's refusal to submit to the PBT.

Discussion

Probable Cause To Request The PBT

¶10 Brinkmeier argues that the officer's request that Brinkmeier submit to a PBT was not supported by probable cause and, therefore, all of the evidence relating to the PBT should have been suppressed.[2] Although somewhat unclear, Brinkmeier's argument appears to be that the evidence that should have been suppressed was Brinkmeier's refusal to submit to the PBT.

¶11 WISCONSIN STAT. § 343.303 requires that an officer have "probable cause to believe" that the person stopped has violated a Wisconsin law, including operating a vehicle while under the influence of an intoxicant, in order to request that the person submit to a PBT. In this context, "probable cause to believe" means "a quantum of proof greater than the reasonable suspicion necessary to justify an investigative stop … but less than the level of proof required to establish

[2] On appeal, Brinkmeier appears to abandon the argument that she made before the circuit court that the officer lacked probable cause to arrest her and that all of the evidence derived from the arrest should be suppressed.

probable cause for arrest." ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 316, 603 N.W.2d 541 (1999).

¶12 To support her argument that the officer lacked the necessary probable cause to request a PBT, Brinkmeier attempts to distinguish her case from the facts in a number of Wisconsin cases where the court determined that an officer had probable cause to request a PBT.[3] For example, Brinkmeier points to ***Renz*** and the supreme court's reliance, in that case, on evidence that the defendant smelled strongly of intoxicants, admitted to drinking three beers, and exhibited some clues on the field sobriety tests. *See* ***id.*** at 316-17. More specifically, Brinkmeier contends that Renz exhibited more intoxication clues: one clue on the one leg stand test by putting his foot down, two clues on the walk and turn test by stepping off of the imaginary line and leaving space between his steps, and all six clues on the HGN test. *See* ***id.*** at 297-98, 316-17. Similarly, Brinkmeier points to ***State v. Colstad***, 2003 WI App 25, ¶¶23-25, 260 Wis. 2d 406, 659 N.W.2d 394. In ***Colstad***, this court concluded that evidence showing that Colstad erred on each of the sobriety tests, including beginning a test early, improperly counting, failing to walk heel to toe in a straight line, in addition to smelling of intoxicants and the circumstances surrounding his accident, was sufficient evidence to establish probable cause to request a PBT. ***Id.***, ¶25. In sum, Brinkmeier argues that, because she exhibited significantly fewer signs of intoxication than the defendants

[3] Brinkmeier also argues that it is "instructive to look at the fact patterns of cases in which the Court found that probable cause to arrest was lacking" when determining whether probable cause to request a PBT exists. As Brinkmeier acknowledges, however, probable cause to request a PBT is a less stringent standard than probable cause to arrest. Cases examining probable cause to arrest are, therefore, not helpful in guiding a decision regarding probable cause to request a PBT.

in ***Renz*** and ***Colstad***, the officer here did not have the necessary probable cause to request a PBT. I disagree.

¶13 Contrary to Brinkmeier's argument, the evidence supporting probable cause in this appeal does not differ significantly from the evidence in ***Renz*** and ***Colstad***. Brinkmeier exhibited erratic driving, including making a left turn while the left turn signal was a red, indicating no left turn. Brinkmeier deviated from her lane, smelled strongly of intoxicants, admitted to consuming alcohol, and exhibited a number of clues on the field sobriety tests. In particular, Brinkmeier exhibited four clues on the walk and turn test by failing to maintain the instructional stance, taking an incorrect number of steps, missing heel to toe, and making an improper turn, and she exhibited six clues on the HGN test. Looking at the totality of the circumstances, the officer easily had probable cause to believe that Brinkmeier had been operating her vehicle while under the influence and, thus, the officer lawfully requested the PBT.

Evidence Of Refusal To Submit To The PBT

¶14 Brinkmeier also argues that, even if the officer lawfully requested the PBT, the officer's testimony that Brinkmeier refused to submit to the PBT should not have been admitted during trial. To support this contention, Brinkmeier points to WIS. STAT. § 343.303, which renders the results of a PBT inadmissible at trial. According to Brinkmeier, § 343.303 should be read to require the exclusion of evidence that a defendant refused to submit to the PBT, in addition to excluding the result of the PBT.

¶15 As Brinkmeier admits, however, WIS. STAT. § 343.303 is silent as to whether a refusal to submit to a PBT is inadmissible.[4] Thus, the question might arise whether evidence of a refusal to submit to a PBT, like evidence of a refusal to submit to field sobriety tests, is admissible as evidence of consciousness of guilt. *See* ***State v. Mallick***, 210 Wis. 2d 427, 433-35, 565 N.W.2d 245 (Ct. App. 1997) (evidence of defendant's refusal to submit to field sobriety tests admissible at trial). But I need not address that issue.

¶16 Regardless whether Brinkmeier's refusal to submit to the PBT is otherwise admissible, here the circuit court correctly concluded that Brinkmeier opened the door to its admissibility by effectively arguing that she fully cooperated with the officer. Admissibility under this theory is determined under the curative admissibility doctrine. *See* ***State v. Dunlap***, 2002 WI 19, ¶32, 250 Wis. 2d 466, 640 N.W.2d 112. Under this doctrine:

> [W]hen one party accidentally or purposefully takes advantage of a piece of evidence that is otherwise inadmissible, the court may, in its discretion, allow the opposing party to introduce otherwise inadmissible evidence if it is required by the concept of fundamental fairness to cure some unfair prejudice.

Id. "The admission of evidence is a decision that is left to the discretion of the circuit court." ***Id.***, ¶31.

[4] Brinkmeier argues that, in ***State v. Albright***, 98 Wis. 2d 663, 675, 298 N.W.2d 196 (Ct. App. 1980), this court concluded that a prosecutor could not reference at trial the fact that the defendant was given a PBT. However, as the State points out, ***Albright*** was decided under a statute predating WIS. STAT. § 343.303, which provided that "[n]either the results of the preliminary breath test *nor the fact that it was administered*" were admissible at trial. ***Albright***, 98 Wis. 2d at 675 (quoting WIS. STAT. § 343.305(2)(a) (1977) (emphasis added)). The current version of § 343.303 provides only that the *results* of a PBT are inadmissible.

¶17 At trial, defense counsel repeatedly cross-examined the officer as to whether Brinkmeier was fully cooperative with the officer's investigation. For example, defense counsel engaged in the following exchange with the officer regarding Brinkmeier's submission to an evidentiary breath test:

> Q. And she – At the end of that form you ask them whether they want to submit to a test or not, right?
>
> A. The evidentiary test of the breath.
>
> ….
>
> Q. And she agreed, no problems with that?
>
> A. Yes, sir.
>
> Q. Wasn't hesitant or anything like that?
>
> ….
>
> A. No, sir.

Similarly, defense counsel questioned the officer on Brinkmeier's cooperation regarding an evidentiary test of Brinkmeier's blood:

> Q. She doesn't protest or anything like that, she's willing to go do the blood test?
>
> A. No. She's cooperative.

Finally, defense counsel elicited testimony from the officer that Brinkmeier was cooperative throughout questioning:

> Q. And you read her a Miranda warning first; is that right?
>
> A. Yes, sir.
>
> ....
>
> Q. And so you kind of advise her she doesn't have to answer if she doesn't want to, all that stuff, she can get a lawyer?

A. I read it verbatim. Yes, sir.

Q. But she still wants to answer the questions and she's willing to answer?

A. Yes, sir.

¶18 Given the above testimony elicited by defense counsel, the circuit court did not err in allowing the State to elicit testimony from the officer that Brinkmeier had refused to submit to the PBT to rebut the inference that Brinkmeier was fully cooperative.

¶19 Brinkmeier makes two additional arguments for why the circuit court erred in admitting the evidence of her refusal to submit to the PBT.

¶20 First, Brinkmeier argues that "the implied consent law requires a hearing on a defendant's alleged refusal to submit to approved breath and blood testing instruments before use of that refusal evidence is made at trial." This argument fails because, as the State points out (and Brinkmeier appears to concede in her reply brief), requests to submit to a PBT are not covered by the implied consent law. *See* ***Renz***, 231 Wis. 2d at 314. And, a refusal to submit to a PBT is not subject to the statutory procedure under which a defendant could move for a hearing on whether a refusal was justified under the implied consent law. *See* WIS. STAT. § 343.305(9) (if a person refuses to provide an approved sample of his or her breath, blood, or urine upon arrest, that person may move within 30 days after his or her initial appearance for a refusal hearing).

¶21 Second, Brinkmeier argues that the State was required to lay a foundation regarding the reliability of the PBT before its admission, or, alternatively, Brinkmeier should have been allowed to present expert evidence of the PBT's unreliability. This argument does not persuade me because the refusal

evidence was used only to rebut the testimony elicited by defense counsel that Brinkmeier fully cooperated with the officer. Testimony regarding the reliability of the PBT is irrelevant to whether Brinkmeier complied with all of the officer's requests. Brinkmeier could have argued at trial that the reason she did not submit to the PBT was because she thought it was unreliable, but she chose not to do so.

Conclusion

¶22 I conclude that the officer had probable cause to request a PBT, and that the circuit court did not err in admitting testimony regarding Brinkmeier's refusal as rebuttal evidence. I affirm the decision of the circuit court.

By the Court.—Judgment affirmed.

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