COURT OF APPEALS
DECISION
DATED AND FILED

September 17, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1034

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN R. LOOTANS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Kenosha County: MICHAEL S. FISHER, Judge. *Affirmed.*

SNYDER, P.J. John R. Lootans appeals from a trial court order revoking his driving privileges for one year based on his refusal to submit to a chemical test for intoxication. Lootans raises two issues on appeal. First, he asserts that the State failed to show that the arresting officer had probable cause to arrest him and request a breath test. Second, he contends that the arresting officer should have realized that due to Lootans' condition at the time of the arrest, he was not capable of withdrawing his consent and thus the officer should have

proceeded under § 343.305(3)(b), STATS., and taken a blood sample without requesting his permission. We are not persuaded by Lootans' arguments and thus affirm the trial court.

Deputy Horace Staples was responding to a citizen report of a possible drunk driver when he came upon a vehicle parked partially in a driveway and partially on the shoulder of the road. When he approached the vehicle, Staples observed the keys were on the seat, the engine was warm and an individual, later identified as Lootans, was slumped over the steering wheel. After requesting that Lootans exit the vehicle and observing his condition, Staples declined to ask him to perform any field sobriety tests.[1]

Lootans was arrested for operating a motor vehicle while intoxicated and transported to the police station. While being transported, Lootans asked Staples to "give him a break." He also told Staples that he was not on any medication. At the station, Lootans refused to submit to a breath test and requested a hearing. At the refusal hearing, the trial court found that probable cause was established and took the question of whether the proper statutory section was followed under advisement. In a written decision, the trial court found that the deputy had proceeded correctly and the refusal was unreasonable. Lootans now appeals. Further facts will be included as necessary in the analysis of the issues presented.

[1] Staples testified as to Lootans' condition: "His legs were very, very wobbly; and he was leaning back and forth, and his eyes were bloodshot; and I said before I smelled a very strong odor of intoxicants; and in fear of his safety, I decided not to perform any field sobriety tests on him." Staples also testified that he had to "hold onto an arm to make sure [Lootans] wouldn't fall down."

The facts in this case are undisputed. A determination of whether probable cause existed to arrest Lootans requires us to apply a constitutional standard to the undisputed facts. *See* ***State v. Riddle,*** 192 Wis.2d 470, 475, 531 N.W.2d 408, 410 (Ct. App. 1995). We review the matter de novo without deference to the trial court. *See* ***id.***

Probable cause generally refers to "that quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed a crime." *See* ***State v. Nordness,*** 128 Wis.2d 15, 35, 381 N.W.2d 300, 308 (1986). If the totality of the circumstances, known to the arresting officer at the time of the arrest, would lead a reasonable police officer to believe that the defendant was operating a motor vehicle while under the influence of an intoxicant, the requirement of probable cause is met. *See* ***id.*** In ***Nordness,*** the supreme court then addressed the very issue that is before us here: review of a probable cause determination made at a revocation hearing. The evidentiary scope of a revocation hearing is narrow—in terms of the issue of probable cause, the trial court is merely required to ascertain whether "probable cause existed for the officer's belief of driving while intoxicated." *See* ***id.*** at 36, 381 N.W.2d at 308. The trial court is not to weigh the evidence between the parties, but only to determine "the plausibility of [the] police officer's account." *See* ***id.***

We apply these guidelines to the instant case. Staples testified that he was in the area because of a citizen report of a possible drunk driver. He came upon a vehicle stopped partially on the shoulder of the roadway. Although the vehicle was not running, the sole occupant, Lootans, was seated in the driver's seat and the keys were on the seat next to him. Staples stated that the engine was warm when he touched it; he could "feel the heat coming off." The occupant of the vehicle had bloodshot eyes and smelled strongly of intoxicants. When asked to

exit the driver's seat, Lootans was unable to do so without help and was unable to stand without assistance.

Based on our independent review of the facts in the record before us, we conclude that Staples had probable cause to believe that Lootans had operated a motor vehicle while under the influence of an intoxicant. Staples had the requisite knowledge "to believe that guilt is more than a possibility." *See* ***Dane County v. Sharpee,*** 154 Wis.2d 515, 518, 453 N.W.2d 508, 510 (Ct. App. 1990). The trial court's probable cause determination is affirmed.

The second issue presented by Lootans is whether Staples wrongly proceeded under § 343.305(3)(a), STATS., rather than (3)(b), because Lootans was incapable of withdrawing his consent to a chemical test for intoxication. This issue is one of statutory interpretation and a de novo standard of review will be applied to this question of law. *See* ***State v. Dawn M.,*** 189 Wis.2d 480, 484, 526 N.W.2d 275, 276 (Ct. App. 1994).

Section 343.305(2), STATS., the "implied consent law," provides that "[a]ny person who … drives or operates a motor vehicle upon the public highways of this state … is deemed to have given consent to one or more tests of his or her breath, blood or urine." This subsection underpins a law enforcement officer's request that a driver submit to a chemical test for intoxicants. Under this statute, an officer may then proceed to obtain a sample in one of the following ways:

> **(3) Requested or required.** (a) Upon arrest of a person for violation of [operating a motor vehicle while under the influence of an intoxicant or other drug] … a law enforcement officer may request the person to provide one or more samples of his or her breath, blood or urine for the purpose specified under sub. (2).
>
> (b) *A person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn*

> *consent under this subsection*, *and* if a law enforcement officer has probable cause to believe that the person has [operated a motor vehicle while under the influence of an intoxicant or other drug] … *one or more samples specified in par. (a) or (am) may be administered to the person.* [Emphasis added.]

Lootans' position is that Staples should not have asked him to submit to the breathalyzer test.[2] *See* § 346.305(3)(a). Instead, because of his state of inebriation, he contends that he was a person who was "unconscious or otherwise not capable of withdrawing consent." Section 346.305(3)(b). He argues that instead of asking whether he consented to a breath test, Staples should have simply had a blood sample drawn without requesting his permission. He cites to ***State v. Disch,*** 129 Wis.2d 225, 385 N.W.2d 140 (1986), in support of his proposition.

The ***Disch*** court held that if a person is not capable of withdrawing consent, it is "useless for [an] officer to request the person to take a test or to give a sample."[3] ***Id.*** at 233, 385 N.W.2d at 143. However, the court also went on to discuss the policy underpinnings of this determination for law enforcement officers:

> The phrase 'not capable of withdrawing consent' must be construed narrowly and applied infrequently. If law enforcement officers or the courts construe the phrase 'not capable of withdrawing consent' broadly to apply to all persons who are confused or disoriented, the legislative purposes of sec. 343.305 will be defeated.… Many people to whom the officer will administer tests may appear

[2] The testimony at the refusal hearing reveals that Lootans was read the Informing the Accused form and asked for a sample of his breath. Lootans refused to provide a breath sample and no test was taken.

[3] The defendant in ***State v. Disch,*** 129 Wis.2d 225, 385 N.W.2d 140 (1986), had been injured in an accident and given an unidentified drug before the officer saw her. Although she was able to state her name and address, she seemed unable to concentrate and was "in a stupor." *See* ***id.*** at 236, 385 N.W.2d at 144. The officer testified that he was not sure she understood when the consent form was being read to her. The defendant herself testified that she was not sure what people were saying to her and that "she was not sure what it was all about." *See* ***id.***

> mentally or physically incapacitated. Indeed, the person's impaired physical or mental condition frequently gives the officer reason to believe the person is under the influence of an intoxicant.

Id. at 235, 385 N.W.2d at 144.

The court went on to state that if the person is conscious, the recommended practice is for the officer to read the Informing the Accused form and then request that the individual provide a sample. *See* ***id.*** The court also noted that "[i]f the officer proceeds under [the alternate section] there is likely to be litigation over whether the person was capable of withdrawing consent." ***Id.*** Consequently, "[l]aw enforcement officers and courts should be very reluctant to declare a person 'not capable of withdrawing consent.'" ***Id.*** at 235-36, 385 N.W.2d at 144.

In the instant case, Lootans claims that the arresting officer "le[ft] the decision as to whether or not to take a breath test to somebody who was clearly incoherent and unable to answer the most routine questions" and that this was improper because ***Disch*** is controlling. Therefore, he posits, the officer "was required to … seize a blood sample from the defendant."

While the record is replete with evidence that Lootans was very inebriated and that at several points "his head was bobbing and his eyes were closed," there is also evidence in the record that Lootans was well aware of his surroundings and the situation. Staples testified that in response to his question about how the vehicle got to where it was, Lootans responded that "he had been there the whole time, [and] he was not driving." While being transported in the squad car, he asked Staples to "give him a break." He also responded to other questions put to him by the deputy.

We conclude that the narrow exception of ***Disch*** does not apply. Lootans was responsive to direct questions and was aware of his situation. Staples followed the correct procedure in reading the Informing the Accused form to Lootans and asking him to consent to the breathalyzer test. The trial court's finding that Lootans' refusal was unreasonable is supported by case law and the record evidence. We affirm the trial court's order finding that the refusal was unreasonable.

By the Court.—Order affirmed.

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