

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 27, 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. 2014AP526-CR

Cir. Ct. No. 2013CT1670

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

JEANMARIE CARINI,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County:
JENNIFER R. DOROW, Judge. *Reversed.*

¶1 BROWN, C.J.¹ The State appeals from an order granting Jeanmarie Carini's motion to suppress the evidence of the result of a preliminary

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

breath test (PBT) Carini was asked to take shortly after she was involved in a car accident. The circuit court concluded that a police officer lacked probable cause to request the PBT even though the other driver said that Carini had caused the accident and the officer smelled intoxicants on the driver's breath. We agree with the State that this conclusion was a misapplication of WIS. STAT. § 343.303 and reverse.

¶2 Under WIS. STAT. § 343.303, a law enforcement officer may request a driver to perform a PBT if the officer “has probable cause to believe” that the person is driving while impaired. In reviewing a circuit court's determination as to probable cause for a PBT, we uphold findings of fact if they are not clearly erroneous but we consider independently whether those facts established probable cause. *County of Jefferson v. Renz*, 231 Wis. 2d 293, 316, 603 N.W.2d 541 (1999).

¶3 There are no material factual disputes in this case. The officer who was called to the scene of Carini's traffic accident had seventeen years of experience and had investigated hundreds of traffic offenses and accidents. He had training about how to investigate driver intoxication. He was dispatched to the accident sometime after 12:30 p.m. He found two vehicles and no drivers on the scene. One vehicle was on the sidewalk and the other was on the side of the road. It was cold outside, and the drivers had gone to a house down the street from the site of the accident. Soon after the officer arrived, he saw the drivers walking back towards the scene. Both drivers spoke to the officer. Carini denied being at fault for the accident, but the other driver said that Carini's vehicle “turned right into her” at the intersection.

¶4 When he saw her walking, the officer did not see anything about Carini's gait or manner that suggested she was intoxicated. As he spoke to her, however, he thought he smelled a "mild odor of intoxicants on her breath," even though he knew that his own sense of smell was not very good. Carini denied drinking when he asked her. To help decide whether he was really smelling intoxicants, the officer asked Carini to "take a breath and blow towards my face." At first Carini blew "off to the side," so he asked her to do it again, and that time she blew directly towards the officer's face as requested. Once again the officer smelled a "mild odor of intoxicants on [Carini's] breath."

¶5 At this point, standing outside in the cold with Carini, the officer decided to ask Carini to do a PBT "just to verify what I thought was alcohol." Carini agreed, and the test showed an alcohol level of .22. The officer then asked again whether Carini had been drinking alcohol, and she admitted that she drank until 2 or 3 a.m. The officer went on to do field sobriety tests (FSTs), during which he observed several clues of intoxication. He arrested Carini for operating while intoxicated.

¶6 Carini filed a motion to suppress the evidence on grounds that the officer's initial observations did not provide reasonable suspicion to detain Carini to investigate whether she had been drinking; that the officer lacked probable cause to request the PBT; and that the arrest was illegal without the evidence from the PBT and the FSTs. At the hearing on the motion, the State, citing *State v. Felton*, 2012 WI App 114, 344 Wis. 2d 483, 824 N.W.2d 871, argued that the two-car accident and the smell of intoxicants provided reasonable suspicion for the brief detention and probable cause to request the PBT.

¶7 The court reviewed the evidence and noted that the officer requested the PBT based on two facts: (1) Carini turned and drove into another car, and (2) even with a poor sense of smell, the officer smelled alcohol on Carini’s breath. The court concluded that the officer in Carini’s case observed fewer indicators of intoxication than the officer in *Felton* and that there was insufficient evidence to support probable cause to request the PBT. Since the PBT was what led to the FSTs, without the PBT there was insufficient evidence to support the arrest. The State appeals.²

¶8 For purposes of whether an officer may request a PBT under WIS. STAT. § 343.303, “probable cause” means more than reasonable suspicion for a traffic stop but less than probable cause for arrest. *Felton*, 344 Wis. 2d 483, ¶8. This is a common-sense, totality of the circumstances inquiry. *Id.*, ¶9. There is no requirement that FSTs be given before a PBT is requested. *Id.*, ¶10³ (“[The officer] would have been fully justified in asking Felton to take a [PBT] without even asking him to perform any [FSTs] because [FSTs] are not needed to establish probable cause to arrest someone for drunk driving.”)

² Such appeal is authorized by WIS. STAT. § 974.05(1)(d)2.

³ We are disappointed that the defendant characterizes the State’s brief as “blatantly false and misleading” on this issue. To the contrary, while it is true that the State omitted a closing quotation mark in quoting a portion of *Renz*, the actual quote supports the State’s point, that a PBT is a screening test. *County of Jefferson v. Renz*, 231 Wis. 2d 293, 307, 603 N.W.2d 541 (1999) (“the legislative history shows that the legislature intended to allow an officer to request a PBT as a screening test before establishing probable cause for an OWI arrest”).

In arguing that *Renz* establishes that PBTs properly come after FSTs in an investigation, it is the defendant who misstates the law. While the defendant in *Felton* was asked to perform FSTs before the PBT was requested, he completed the FSTs successfully, so they were not any justification for the PBT; in fact, Felton argued that in his case the FSTs dispelled, rather than supported, probable cause for the PBT. *State v. Felton*, 2012 WI App 114, ¶¶1, 10, 344 Wis. 2d 483, 824 N.W.2d 871. In flatly rejecting that argument, the court pointed out that there is no requirement that FSTs be given before a PBT, anyway. *Id.*, ¶10.

¶9 The indicators of intoxication in Carini’s case were sufficient to establish probable cause to request a PBT. Carini inexplicably drove her car into another car at an intersection, causing an accident. Even with his poor sense of smell, the officer confirmed an odor of intoxicants on Carini’s breath. In these circumstances, on a cold November day, it is unsurprising that the officer chose a PBT as his next screening tool rather than FSTs.

¶10 It is true that there were more indicators of intoxication present in *Felton* when the officer requested the PBT (seeing the driver “linger unusually long” at one stop sign and then “go right through” another; bloodshot and glassy eyes; a strong odor of intoxicants; and admission of drinking), *id.*, ¶¶2, 3, than in Carini’s case. The inquiry, however, is not a matter of counting up how many indicators are present. It is a totality-of-the-circumstances test. Sometimes a single indicator might be enough. It all depends on the particular case.

¶11 Again, here, while the officer had not observed Carini’s driving, he saw its effect: turning into another car and causing an accident. He smelled intoxicants on Carini’s breath, even after checking to make sure that he was smelling intoxicants. In these circumstances, administering the PBT was authorized by WIS. STAT. § 343.303. We reverse the circuit court’s order granting Carini’s motion to suppress the PBT and the evidence derived from it.

By the Court.—Order reversed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.

