COURT OF APPEALS
DECISION
DATED AND FILED

July 3, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2454 **Cir. Ct. No. 2010TR2986**

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

IN THE MATTER OF THE REFUSAL OF THOMAS J. WAGENAAR:

MARQUETTE COUNTY,

PLAINTIFF-RESPONDENT,

V.

THOMAS J. WAGENAAR,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Marquette County: RICHARD O. WRIGHT, Judge. *Affirmed*.

¶1 SHERMAN, J.[1] Thomas Wagenaar appeals a judgment of the circuit court imposing a one-year revocation of his operating privileges pursuant to

[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.

WIS. STAT. § 343.305, based on Wagenaar's refusal to submit to a chemical test to determine his blood alcohol concentration under Wisconsin's implied consent law. Wagenaar argues that the circuit court erred in determining that there was probable cause to believe that he was operating a motor vehicle while under the influence of an intoxicant and that he had been properly informed of his rights and obligations under the implied consent law. For the reasons discussed below, I affirm.

BACKGROUND

¶2 The relevant facts are taken from the refusal hearing and are not in dispute. At approximately 8:20 p.m. on August 31, 2010, Aaron Williams, a Detective Sergeant with the Marquette County Sheriff's Department, was dispatched to an area near the Call of the Wild Campground, which is located in the town of Packwaukee. Sergeant Williams testified that when he arrived at the scene, he observed that Wagenaar had a large laceration on his forehead and was bleeding. Sergeant Williams testified that he observed a red motorcycle parked nearby with some broken pieces on the fender areas and multiple scratches along the bottom areas on both sides of the motorcycle. Sergeant Williams testified that there were skid marks in the gravel on the roadway leading directly toward a rock pile where Sergeant Williams observed red plastic pieces similar to the motorcycle, as well as what appeared to be "small spots or blotches of blood." Sergeant Williams further testified that when he made contact with Wagenaar, he smelled the odor of intoxicants coming from Wagenaar's breath and that when asked if he had been drinking, Wagenaar responded "something to the effect of obviously a little bit."

¶3 Wagenaar was transported to a local hospital, where he was placed under arrest by Sergeant Williams. Sergeant Williams testified that he read

Wagenaar the Informing the Accused form and then asked Wagenaar whether he was willing to submit to a chemical test of his blood. Wagenaar indicated that he was not, and Sergeant Williams marked the Informing the Accused form as a refusal. Sergeant Williams further testified that Wagenaar was continuing to receive medical care for injuries he sustained, so he handed a notice to revoke operating privilege form to Wagenaar's nurse.

¶4 Wagenaar was charged with OWI, which was later dismissed, and with refusal to take a test for intoxication following an arrest. Wagenaar moved to dismiss the refusal charge and a hearing was held on his motion. The circuit court denied Wagenaar's motion, after which Wagenaar entered a guilty plea to the refusal charge. A judgment of conviction was then entered, revoking Wagenaar's driver's license for a period of one year. Wagenaar appeals.

ANALYSIS

¶5 Under Wisconsin law, when a driver is alleged to have improperly refused to submit to a blood test, the issues are limited to: (1) whether the officer stopping the driver had probable cause to believe the driver was operating a motor vehicle while under the influence of an intoxicant; (2) whether the officer properly informed the driver of his or her rights and responsibilities under the implied consent law; and (3) whether the defendant improperly refused the test. WIS. STAT. § 343.305(9)(a)5. Wagenaar challenges the first and second issues on appeal—probable cause and proper notification.

A. Probable Cause

¶6 Wagenaar contends that Deputy Williams did not have probable cause to believe that Wagenaar was operating a motor vehicle while under the

influence of an intoxicant. We review the issue of probable cause de novo. *See* ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 316, 603 N.W.2d 541 (1999). In the context of a refusal, the test for probable cause 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 an arrest. ***Id.*** at 314. This court's inquiry is focused on whether Marquette County established that the arresting officer had probable cause to believe that Wagenaar was operating a motor vehicle while under the influence of an intoxicant. *See* ***State v. Nordness***, 128 Wis. 2d 15, 35, 381 N.W.2d 300 (1986). The evidentiary scope of the refusal hearing is narrow—the court simply ascertains the plausibility of the arresting officer's account. *See* ***id.*** at 35-36.

¶7 In ***State v. Kasian***, 207 Wis. 2d 611, 622, 558 N.W.2d 687 (Ct. App. 1996), this court concluded that there was probable cause to arrest for OWI when police found Kasian injured at the scene of a one-car accident, smelled intoxicants on Kasian, and observed that Kasian's speech was slurred. In ***State v. Wille***, 185 Wis. 2d 673, 681, 683-84, 518 N.W.2d 325 (Ct. App. 1994), this court concluded that probable cause to arrest existed after Wille struck a parked car on the shoulder of a highway, Wille smelled of intoxicants, and Wille stated to police that he had "to quit doing this."

¶8 In the present case, Sergeant Williams found Wagenaar at the scene of an accident involving a motorcycle, Sergeant Williams observed the odor of intoxicants on Wagenaar's person, and Wagenaar admitted that he had been drinking. I conclude that under the lower standard required at a refusal hearing, where the circuit court "need only be persuaded that the State's account is plausible," this information was sufficient to lead a reasonable police officer to

believe that Wagenaar was operating a motor vehicle under the influence of an intoxicant. *See* ***id.*** at 681.

B. Proper Notification

¶9 Wagenaar contends that he was not properly informed of his rights and responsibilities under the implied consent law because Marquette County failed to establish that notice of intent to revoke operating privileges was properly and timely filed with the circuit court,[2] or that he was personally issued the notice of intent to revoke, which he claims is required by WIS. STAT. § 343.305(9). Wagenaar argues this court "ought to hold [that] the circuit court lacked an adequate jurisdictional basis" because the County failed to establish that it "adequate[ly]" complied with § 343.305(9).

¶10 Wagenaar acknowledges that in ***State v. Moline***, 170 Wis. 2d 531, 542, 489 N.W.2d 667 (Ct. App. 1992), this court held that the immediate preparation and service requirements of WIS. STAT. § 343.305(9) is directory, not mandatory, and that the failure to do so does not deprive the circuit court of personal jurisdiction over a defendant. Wagenaar argues, however, that the present case is distinguishable from ***Moline*** because in that case, the notice of intent to revoke was filed only two days after the arrest and the record established that the defendant in ***Moline*** was personally served the notice of intent to revoke. Wagenaar has failed to present this court with a persuasive argument that those factual differences between the present case and ***Moline*** that are emphasized by Wagenaar affect the precedential effect ***Moline*** has in this case, and I conclude

[2] It is undisputed that the notice of intent to revoke is dated August 31, 2010, but that the earliest record of it being filed with the clerk of the court wasn't until December 19, 2011.

that they do not. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 185-190, 560 N.W.2d 246 (1997) (the court of appeals is bound by published decisions of the court of appeals). Accordingly, I conclude that the irregularities in this case with the notice of intent to revoke did not affect the circuit court's jurisdiction.

CONCLUSION

¶11 For the reasons discussed above, I affirm.

By the Court.—Judgment affirmed.

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