COURT OF APPEALS
DECISION
DATED AND RELEASED

February 27, 1997

NOTICE

No. 96-2320

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

COUNTY OF IOWA,

Plaintiff-Respondent,

v.

RANDY D. SKOGEN,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Iowa County: JAMES P. FIEDLER, Judge. *Affirmed*.

ROGGENSACK, J.[1] Randy D. Skogen appeals his conviction on charges of operating a motor vehicle while intoxicated (OMVWI) and with a prohibited alcohol concentration (PAC), based on the denial of his motions to suppress evidence and to dismiss on double jeopardy grounds. Skogen argues that the police lacked probable cause to administer a preliminary breath test (PBT) at his home following a traffic accident, and without the results of that

[1] This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

test, lacked probable cause to arrest him and to obtain the blood test used in his conviction. He also contends that the initiation of a criminal OMVWI/PAC prosecution subsequent to the imposition of an administrative suspension of his driving privileges violated the Double Jeopardy Clause of the United States Constitution. However, the probable cause determination in this case was proper under the totality of the circumstances, and Skogen's double jeopardy argument is contrary to controlling precedent. Therefore, the judgment is affirmed.

BACKGROUND

Officer Darrell Kreul was dispatched to the scene of an Iowa County traffic accident at approximately 1:34 a.m. on October 22, 1995. When Kreul was unable to locate the accident site, he asked the dispatcher to contact the woman who had reported the accident. When the dispatcher was unable to do so,[2] Kreul drove to her residence.

Upon Kreul's arrival, he met Skogen, who admitted that he was the driver of the accident vehicle. Skogen stated that he was coming home from a bar when he took a curve too fast and went off the road, hitting a tree. Kreul detected a strong odor of alcohol on Skogen's breath, and observed that his eyes were glassy and bloodshot. No sobriety tests were performed; however, Skogen admitted that he had been drinking prior to the accident and that he had not intended to report the incident.[3] He also said that he drank one beer after the accident. When Kreul inspected Skogen's car, he observed substantial damage on the outside, and a number of beer cans on the inside of the vehicle, including one with a fresh odor of alcohol. After discussing the circumstances of the accident for thirty to forty minutes, Kreul asked Skogen to submit to a preliminary breath test. The PBT showed an alcohol concentration of .20.

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[2] When the dispatcher called the complainant's number, a man answered and said there had been no accident and that the call should not have been placed.

[3] Skogen explained that he drives a truck for a living and did not want the accident on his record.

Skogen was then arrested and transported to a hospital for a blood alcohol test, which he also failed. He was cited for OMVWI and PAC, contrary to § 346.63(1)(a) and (b), STATS., and for failing to notify police of an accident, contrary to § 346.70(1), STATS. His driver's license was administratively suspended, and he was subsequently charged in a criminal complaint with all three counts. The trial court denied Skogen's motions to suppress the blood test and to dismiss on double jeopardy grounds. The State dismissed the § 346.70(1) charge, and after a stipulated trial, the court adjudged him guilty on the OMVWI and PAC counts. Skogen appeals.

DISCUSSION

Standard of Review.

Whether Skogen's arrest was based on probable cause presents a mixed question of fact and law. The trial court's findings on disputed factual issues will be upheld unless clearly erroneous. Section 805.17(2), STATS. Whether those facts establish probable cause is a question of law to be reviewed *de novo*. ***State v. Babbitt***, 188 Wis.2d 349, 356, 525 N.W.2d 102, 104 (Ct. App. 1994). Likewise, the level of suspicion required to fulfill the statutory prerequisite to requesting that a driver submit to a PBT is a question of law, reviewed without deference to the trial court. *See* ***State v. Nordness***, 128 Wis.2d 15, 36, 381 N.W.2d 300, 305-06 (1986).

Skogen's double jeopardy argument requires analysis of the Fifth Amendment of the United States Constitution,[4] in light of Wisconsin's Implied Consent Law, § 343.305, STATS. Because the question involves the application of constitutional principles to undisputed facts, we review the issue *de novo*. ***State v. Pheil***, 152 Wis.2d 523, 529, 449 N.W.2d 858, 861 (Ct. App. 1989).

[4] Article I, sec. 8 of the Wisconsin Constitution also provides that "no person for the same offense may be put twice in jeopardy of punishment." However, Wisconsin interprets its double jeopardy clause in accordance with the rulings of the United States Supreme Court. ***State v. Kurzawa***, 180 Wis.2d 502, 522, 509 N.W.2d 712, 721, *cert. denied* 114 S. Ct. 2712 (1994). In addition, because the defendant does not raise the Wisconsin constitutional issue, this analysis is limited to the federal clause.

Probable Cause.

Taking a breath sample from a suspected drunk driver constitutes a search and seizure under the United States and Wisconsin constitutions. ***Milwaukee County v. Proegler***, 95 Wis.2d 614, 623, 291 N.W.2d 608, 612 (Ct. App. 1980). However, any person who operates a motor vehicle in Wisconsin is deemed to have consented to a blood, urine or breath test under statutorily determined circumstances. ***Id.***; § 343.305(4), STATS. By virtue of Wisconsin's regulatory scheme, a law enforcement officer also may request an individual to submit to a PBT, if the officer has probable cause to believe that the individual has violated § 346.63(1), STATS. The result of that test then becomes part of the totality of circumstances which the officer considers in determining whether to arrest. Section 343.303, STATS.; ***State v. Beaver***, 181 Wis.2d 959, 969, 512 N.W.2d 254, 258 (Ct. App. 1994); ***County of Dane v. Sharpee***, 154 Wis.2d 515, 520, 453 N.W.2d 508, 511 (Ct. App. 1990).

Skogen argues that the facts of this case were insufficient to sustain the probable cause necessary for the officer to ask him to submit to a PBT. And, without the PBT, there was insufficient proof to sustain probable cause to arrest. Therefore, without a valid arrest, the blood test used to convict him of operating a motor vehicle with a PAC must be suppressed. His argument requires this court to examine the quantum of proof required for an officer to believe that a driver has violated § 346.63(1), STATS., because that is the predicate required in this case before a PBT can be requested.

No appellate decision has directly addressed the quantum of proof required to sustain the probable cause which § 343.303, STATS., requires prior to requesting a PBT. However, at least one decision of this court has held that the quantum of proof necessary to sustain probable cause at a refusal hearing is significantly less than that required to sustain probable cause at a suppression hearing. ***State v. Wille***, 185 Wis.2d 673, 681, 518 N.W.2d 325, 328 (Ct. App. 1994).

An officer must have probable cause to arrest a driver for operating in contravention of § 346.63(1), (2m), or (5), STATS., before he or she can request a chemical test under § 343.305(3), STATS., the refusal of which sets the stage for a refusal hearing under § 343.305(9). However, probable cause to

arrest is not required before a PBT can be requested; rather, probable cause to believe that a driver has violated § 343.63(1) is all that is required. Therefore, we conclude that given the holding in ***Wille***, the quantum of proof required for an officer to have "probable cause" to believe, as those terms are used in § 343.303, STATS., in order to request a PBT, can be no greater than that level of proof required to sustain probable cause to arrest at a refusal hearing.

At a refusal hearing, the State must simply show that the officer's belief is plausible. A court does not weigh evidence for and against probable cause or determine the credibility of witnesses, as is done at a suppression hearing. ***Wille***, 185 Wis.2d at 681, 518 N.W.2d at 328. Additionally, a court properly takes into account the officer's knowledge, training, and prior personal and professional experiences, when determining if his belief is plausible. *See* ***State v. DeSmidt***, 155 Wis.2d 119, 134-35, 454 N.W.2d 780, 787 (1990), *citing* ***United States v. Crozier***, 777 F.2d 1376, 1380 (9th Cir. 1985).

The arresting officer in this case had ten years of police experience and had made over 200 drunk driving arrests. When he administered the PBT, Kreul had talked with Skogen for thirty to forty minutes. He knew that Skogen had been driving a car which went off the road into a tree; that he had been drinking at a bar immediately prior to the accident; that he had bloodshot eyes and a strong odor of alcohol on his breath roughly one hour and one beer after the accident; that there were beer cans in his car, at least one of which smelled of fresh alcohol; and that the defendant did not report the accident because he feared he could lose his truck-driving job because of it. *See* ***Wille***, 185 Wis.2d at 684, 518 N.W.2d at 329 (finding that a defendant's statement that he had "to quit doing this," in conjunction with his involvement in an accident and the odor of alcohol, was relevant to the arresting officer's probable cause to believe Wille had been driving while intoxicated). Additionally, field sobriety tests, while encouraged, are not required where other strong evidence of intoxication exists. ***Id.***

Finally, Kreul's probable cause to request that Skogen take a PBT was not negated by the one beer Skogen drank between the time of the accident and the administration of the PBT because in determining whether the PBT was properly requested, the court does not weigh evidence. ***Wille***, 185 Wis.2d at 681, 518 N.W.2d at 328. It determines only whether the officer's belief was

plausible, given the totality of the circumstances. We conclude the officer had probable cause sufficient to request Skogen to take a PBT.

Double Jeopardy.

The Fifth Amendment of the United States Constitution provides that no person "shall be subject for the same offense to be twice put in jeopardy of life or limb." The Double Jeopardy Clause includes three distinct constitutional guarantees: (1) protection against a second prosecution for the same offense after an acquittal; (2) protection against a second prosecution after a conviction; and (3) protection against multiple punishments for the same offense. ***State v. Kurzawa***, 180 Wis.2d 502, 515, 509 N.W.2d 712, 717, *cert. denied*, 114 S. Ct. 2712 (1994). Skogen argues that he was subjected to multiple punishments for the same offense, contrary to the third prong of double jeopardy analysis.

A civil penalty may constitute "punishment" when the penalty serves the goals of punishment, such as retribution or deterrence. ***United States v. Halper***, 490 U.S. 435, 448 (1989). However, the supreme court has already determined that § 343.305, STATS., is remedial in nature because it was enacted to keep drunken drivers off the road. ***State v. McMaster***, 206 Wis.2d 30, 45, 556 N.W.2d 673, 679 (1996). In other words, the primary purpose of the implied consent law is to protect innocent drivers and pedestrians, rather than to punish drunken drivers. ***Id. McMaster*** represents the current state of Wisconsin law, and is binding precedent. Therefore, Skogen's criminal prosecution for operating a motor vehicle while intoxicated, after the administrative suspension of his operating privileges, did not constitute multiple punishments, and did not violate the Double Jeopardy Clause.

CONCLUSION

Kreul's belief that Skogen was driving under the influence of an intoxicant was plausible. Therefore, the PBT was properly requested. Its results added to the totality of the circumstances which Kreul considered in deciding whether to arrest Skogen. Additionally, Skogen was not placed in double jeopardy by a OMVWI/PAC prosecution following the administrative

suspension of his license. Therefore, Skogen's motions to suppress evidence and to dismiss were properly denied.

By the Court.—Judgment affirmed.

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