COURT OF APPEALS
DECISION
DATED AND RELEASED

OCTOBER 2, 1996

No. 96-0964

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOSEPH A. ROE,

Defendant-Appellant.

APPEAL from an order of the circuit court for Kenosha County: BARBARA A. KLUKA, Judge. *Reversed*.

ANDERSON, P.J. Joseph A. Roe appeals from the trial court's order revoking his operating privileges for two years pursuant to § 343.305(2), STATS. On appeal, Roe argues that the arresting officer lacked probable cause to believe that he was driving while under the influence of intoxicants. We agree and therefore reverse.

The evidence adduced at Roe's refusal hearing established the relevant facts. On November 11, 1995, Officer Twain Robinson was dispatched

to Sullivan's Bar at 75th Street and 60th Avenue in the City of Kenosha. Robinson was met by a citizen who stated that a man in another vehicle backed into his vehicle and then went inside the bar. Robinson observed the citizen's damaged bumper, as well as the other vehicle.

While Robinson was taking the citizen's statement, Roe exited the bar. The citizen positively identified him as the driver of the other vehicle. Robinson called Roe over to ask him about the incident. Robinson observed that Roe stumbled and lost his balance a couple of times, his speech was slurred and there was a strong odor of intoxicants on his breath. Robinson asked Roe about the accident, but Roe refused to acknowledge the incident altogether. Robinson then transported Roe to the public safety building. At 12:19 a.m., on November 12, 1995, Robinson read Roe the Informing the Accused Form, but Roe refused to submit to testing. Robinson issued him a citation for operating while intoxicated.

At the refusal hearing, Roe moved to dismiss arguing that "there's no indication in the record as to when this subject was driving relative to the request for submission to the test." Roe maintained that the court was being "asked to make that quantum leap beyond inference … rather than reflecting upon the testimony that has been given." Nevertheless, the trial court determined that Roe's refusal to submit to a test of his blood or breath was unreasonable and revoked his operating privileges for two years. This appeal followed.

On appeal, Roe renews his argument that a finding that a reasonable officer would believe Roe was operating his vehicle while under the influence of an intoxicant is unsupported by the record. Whether there was probable cause for Roe's arrest is a question of law which we review de novo. *See* ***State v. Truax***, 151 Wis.2d 354, 360, 444 N.W.2d 432, 435 (Ct. App. 1989).

One of the issues at a refusal hearing is whether the officer requesting the driver to take the test had probable cause to believe that the person was driving or operating a motor vehicle while under the influence of intoxicants. Section 343.305(9)(a)5.a, STATS. Probable cause to arrest refers to the quantum of evidence which would lead a reasonable person to believe that the defendant is committing, or has committed, an offense. *See* ***Truax***, 151 Wis.2d at 359, 444 N.W.2d at 435. The evidence need not be sufficient to prove the defendant's guilt beyond a reasonable doubt or to show that the defendant's guilt is more probable than not. ***Id.*** at 360, 444 N.W.2d at 435. Rather, the objective facts before the officer need only lead a *reasonable person* to believe that guilt is more than a possibility. ***Id.***

Based upon Roe's indicia of intoxication—stumbling, slurred speech and odor of intoxicants—and his refusal to submit to testing, the trial court concluded that a reasonable officer could believe that Roe was operating his vehicle while under the influence of an intoxicant. Although the record was "devoid" of information regarding the time of the accident, the court concluded that the officer did not have to be "concerned about what time did [the accident]

happen, how long ago, when is it reported in. I think he could conclude it." We disagree.

The supreme court has articulated two principal elements that constitute the crime of operating a motor vehicle while under the influence of an intoxicant: (1) the defendant was driving or operating a motor vehicle; and (2) the defendant was under the influence of an intoxicant *at the time* that he or she was driving or operating the motor vehicle. ***State v. Vick***, 104 Wis.2d 678, 692, 312 N.W.2d 489, 496 (1981). The simultaneous occurrence of the first two elements is obvious: the operation of the motor vehicle *must take place while* the operator is under the influence of intoxicating liquor. *See* ***City of Milwaukee v. Kelly***, 40 Wis.2d 136, 138, 161 N.W.2d 271, 272 (1968).

Here, the record is devoid of evidence to support this simultaneous occurrence. This is not a situation where the officer observed erratic driving by Roe or viewed the accident itself. Rather, a citizen allegedly watched Roe back into his vehicle.

More importantly, Roe was in the tavern for an *unknown* period of time after the incident and prior to any contact with the police. For example, if Roe was in the tavern for only ten minutes or so, then a reasonable inference would be that he was intoxicated when he struck the other vehicle. *See* ***id***. at 137-38, 161 N.W.2d at 271-72. If, however, Roe hit the other vehicle at 8:00 p.m., went into the bar for drinks and then exited just after 11:00 p.m., it would not be reasonable to infer that he was intoxicated when he hit the vehicle at 8:00 p.m.

On this record, it is impossible to determine which scenario is more accurate.[1] Unfortunately, the only time reference in the record is that the officer was dispatched just after 11:00 p.m. and Roe refused to submit to testing at about 12:20 a.m. This evidence does not establish, beyond a mere *possibility*, that Roe was under the influence of an intoxicant *at the same time* that he was driving. This is insufficient. We conclude that no reasonable officer could infer or conclude that Roe was under the influence of an intoxicant *at the time* that he allegedly backed into the other vehicle, and we therefore reverse the trial court's order revoking Roe's operating privileges.

By the Court.—Order reversed.

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

[1] The State contends that when a police officer is confronted with two *reasonable competing inferences*, one justifying arrest and the other not, the officer is entitled to rely on the reasonable inference justifying the arrest. *Cf.* ***State v. Tompkins***, 144 Wis.2d 116, 125, 423 N.W.2d 823, 827 (1988). We agree, however, the key is that the competing inferences must be reasonable. In this case it was unreasonable for the officer to infer that Roe was under the influence of an intoxicant at the same time that he struck the other vehicle without more specific knowledge of the amount of time between the accident and Roe's exiting the bar. Thus, ***Tompkins*** is inapposite.