

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 6, 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. 2014AP258

Cir. Ct. No. 2013TR3518

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN THE MATTER OF THE REFUSAL OF ROBERT J. KOWALIS:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ROBERT J. KOWALIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sheboygan County: L. EDWARD STENGEL, Judge. *Affirmed.*

¶1 GUNDRUM, J.¹ Robert Kowalis appeals from the judgment of conviction in which he was found guilty of unlawfully refusing to take a test for intoxication after arrest, contrary to WIS. STAT. § 343.305(10). He contends the circuit court erred in concluding that the city of Sheboygan police officer who arrested him for operating while intoxicated had probable cause to do so and thus had probable cause to request that Kowalis take a test for intoxication. Because we conclude, as the State argues,² that the officer did have probable cause to arrest Kowalis and request a test for intoxication, we affirm.

Background

¶2 The arresting officer was the only person to testify at the refusal hearing, and he testified, in relevant part, as follows. At approximately 8:15 p.m. on September 22, 2013, the officer was dispatched to 708 Kentucky Avenue³ because “[a] neighbor was calling because they were concerned about somebody that was in their car, passed out behind the wheel, with the radio very loud, kind of hanging out of the car, and they were parked across the sidewalk.” Upon arrival, the officer observed the vehicle “parked diagonally [I]t appeared as though it

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.

² The State also asserts that Kowalis’ contention that the arresting officer lacked probable cause “should be considered moot given his later plea of ‘no contest’ to the underlying felony drunk driving charge” and is barred by the doctrine of issue preclusion because of his plea to the related OWI 5th/6th charge. Because the State does not adequately develop arguments related to mootness or issue preclusion and because we conclude that the officer did have probable cause to arrest Kowalis, we do not address these issues. *ABKA Ltd. P’ship v. Board of Review*, 231 Wis. 2d 328, 349 n.9, 603 N.W.2d 217 (1999) (we do not address undeveloped arguments); *State v. Davis*, 2011 WI App 147, ¶15, 337 Wis. 2d 688, 808 N.W.2d 130 (we need not address other issues when one is dispositive).

³ The record shows this is Kowalis’ residence.

was starting to back into a driveway or pull out of a driveway.... And it was parked across a sidewalk” and partly into the “grassy area between the sidewalk and the curb of the street,” with the front part of the car facing toward the street. The keys were in the ignition and turned to the “on” position, “and the gear shift lever was in reverse,” however, the vehicle was not running. The radio was playing “extremely loud.” Kowalis “appeared to be passed out” and was “kind of leaning to the right side of the car” with both feet outside the car. Kowalis did not respond when the officer “call[ed] out for him,” and it took several taps on his leg to get him to respond.

¶3 In speaking with the officer, Kowalis denied that he was parked across the sidewalk and told the officer he had not been driving. The officer observed the strong odor of intoxicants on Kowalis’ breath, his speech was “very strongly slurred,” and his eyes were “bloodshot and glassy.” The officer testified that when he asked Kowalis “where he was headed to this evening or where he was coming from,” Kowalis initially stated that he had been at his house all day, “but then later told me that he had been at Happy Valley tavern.” The officer testified that he further asked Kowalis “if he had been drinking at all this evening,” and Kowalis “told me yes, that he had a couple.”

¶4 When the officer asked Kowalis to get out of the vehicle, Kowalis made several attempts to remove his keys from the ignition, but was ultimately unsuccessful. When he finally stepped out of the vehicle to perform field sobriety tests (FSTs), the officer “actually had to grab onto [Kowalis] for fear he was going to fall over because his level of intoxication rendered him very unstable and wasn’t unable [sic] to stand on his own power at first.” The officer then had to hold on to Kowalis’ arm while walking him to a spot to perform FSTs “because he was unable to walk on his own.”

¶5 When the officer explained the Horizontal Gaze Nystagmus (HGN) test to Kowalis, Kowalis “just stared” at the officer. The officer provided more explanation and Kowalis “continued to stare” at him. Kowalis then refused to do the test and also refused to do the walk-and-turn and one-legged-stand tests. The officer arrested Kowalis for operating a motor vehicle while intoxicated and took him to a hospital for a blood draw, which Kowalis also refused. A blood sample was then procured against Kowalis’ wishes and subsequently revealed a blood alcohol concentration level of .309 percent.

¶6 On cross-examination, the officer agreed that, based upon conversations with the reporting neighbor, he believed the vehicle had not been running for at least an hour before he arrived on the scene. The officer further acknowledged that Kowalis never stated when he had been at the Happy Valley tavern. On re-direct examination, the officer prepared and described a sketch showing the garage, driveway, road, sidewalk, the grassy area between the road and the sidewalk, and the vehicle. The officer’s sketch and verbal description show the vehicle completely blocking the sidewalk, parked at an angle with the back end in the driveway and the front end facing the road and partially in the driveway and partially onto the grassy area between the road and the sidewalk.

¶7 The circuit court concluded that the officer’s request that Kowalis submit to a blood draw was reasonable and Kowalis’ refusal was unreasonable.

Discussion

¶8 As relevant to this case, the issues to be considered at a refusal hearing are (1) “[w]hether the officer had probable cause to believe the [defendant] was ... operating a motor vehicle while under the influence of alcohol,” (2) whether the officer properly informed the defendant of his or her

rights and responsibilities under the implied consent law, and (3) whether the defendant refused to permit the test. *See* WIS. STAT. § 343.305(9)(a)5. The parties agree that, of these, the sole issue before us on appeal is whether the deputy had probable cause to believe Kowalis had been operating a motor vehicle while under the influence of alcohol.

¶9 Whether an arresting officer had probable cause to believe a defendant operated a motor vehicle while under the influence of an intoxicant is a question of law we review de novo. *See Washburn Cnty. v. Smith*, 2008 WI 23, ¶16, 308 Wis. 2d 65, 746 N.W.2d 243. Probable cause “must be assessed on a case-by-case basis,” *State v. Lange*, 2009 WI 49, ¶20, 317 Wis. 2d 383, 766 N.W.2d 551, and “exists where the totality of the circumstances within the arresting officer’s knowledge at the time of the arrest would lead a reasonable police officer to believe, in this case, that the defendant was operating a motor vehicle while under the influence of an intoxicant,” *State v. Nordness*, 128 Wis. 2d 15, 35, 381 N.W.2d 300 (1986). Probable cause is a question “based on probabilities; and, as a result, the facts faced by the officer ‘need only be sufficient to lead a reasonable officer to believe that guilt is more than a possibility.’” *County of Dane v. Sharpee*, 154 Wis. 2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990) (citation omitted).

¶10 At the time he arrested Kowalis, the officer was aware (1) Kowalis was in the driver’s seat of the vehicle and appeared to be “passed out,” with the key in the ignition, the radio playing, and the gear shift lever in reverse; (2) the vehicle was parked on an angle near the road and completely blocking the sidewalk, with part of the vehicle on the driveway and part on the grassy area between the sidewalk and the road, with the front end facing the road; (3) when roused, Kowalis denied being parked across the sidewalk and denied driving,

although he gave no indication of anyone else having driven the vehicle to its resting place; (4) Kowalis had a strong odor of intoxicants on his breath, his speech was “very strongly slurred,” his eyes were “bloodshot and glassy,” he was unable to remove the keys from the ignition, he had trouble standing and was unable to walk on his own, and “just stared” at the officer when he explained the HGN test to Kowalis; (5) when asked where he was going to or coming from “this evening,” Kowalis first indicated that he had been at his house all day, but subsequently stated “he had been at Happy Valley tavern”; (6) when asked if he had been drinking “this evening,” Kowalis responded that he had; and (7) Kowalis refused to perform FSTs.⁴

¶11 Kowalis does not dispute that he was intoxicated at the time the officer arrived on the scene. Rather, he argues that the officer’s “arrival to Kowalis’ residence more than one hour after the citizen reporter witnessed Kowalis in the vehicle with the engine off, combined with the lack of knowledge as to when Kowalis consumed any intoxicating beverages do not rise to the level of probable cause necessary” for arrest for operating while intoxicated.

¶12 We conclude that the officer had probable cause to arrest Kowalis. It is undisputed that Kowalis was extremely intoxicated when the officer found him in the driver’s seat with the keys in the ignition, the radio playing, and the gear shift lever in reverse. When the officer asked Kowalis “where he was headed to *this evening* or where he was *coming from*,” Kowalis initially denied leaving his house at all that day, but subsequently acknowledged having been at a tavern.

⁴ See *State v. Babbitt*, 188 Wis. 2d 349, 363, 525 N.W.2d 102 (Ct. App. 1994) (holding that “a defendant’s refusal to submit to [a field sobriety] test may be used as evidence of probable cause to arrest”).

(Emphasis added.) A reasonable officer could infer from these responses that Kowalis was initially attempting to hide the truth about operating the vehicle on the roads and being at a tavern. Although the officer testified and the circuit court found⁵ that Kowalis did not provide the officer with a specific time when he was at the tavern, the officer spoke with Kowalis around 8:20 p.m. and at that time Kowalis indicated that he had been drinking “this evening.” Thus, Kowalis had identified where he was coming from “this evening” and that he had been drinking “this evening.” And, as the circuit court pointed out, Kowalis never identified anyone else who might have driven the vehicle. From the above context and conversation, a reasonable officer could infer that Kowalis had been drinking at a tavern in the evening, as opposed to the morning or afternoon, and had driven the vehicle. And in light of the significant indicia of intoxication, a reasonable officer could infer that Kowalis had been drinking quite heavily. Finally, Kowalis’ refusal to cooperate with requested FSTs further demonstrated his guilt. The “facts faced by the officer” were “sufficient to lead a reasonable officer to believe that guilt [was] more than a possibility.” See *id.* at 518 (citation omitted).

¶13 We are satisfied that from the totality of the circumstances the officer could reasonably infer that Kowalis operated the vehicle while under the influence of an intoxicant and thus had probable cause to arrest Kowalis and request a blood sample from him.

By the Court.—Judgment affirmed.

⁵ The circuit court found that Kowalis did not “say exactly when he was at Happy Valley” tavern.

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

