

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 26, 2013

Diane M. Fremgen
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. 2012AP2602

Cir. Ct. No. 2012TR338

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN THE MATTER OF THE REFUSAL OF GEORGE R. FERRELL:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GEORGE R. FERRELL,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Sauk County:
PATRICK J. TAGGART, Judge. *Affirmed.*

¶1 KLOPPENBURG, J.¹ George Ferrell appeals an order finding that the arresting officer had probable cause to arrest Ferrell for operating while

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.

intoxicated, and upholding the one-year revocation of his operating privileges. Ferrell argues that the arresting officer lacked probable cause to arrest him for operating while intoxicated. This court concludes that the arresting officer had probable cause to arrest Ferrell and therefore affirms.

BACKGROUND

¶2 The relevant facts are not in dispute. At approximately 1:37 p.m. on January 13, 2012, the Wisconsin State Patrol received a number of calls about a vehicle traveling on the interstate in Dane County. One caller reported that the vehicle was stopped on the shoulder of the interstate, and that a man was standing outside of the vehicle and threatening a woman inside of the vehicle. Other callers reported that the vehicle was speeding, aggressively changing lanes, and passing on the left shoulder.

¶3 State Trooper Scott Thiede was patrolling the interstate in Sauk County when the vehicle described by the callers passed him. The vehicle was traveling at 82 miles per hour and swerving within its lane. The vehicle caught up to slower traffic, made a sharp lane change, and started following closely behind a semi-truck. While the vehicle was traveling behind the semi, it drifted to the center line and then to the fog line before making a jerky correction back to the center of the lane.

¶4 Thiede activated his lights and siren in order to stop the vehicle. The vehicle did not immediately pull over. Instead, the vehicle continued to an exit and stopped halfway down the exit ramp.

¶5 Thiede approached the vehicle on the passenger side. He identified the driver as George Ferrell. Thiede asked Ferrell for his driver's license. Ferrell

had trouble finding his license. Thiede observed that Ferrell was very rigid. Thiede also observed that Ferrell's eyes were bloodshot and his pupils were unusually constricted, and his speech was slightly slurred. Thiede did not smell alcohol on Ferrell's or the passenger's breath, and he did not see intoxicants in the vehicle.

¶6 At this point, Thiede requested backup because he suspected that Ferrell was intoxicated. Once a second squad car arrived, Thiede asked Ferrell to step out of the vehicle. Ferrell exited the vehicle and walked towards the back of the vehicle with his arm extended in front of him "like a mummy." Thiede asked Ferrell to perform field sobriety tests, and Ferrell refused. Thiede then arrested Ferrell for operating while intoxicated. Ferrell additionally refused to submit to a breath test following his arrest.

¶7 Thiede immediately prepared a Notice of Intent to Revoke Operating Privilege under WIS. STAT. § 343.305(9), which states: "If a person refuses to take a [breath] test under sub. (3) (a), the law enforcement officer shall immediately prepare a notice of intent to revoke ... the person's operating privilege." Ferrell requested a hearing on the revocation under § 343.305(9)(a)4., which allows a person whose operating privileges have been revoked under § 343.305(9)(a) to request a hearing on the revocation within ten days.

¶8 The Sauk County Circuit Court held a hearing on the revocation. The sole issue at the hearing was whether Thiede had probable cause to arrest Ferrell for operating while intoxicated. Ferrell argued that Thiede did not have probable cause to arrest him for operating while intoxicated, and that his refusal to submit to a breath test was therefore reasonable.

¶9 The circuit court concluded that Thiede had probable cause to arrest Ferrell. In reaching this conclusion, the circuit court relied on the following factors: Thiede’s testimony at the hearing and his twenty-two years of experience as a law enforcement officer; Ferrell’s “erratic and dangerous driving behavior”; Ferrell’s “dismissive behavior when asked about his speed”; Ferrell’s bloodshot eyes, constricted pupils, slurred speech, and rigid and aggressive posture; Ferrell’s difficulty locating his driver’s license; and Ferrell’s refusal to perform field sobriety tests. Based on these factors, the circuit court found that, under the totality of the circumstances, Thiede had probable cause to believe that Ferrell was operating while intoxicated. As a result, the circuit court ruled that Ferrell’s refusal to submit to the breath test was unreasonable, and upheld the one-year revocation of Ferrell’s operating privileges. Ferrell now appeals.

DISCUSSION

¶10 Ferrell argues that the circuit court erred in determining that the totality of the circumstances established probable cause to arrest him because Ferrell did not admit to drinking, Thiede did not smell alcohol on Ferrell’s breath, and Thiede did not observe evidence of alcohol consumption in Ferrell’s car. Ferrell contends that his refusal to submit to field sobriety tests was reasonable because Thiede did not have probable cause to arrest him. As explained below, Ferrell’s arguments lack merit.

¶11 Whether undisputed facts establish probable cause is a question of law that this court reviews without deference to the trial court. *State v. Kasian*, 207 Wis. 2d 611, 621, 558 N.W.2d 687 (Ct. App. 1996). Probable cause to arrest for operating while intoxicated exists when the “quantum of evidence within the arresting officer’s knowledge at the time of the arrest ... would lead a reasonable

law enforcement officer to believe that the defendant was operating a motor vehicle while under the influence of an intoxicant.” *State v. Lange*, 2009 WI 49, ¶19, 317 Wis. 2d 383, 766 N.W.2d 551. The court applies an objective standard, and considers “the information available to the officer and the officer’s training and experience.” *Id.*, ¶20.

¶12 Turning to the facts of this case, the State Patrol received several reports that Ferrell was driving erratically and dangerously. Thiede observed that Ferrell was speeding and watched Ferrell swerve within his lane. When Thiede activated his lights and siren, Ferrell did not immediately react; instead, he continued to an exit and stopped halfway down the exit ramp. Thiede also observed physical signs that caused him to believe that Ferrell was intoxicated. Ferrell’s eyes were bloodshot and his pupils were unusually constricted, and his speech was slightly slurred. All of these facts taken together would lead a reasonable officer to believe that Ferrell was driving while under the influence of an intoxicant. Further evidence of use of intoxicants, such as odors, admissions, and containers, is not required. *Id.*, ¶37.

¶13 In addition, Ferrell refused to submit to field sobriety tests. This court has previously acknowledged that a refusal to perform field sobriety tests is indicative of consciousness of guilt. *State v. Babbitt*, 188 Wis. 2d 349, 359-60, 525 N.W.2d 102 (Ct. App. 1994) (“The most plausible reason for a defendant to refuse such a test is the fear that taking the test will expose the defendant’s guilt. Thus ... this evidence should be admissible for the purpose of establishing probable cause to arrest.”).

¶14 Based on all of the facts stated above, the totality of the circumstances would lead a reasonable police officer to conclude that Ferrell was

probably operating his vehicle while intoxicated, and Thiede therefore had probable cause to arrest Ferrell.

CONCLUSION

¶15 For the reasons set forth above, this court affirms the circuit court's finding that Thiede had probable cause to arrest Ferrell for operating while intoxicated and that Ferrell's refusal to submit to a breath test was unreasonable.

By the Court.—Order affirmed.

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

