

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 18, 2014

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. 2014AP174

Cir. Ct. No. 2013TR1667

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN THE MATTER OF THE REFUSAL OF DALE F. WENDT:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DALE F. WENDT,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Manitowoc County:
GARY L. BENDIX, Judge. *Affirmed.*

¶1 BROWN, C.J.¹ Dale Wendt appeals from the order revoking his driving privileges. This revocation was ordered because Wendt unreasonably refused a blood test when he was arrested for operating his vehicle while intoxicated, which would be his third offense. We affirm.

Facts

¶2 On April 16, 2013, at about 5:43 p.m., a Manitowoc County Sheriff's Deputy responded to a call from a citizen, Anton Kalcik, complaining that his neighbor, Wendt, had threatened him at about 5:15 p.m. Kalcik said that Wendt had been drinking and was angry because he thought Kalcik had sold him some moldy hay. Kalcik said that Wendt drove over in a pickup truck, threw moldy hay out of the back of the truck, and threatened to kill Kalcik. Kalcik said that he had smelled alcohol on Wendt's breath during the incident. The deputy saw the hay that Wendt had reportedly thrown out of his truck.

¶3 After talking to Kalcik and photographing the hay, the deputy went to Wendt's residence, about two or three minutes away from Kalcik's residence, arriving at 6:26 p.m. Wendt was in the driveway area in front of his garage, and the deputy saw the pickup truck that Kalcik had described. When talking to Wendt, the deputy noticed that he was slurring his speech, had bloodshot and glassy eyes, and was unsteady on his feet. He was so unsteady that he seemed to be leaning on the truck for support.

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.

¶4 Wendt readily admitted driving the pickup to Kalcik's and leaving the hay there. When the deputy said he could smell alcohol on Wendt's breath, Wendt said, "I know." When he asked how much Wendt had been drinking that day, Wendt said, "Does that really matter[?]" After several minutes of discussion about Wendt's driving the vehicle while under the influence of alcohol, the deputy asked Wendt to perform field sobriety tests, but Wendt refused. When the deputy asked why Wendt was refusing the tests, Wendt said, "[I]t doesn't really matter, I'm going to jail." The deputy then decided to arrest Wendt for operating the vehicle while intoxicated and for disorderly conduct.

¶5 After arresting Wendt, the deputy transported him to the hospital to have blood drawn. In the squad car, the deputy reviewed the standard Informing the Accused form with Wendt and then asked Wendt to consent to the blood draw. Wendt refused.

¶6 The deputy issued Wendt a Notice of Intent to Revoke Operating Privilege, based upon Wendt's refusal to consent to the blood draw, as required by WIS. STAT. § 343.305(9)(a). The deputy then proceeded to have the blood drawn. The testing ultimately indicated a blood alcohol level of .298.

¶7 Wendt requested a hearing on the issue of whether his refusal was unreasonable. The court concluded that based upon the information the deputy had at the time of the arrest—including Kalcik's statement that Wendt drove to his residence and smelled like alcohol, the deputy's own observations of Wendt's appearing intoxicated a little over an hour later, and Wendt's admission to the driving and to smelling like alcohol—the officer had probable cause for the arrest. The court therefore ruled that Wendt's refusal to consent to the blood test was unreasonable. Wendt appeals.

Analysis

¶8 The only issues at a refusal hearing under WIS. STAT. § 343.305(9) are whether the officer had probable cause to believe that the person was operating a motor vehicle under the influence and whether the officer read the information required by § 343.305(4) before asking for consent to the testing. *Washburn Cnty. v. Smith*, 2008 WI 23, ¶2, 308 Wis. 2d 65, 746 N.W.2d 243. Wendt does not dispute that the deputy read him the information required under § 343.305(4), so the only issue in this appeal is whether the deputy had probable cause for the arrest.

¶9 An appellate court reviews the determination of probable cause at a refusal hearing de novo and with the benefit of the circuit court’s analysis. *Id.*, ¶16. In the refusal hearing context, probable cause means “evidence that would lead a reasonable law enforcement officer to believe that the defendant was operating a motor vehicle while under the influence of an intoxicant.” *Id.*, ¶15.

¶10 The information known to the deputy at the time he requested Wendt’s consent to the blood test supported probable cause to believe Wendt had driven his vehicle while intoxicated earlier that evening. To begin with, the dramatic belligerence that led to the deputy’s dispatch—Wendt being so angry about the moldy hay that he drove to the Kalcik’s home, threw hay on the ground, and reportedly threatened to kill Kalcik—was an indicator of intoxication. *See State v. Seibel*, 163 Wis. 2d 164, 182, 471 N.W.2d 226 (1991) (discussing “a belligerence and lack of contact with reality often associated with excessive drinking”). While a sober person could certainly engage in such behavior, anyone hearing the story might have wondered whether Wendt had been drinking. And

Kalcik in fact told the deputy that Wendt had been drinking and smelled of alcohol during the incident.

¶11 Next, when the deputy spoke with Wendt, just one hour and fifteen minutes after the incident at Kalcik's home, Wendt was leaning on his truck for support because he was so unsteady on his feet, his breath smelled like intoxicants, his eyes were bloodshot and glassy, and his speech was slurred. When asked whether he had been drinking alcohol that day, Wendt said, "Does that really matter[?]" He also refused to do field sobriety tests, saying, "It doesn't really matter, I'm going to jail." Considering "all [the] circumstances," the deputy had probable cause to believe Wendt drove while intoxicated when he went over to Kalcik's earlier that evening. *Smith*, 308 Wis. 2d 65, ¶35.

¶12 Wendt is wrong when he argues that the deputy lacked information to believe that Wendt was intoxicated "at the time" Wendt drove over to Kalcik's residence. His theory on appeal is that, in between the time that he was at Kalcik's and the time he was confronted by the officer, the State has not proven that he did not drink. Note the double negative in the preceding sentence. This is important because Wendt is claiming that the State has to prove the negative. He cites no authority for this proposition, most likely because there is none. If Wendt wanted to, he could have taken the stand and testified that he had not been intoxicated when he was at Kalcik's, but drank when he came home and then argued that this after-incident drinking was just as likely the cause of the high alcohol content in his blood. He would have thus asserted an affirmative defense to probable cause and it would have been the trial court's obligation to assess his credibility. But he did not do that. As it stands, there is not even an ounce of proof that he even drank anything after he left Kalcik's. Without that proof, we fail to understand how he can even begin to make the argument that he tenders to this court now.

¶13 What we have to work with and what the trial court had to work with were the facts of record. Looking at those facts, two important indicators—Wendt’s belligerent display at Kalcik’s and Kalcik’s smelling alcohol on Wendt’s breath—were from just moments after Wendt drove his truck. While the officer’s observations were made over an hour later, they only confirmed the suspicion that Wendt had been intoxicated when he drove over to Kalcik’s. Those suspicions were also confirmed when Wendt told the deputy that it did not matter and that he expected he was going to jail. Wendt’s expressing consciousness of guilt is an additional circumstance supporting probable cause, *State v. Wille*, 185 Wis. 2d 673, 684, 518 N.W.2d 325 (Ct. App. 1994), and with these expressions he confirmed rather than dispelled the deputy’s suspicions that he was driving while intoxicated when he went over to Kalcik’s.

¶14 If, in fact, Wendt was not operating while intoxicated he still has the chance to present evidence supporting his defense. But for purposes of the refusal hearing the only question was whether the deputy had probable cause to believe Wendt was operating while intoxicated. The deputy did.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

