COURT OF APPEALS
DECISION
DATED AND RELEASED

JULY 30, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-3607

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

VILLAGE OF MENOMONEE FALLS,

PLAINTIFF-RESPONDENT,

v.

THOMAS O'NEILL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: LEE S. DREYFUS, JR., Judge. *Affirmed.*

ANDERSON, J. Thomas J. O'Neill appeals from the trial court's denial of his pretrial motions and the subsequent judgment of conviction for operating a motor vehicle with a prohibited alcohol concentration (OWPAC) in violation of § 346.63(1)(b), STATS. On appeal, O'Neill contests the trial court's finding of probable cause for his arrest. He further contends that the trial court erred by refusing to suppress his breath test results because the police improperly

denied his request for an alternative chemical test under § 343.305(5)(a), STATS.[1] Because the trial court's findings are not clearly erroneous, we affirm the judgment.

FACTS

On April 20, 1995, Menomonee Falls police officers Rodney Nap and James Kirchberger were dispatched to the scene of a single car accident at Maple Road and Main Street in Menomonee Falls. Nap was informed that the driver was seen running from the accident towards the Village Bowl. Nap located the driver on the telephone in the lobby of the Village Bowl and identified him as O'Neill.

Nap observed that O'Neill had a strong odor of garlic, his eyes were very glassy and bloodshot and his speech was slurred. When Nap transported O'Neill back to the scene of the accident, he also detected an odor of intoxicants. O'Neill confirmed that he had a few drinks.

At the scene, Nap requested that O'Neill submit to some preliminary field sobriety tests. Although O'Neill correctly recited the alphabet, Nap testified that his speech was slurred. Nap also stated that while O'Neill performed the finger-to-nose test, there "was quite a bit of shoulder sway back and forth, his body wobbling." Nap then performed a preliminary breath test which resulted in a reading of blood alcohol concentration (BAC) of 0.13%.

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[1] Section 343.305(5)(a), STATS., provides in relevant part:

> The person who submits to [a breath test] is permitted, upon his or her request, the alternative test provided by the agency under sub. (2) or, at his or her own expense, reasonable opportunity to have any qualified person of his or her own choosing administer a chemical test for the purpose specified under sub. (2).

O'Neill was arrested for operating a vehicle while intoxicated (OWI) and transported to the police station where Kirchberger read O'Neill the standard Informing the Accused form. O'Neill agreed to submit to an evidentiary test of his breath which registered a BAC of 0.12%. It is disputed whether O'Neill requested an alternative test. O'Neill was subsequently charged with OWI and OWPAC.

O'Neill filed two pretrial motions: a motion to suppress statements and evidence based on the arrest of O'Neill without probable cause and a motion in limine seeking suppression of the breath test due to the agency's failure to provide O'Neill with an alternative test at the agency's expense. Both motions were denied. At the subsequent bench trial, the court found O'Neill guilty of OWPAC.[2] The judgment of conviction was entered on December 11, 1996. O'Neil appeals. Additional facts will be included within the body of the decision, as necessary.

PROBABLE CAUSE TO ARREST

The first issue is whether the officers had probable cause to arrest O'Neill. Probable cause exists when the totality of the circumstances within the officer's knowledge would lead a reasonable officer to believe that the individual 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, 308 (1986). Probable cause is judged by the factual and practical considerations of everyday life in which reasonable and prudent persons, not legal technicians, act. *See* ***State v. Truax***, 151 Wis.2d 354, 360, 444 N.W.2d 432, 435 (Ct. App. 1989).

[2] The charge of operating while intoxicated was dismissed without prejudice.

When Nap first approached O'Neill, he observed that O'Neill's eyes were glassy and bloodshot and his speech was slurred. During transport to the accident, an odor of intoxicants could be detected from O'Neill and he admitted that he had consumed a few drinks. Although O'Neill performed the field sobriety tests, his speech was slurred and he swayed back and forth while trying to execute the second test. Nap also noted that O'Neill appeared confused about where the accident occurred; it happened on Maple Road, not Menomonee Avenue as O'Neill indicated. Based on these observations, coupled with an accident where O'Neill attempted a right-hand turn at too great of speed and his vehicle skidded into a ditch, this court is satisfied that the trial court correctly concluded that Nap had sufficient probable cause to arrest O'Neill for OWI. *Cf.* ***State v. Sayles***, 124 Wis.2d 593, 596, 370 N.W.2d 265, 267 (1985) (even without odor of intoxicants, weaving on highway, bloodshot eyes, failure to pass field sobriety tests and slow, hesitant answers to questions establish probable cause to arrest).

IMPLIED CONSENT LAW

Next, O'Neill argues that the arresting officer, Kirchberger, denied his request for an alternative test to be performed at the agency's expense. Because Kirchberger "flat out den[ied]" O'Neill's request for an additional test, O'Neill maintains that the suppression of the Village's test is the appropriate sanction.[3] We disagree.

[3] O'Neill's argument for suppression is based on ***State v. McCrossen***, 129 Wis.2d 277, 385 N.W.2d 161 (1986), and ***State v. Renard***, 123 Wis.2d 458, 367 N.W.2d 237 (Ct. App. 1985). In ***McCrossen***, there was no dispute as to the defendant's request for an alternative test and the officer's failure to provide it. In the instant case, the issue is whether O'Neill actually asked for and was denied the opportunity to have an alternative test performed. Thus, ***McCrossen*** is not controlling.

(continued)

Initially, we note that Kirchberger testified that he did not recall having a conversation with O'Neill about an alternative test. He also indicated that if in fact O'Neill had requested an alternative test that Kirchberger "would be required to provide that test for him and that test was not provided, so based on that Mr. O'Neill never requested the alternative test that our department was prepared to administer."

In contrast, O'Neill testified that after receiving the results of his breath test, he asked about the alternative test and when he could have it done. O'Neill also asked what a reasonable period of time was, but did not receive a response. However, O'Neill further explained that "when I asked him about the alternative test I understood that I would have to pay for it and I have to have it done at a reasonable time." Then, when questioned by the court, O'Neill admitted that he never asked Kirchberger to administer the alternative test.

O'Neill contends that these statements unequivocally demonstrate his request and Kirchberger's denial of the alternative test. The trial court, however, made a factual finding that O'Neill did not request an alternative test. Under § 805.17(2), STATS., a trial court's findings of fact will not be set aside unless they are clearly erroneous. *See* ***State v. Coerper***, 192 Wis.2d 566, 571, 531 N.W.2d 614, 617 (Ct. App. 1995). This court also defers to the trial court's assessment of the weight and credibility of the evidence. *See* § 805.17(2). However, the construction of a statute in relation to a given set of facts is a

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Renard is also inapposite. In ***Renard***, the trial court found that "Renard requested a breathalyzer test in addition to the blood test," and we held that the finding was supported by the evidence. See ***Renard,***, 123 Wis.2d at 460, 367 N.W.2d at 238. However, in this case, the trial court found that O'Neill did not request an alternate test and we must affirm this finding if it is not clearly erroneous.

question of law that we review de novo. *See* ***Tahtinen v. MSI Ins. Co.***, 122 Wis.2d 158, 166, 361 N.W.2d 673, 677 (1985).

In this case, there is ambiguity as to whether O'Neill actually requested Kirchberger to administer an alternative test, or if he was inquiring about an alternative test that he could take in a reasonable time and would have to pay for. The court found that while O'Neill inquired about an alternative test, his query related to an individual having a test done by a person of his or her own choosing at his or her own expense. Implicit in this finding is an acceptance of O'Neill's testimony that he did not ask Kirchberger to administer an alternative test. This jibes with Kirchberger's recollection as well. Based on the evidence, the trial court found that O'Neill did not request an alternative test by the agency. Because this conclusion is supported by the evidence, we cannot conclude that the trial court's findings were clearly erroneous.

Section 343.305(5)(a), STATS., requires the officer to provide the suspect with an alternative test only "upon his or her request." O'Neill testified that when he asked about the alternative test, he understood that he would have to pay for it and he would have to have it done in a reasonable time. Upon further questioning by the court, he conceded that he never asked Kirchberger to administer an alternative test. O'Neill's obscure statement, "what about the alternative test," cannot reasonably be construed as a request for an alternative test. Accordingly, we conclude that the trial court properly denied O'Neill's motion in limine.

By the Court.—Judgment affirmed.

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