COURT OF APPEALS
DECISION
DATED AND FILED

February 6, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2369-CR **Cir. Ct. No. 2012CT162**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LAWRENCE A. LEVASSEUR, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Wood County: NICHOLAS J. BRAZEAU, JR., Judge. *Affirmed*.

¶1 BLANCHARD, P.J.[1] Lawrence Levasseur appeals a judgment of conviction for operating a motor vehicle with a prohibited alcohol concentration,

[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.

as a second offense. He makes two arguments on appeal. Levasseur first challenges the circuit court's denial of his motion to suppress evidence obtained as a result of the arresting officer's administration of a preliminary breath test (PBT) immediately preceding his arrest. Levasseur argues that the officer lacked "probable cause to believe" that Levasseur had been operating a vehicle while under the influence before requesting the PBT. Levasseur's second contention is that the circuit court erred in denying his motion for an order determining that a test of a sample of his blood that was taken after the officer read to him from the Informing the Accused form lacks the presumption of admissibility and accuracy. The basis for this argument is that the form used by the officer was outdated, which Levasseur submits mattered because it lacked language required by statute to be read to all persons in Levasseur's position. For the following reasons, I affirm.

BACKGROUND

¶2 The controlling facts are undisputed. At approximately 3:00 p.m. on a Wednesday afternoon, an officer with twenty-four years of law enforcement experience responded to a call of a vehicle in a ditch. At the scene, the officer found an unattended vehicle that had run off the roadway, hit a culvert, and proceeded about fifteen yards before coming to a stop.[2] A front tire of the vehicle was flat.

[2] The officer did not describe the culvert, but a culvert is commonly understood to be a structure that allows water to flow under an area used for travel, such as a roadway, made from pipe, reinforced concrete, or other solid material.

¶3 Levasseur approached the officer and explained that he had been the driver of this vehicle. He said that the vehicle had developed a flat tire, he had lost control of the vehicle as a result, and it hit the culvert. The officer did not observe anything about the scene that caused him to doubt this account.

¶4 The officer "could detect the strong odor of alcoholic beverage coming from" Levasseur. The officer asked Levasseur if he had consumed any alcoholic beverages that day. Levasseur responded that "he had consumed one alcoholic beverage earlier that morning." At the same time, Levasseur was "very cooperative," did not appear confused, and appeared to understand the officer's questions and responded appropriately to questions.

¶5 The officer asked Levasseur to perform field sobriety tests, and Levasseur agreed to do so. Levasseur did "a fairly good job" on the nine-step walk-and-turn, although on two steps his feet were not heel to toe. This counted as one "clue" of impairment, for a passing score. Similarly, during the one-leg-stand, Levasseur "did a fairly good job," although he had "a little bit of poor balance" and "was swaying a little bit." Again, this counted as one "clue," for a passing score. Regarding the horizontal gaze nystagmus (HGN) test, there was a "lack of smooth pursuit of his eyes going from left to right," and his eyes were "jerky." This counted for two "clues," also a passing score. Separately, the officer noticed that Levasseur's eyes were "reddish."

¶6 The officer decided to request a PBT "because I was on the edge of suspicion and I wanted to make sure I had enough probable cause for the arrest, and I used the PBT as a tool to ... confirm probable cause for the arrest." The result of the PBT was .10.

¶7 After placing Levasseur under arrest, the officer read to him from an Informing the Accused form. The particular form the officer used indicates on its face that it was developed by the Wisconsin Department of Transportation in January 2003. It was, therefore, missing language deriving from 2009 amendments to the implied consent law. The form reflects that Levasseur agreed to submit to an evidentiary chemical test of his blood, and a sample was taken.

¶8 Levasseur filed a motion to suppress, challenging the officer's grounds for the PBT and the presumptions of admissibility and accuracy for the blood test. In a written decision issued after a hearing, the circuit court denied the motions, concluding that the officer had "probable cause to believe" that Levasseur had operated while intoxicated so as to justify use of a PBT, and that the omission of language from the form was of no consequence in this case.

DISCUSSION

"Probable Cause to Believe" for PBT

¶9 Levasseur argues that the officer lacked "probable cause to believe" that Levasseur had been operating a vehicle while impaired, and therefore could not lawfully administer a PBT under WIS. STAT. § 343.303.[3] Levasseur emphasizes the following: what he alleges was a lack of indicia of poor driving;

[3] WISCONSIN STAT. § 343.303 provides in pertinent part:

> If a law enforcement officer has *probable cause to believe that* the person is violating or has violated s. 346.63 (1) or (2m) ... the officer, prior to an arrest, may request the person to provide a sample of his or her breath for a preliminary breath screening test using a device approved by the department for this purpose.

(Emphasis added.)

the accident occurred during the day time, not at night or near bar time; his statement to the officer that he had consumed only one drink that morning; his "passing" the field sobriety tests; and the officer's subjective belief that he was merely "on the edge of suspicion."

¶10 ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 603 N.W.2d 541 (1999), describes the requisite levels of reasonable suspicion and probable cause throughout an OWI investigation. If an officer has cause to suspect that a driver was driving while impaired, but does not have a sufficient basis to establish probable cause to arrest for an OWI violation, the officer is permitted to request that the driver perform field sobriety tests. ***Id.*** at 310. If the field sobriety tests do not produce enough evidence to establish probable cause for arrest under WIS. STAT. § 343.303, an officer is permitted to utilize a PBT to aid in determination of probable cause to arrest for an OWI violation. ***Id.*** at 310-11. The phrase "probable cause to believe" in WIS. STAT. § 343.303 refers "to a quantum of proof that is greater than the reasonable suspicion necessary to justify an investigative stop ... but less than the level of proof required to establish probable cause for arrest." ***Id.*** at 317.

¶11 I conclude that the facts in ***Renz*** and those in ***State v. Felton***, 2012 WI App 114, 344 Wis. 2d 483, 824 N.W.2d 871, both cases in which the courts concluded that there was a requisite level of suspicion, are sufficiently similar to the facts in this case when considered in their totality to compel an affirmance on this issue.

¶12 In ***Renz***, the driver was pulled over for a loud exhaust at 2:00 a.m. ***Renz***, 231 Wis. 2d at 296. During an initial interaction, the officer smelled a strong odor of intoxicants coming from inside the car, and the driver's eyes were

bloodshot and glassy. ***Id.*** The driver told the officer that he was a bartender at a tavern and had drunk three beers earlier in the evening. ***Id.*** During field sobriety tests the driver: was able to recite the alphabet correctly and never slurred his speech; exhibited one "clue" during the one-leg stand; exhibited two "clues" during the heel-to-toe walking test, and swayed while performing the test; made an error during a finger-to-nose test; and exhibited all six "clues" during the HGN test. ***Id.*** at 298.

¶13 In ***Felton***, early one morning an officer saw a car linger for an unusually long time at a stop sign, and thereafter proceed through an intersection controlled by a stop sign at approximately twenty miles per hour without slowing down. ***Felton***, 344 Wis. 2d 483, ¶2. When the officer stopped the car, the driver's eyes were glassy and bloodshot. ***Id.***, ¶3. The officer detected an odor of intoxicants coming from the driver. ***Id.*** The driver stated that he had consumed three beers two hours earlier. ***Id.*** The driver cooperated fully with the officer and the driver's responses to the officer's questions were appropriate. ***Id.*** During field sobriety tests, the driver successfully completed the one-leg-stand test, and only faltered slightly once when he did the walk-and-turn test, which counted as a pass. ***Id.***, ¶4.

¶14 I begin the analysis by identifying one non-pertinent factor cited by Levasseur. This is his reliance on the officer's subjective belief about whether the facts met the requisite legal standard (putting aside the ambiguity inherent in the officer's testimony that he believed the facts put the case "on the edge of suspicion."). I reject this argument of Levasseur's, because it rests on the incorrect premise that courts are to consider an officer's subjective assessment or motivation in this context. *See* ***State v. Kutz***, 2003 WI App 205, ¶12, 267 Wis. 2d 531, 671 N.W.2d 660 (courts apply objective standards to probable cause

determinations, and are "not bound by the officer's subjective assessment or motivation.").

¶15 Turning more generally to ***Renz*** and ***Felton***, the facts of those cases and the facts here are in some ways distinguishable, but there is much overlap. Moreover, the principal argument that Levasseur relies on to distinguish ***Felton*** is without merit. This is Levasseur's position that his vehicle leaving the roadway "was not indicative of operating while intoxicated," in part because the officer testified that nothing at the scene caused the officer to question Levasseur's account that a flat tire caused the accident. However, as I now explain, given the totality of the circumstances, the fact of the accident counts as a suspicious fact, contrary to Levasseur's position.

¶16 The problem with Levasseur's position is that it ignores the rule stated above that courts employ an objective test, not a subjective one. When a vehicle departs a roadway and hits a culvert, that might cause a flat tire. The officer's apparent subjective view that the flat tire might not have been caused by something that happened after the vehicle left the roadway did not remove that possibility, based on an objective review of the undisputed facts. This leaves open the distinct possibility that the vehicle departed the roadway due, to a greater or lesser degree, to the driver's impairment, since no other cause of the accident is evident. Moreover, even if the flat or a leak started before the vehicle left the roadway, every time a vehicle has a flat or a leak the driver is not forced completely off the roadway on which he or she is operating, ramming into impediments such as culverts and travelling further yet. Thus, even assuming that a flat tire contributed to the accident, perhaps even as a major factor, an objective view of the facts allows for the inference that impairment might have played a role in causing the accident or increasing its severity.

¶17 With two of Levasseur's arguments rejected on these grounds, there is little to distinguish this case from many of the facts in ***Renz*** and ***Felton***. It is true that late night driving can add a suspicious element missing here. However, weighing on the other side of the equation in this case was the fact that Levasseur told the officer that he had been drinking that Wednesday morning. The officer was of course not obligated to take at face value Levasseur's statement about having only a single drink, particularly in light of his red eyes, strong odor of alcohol, and the fact of the accident. It is of course generally not unlawful to drink alcohol, in any amount, on a Wednesday morning. However, as a statistical matter, the Wednesday morning drinker is more often going to be a heavy drinker, and thus more likely impaired, than the average person (absent some explanation for Wednesday morning alcohol consumption, missing here, such as that the driver worked a third-shift job or was otherwise on an unusual schedule).

Informing the Accused Form

¶18 Under the implied consent law, as amended in 2009, officers are obligated to read language that includes the following to persons under certain circumstances when an officer is requesting the person consent to a chemical test:

> You have either been arrested for an offense that involves driving or operating a motor vehicle while under the influence of alcohol or drugs, or both, *or you are the operator of a vehicle that was involved in an accident that caused the death of, great bodily harm to, or substantial bodily harm to a person*, or you are suspected of driving or being on duty time with respect to a commercial motor vehicle after consuming an intoxicating beverage.
>
> This law enforcement agency now wants to test one or more samples of your breath, blood or urine to determine the concentration of alcohol or drugs in your system. If any test shows more alcohol in your system than the law permits while driving, your operating privilege will be suspended.

WIS. STAT. § 343.305(4) (emphasis added to the language at issue in this appeal). As indicated above, the officer here used a form that pre-dated 2009 amendments that resulted in the addition of the language highlighted in the passage above. Levasseur acknowledges that "the omitted language is not directly applicable to his situation since he was not involved in an accident that resulted in the death or serious injury of someone." The problem, Levasseur argues, is that, "Our statutes are very clear that only tests administered in accordance with Wisconsin Statutes section 343.305 are to be afforded the statutory presumptions of admissibility and accuracy. Wis. Stat. §§ 343.305(5)(d) and 885.235(1m)."

¶19 I reject this argument on the same grounds as those relied on by the circuit court, namely, the reasoning in ***State v. Piskula***, 168 Wis. 2d 135, 483 N.W.2d 250 (Ct. App. 1992). In ***Piskula*** the defendant was read the Informing the Accused form, but the officer who read the form to him omitted the paragraphs related to commercial drivers. ***Id.*** at 139. The defendant argued that, despite the fact that he was not a commercial driver, the officer was required to read him the entirety of the Informing the Accused form. ***Id.*** This court rejected the defendant's argument, concluding:

> [T]he information given to Piskula substantially complied with the requirements of sec. 343.305(4), Stats. Piskula was actually informed of all rights and penalties relating to him. He was not informed about the rights and penalties relating to drivers of commercial vehicles, but Piskula was not driving a commercial vehicle and he does not assert that he was driving or on duty time with respect to a commercial vehicle. With respect to noncommercial drivers, the reasonable objective of sec. 343.305(4) is to inform them of their rights and penalties regarding refusal and a blood alcohol concentration (BAC) of .10%.[4] It

[4] The general base line now is .08 and not .10 as in 1992. This difference does not affect the analysis here.

> would be unreasonable to require officers to inform persons who are clearly noncommercial drivers about the rights and penalties applicable only to commercial drivers. We conclude that Piskula was properly informed of his rights pursuant to sec. 343.305(4) because there was actual compliance with respect to the substance essential to every reasonable objective of the statute.

Id. at 140-41 (citations omitted).

¶20 Faced with ***Piskula***, Levasseur advances only a hypertechnical argument that is completely untethered from the logic and purposes of the implied consent law. The only portion of the amended implied consent law that the officer failed to read to Levasseur did not apply to him. The rest of the form as read to Levasseur accurately informed him of the rights and penalties that related to him.

¶21 Levasseur argues that ***Piskula*** is not controlling in this case, and that instead ***Washburn County v. Smith***, 2008 WI 23, ¶72, 308 Wis. 2d 65, 746 N.W.2d 243, mandates that, in any case in which a law enforcement officer fails to provide all of the statutorily required information to the defendant through the Informing the Accused form, the presumption of admissibility and accuracy does not apply. I disagree.

¶22 In ***Smith***, the court explained that the analysis for cases in which an officer *fails* to provide statutorily required information to a defendant is different than the analysis for cases in which an officer provides *additional information* beyond what is statutorily required to the defendant. ***Smith***, 308 Wis. 2d 65, ¶72. In the former, fail-to-provide scenario, the ***Smith*** court stated, courts should apply the analysis from ***State v. Wilke***, 152 Wis. 2d 243, 448 N.W.2d 13 (Ct. App. 1989). The ***Smith*** court read ***Wilke*** to stand for the proposition that "there cannot be substantial compliance with [WIS. STAT.] § 343.305(4) when the law enforcement officer fails to give the defendant the statutorily required information

about penalties." ***Id.***, ¶75. Failure to provide statutorily required information about penalties that apply to the defendant is easily distinguishable from the omission at issue in this appeal. Thus, I see nothing inconsistent in the ***Smith***, ***Wilke***, and ***Piskula*** decisions, and, under the logic of ***Piskula***, the officer who read Levasseur the Informing the Accused substantially complied with the requirements of § 343.305(4).

By the Court.—Judgment affirmed.

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