COURT OF APPEALS
DECISION
DATED AND FILED

September 18, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1047

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH P. RACICOT

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for La Crosse County: DENNIS G. MONTABON, Judge. *Affirmed.*

ROGGENSACK, J.[1] Joseph P. Racicot appeals his conviction for a second offense of operating a motor vehicle while intoxicated (OMVWI), based on the denial of his motion to suppress evidence gathered during field sobriety tests and after arrest. Racicot claims the arresting officer exceeded the scope of

[1] This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

the traffic stop when she asked him to submit to a preliminary breath test before she asked him to perform the heel-to-toe test, which he subsequently failed. However, because we determine that the arresting officer had probable cause to believe that Racicot had been driving while under the influence, within the meaning of § 343.303, STATS., we affirm the judgment of the circuit court.

BACKGROUND

At approximately 11:21 p.m. on the evening of May 17, 1996, Officer Sharon Neitzke observed a Chevrolet tailgating a Ford along a public highway. Neitzke turned to follow the two vehicles and observed the Ford, which was moving slowly at approximately seventeen to twenty miles per hour, travel partially off the road onto the gravel shoulder two or three times, then overcorrect and hit the center line. When the road curved, the Ford did not; instead, it traveled across the shoulder and into a parking lot. Neitzke activated the squad's lights and stopped the Ford. Racicot pulled over; but when he did so, he put the car in reverse rather than park, and backed up before coming to a complete stop. Neitzke requested identification. Racicot complied, but it took him several minutes to locate his license in his wallet. By the beam of her flashlight, Neitzke observed Racicot pass by the license at least twice. Racicot had been smoking in his vehicle with the windows closed and Neitzke did not detect the odor of intoxicants.

Neitzke asked Racicot to step into her squad car, out of the rain, in order to investigate the cause of his erratic driving. She had him recite the alphabet, which he was able to do, but she noted the odor of intoxicants as he performed the test. While in the squad car, she also asked him to submit a breath

sample for a preliminary breath test (PBT).[2] Again, Racicot cooperated, but the machine gave error messages (possibly due to the cigarette smoke) and the officer was unable to get an accurate reading. By this time, the rain had stopped and Neitzke asked Racicot to step out of the squad car to perform the heel-to-toe test. Racicot failed the test when he lost his balance after three or four steps. Neitzke let him try again, but he again lost his balance and fell out of line after two steps, so that the officer had to support him to keep him from falling down. Neitzke then placed Racicot under arrest for OMVWI and transported him to the La Crosse Police Department, where a breath test showed an alcohol concentration of .17.

Racicot was charged with one count of OMVWI and one count of operating a motor vehicle with a prohibited alcohol concentration (PAC). He moved to suppress the results of the heel-to-toe and breath tests, but after his motion was denied, he pled guilty to the OMVWI count and the PAC count was dismissed. This appeal followed.

DISCUSSION

Standard of Review.

Whether Racicot was unlawfully detained while a PBT was taken presents a mixed question of law and fact. The circuit court's findings on disputed factual issues will be upheld unless clearly erroneous. Section 805.17(2), STATS. However, the level of suspicion required to fulfill the statutory prerequisite for

[2] Neitzke initially testified that she could not recall whether she asked Racicot to perform the alphabet test before or after she asked him to submit to the PBT, but later explained that she normally has drivers do the alphabet test outside or in their own cars, and only asked Racicot to step into the squad car to perform the alphabet test due to the rain. Neitzke also stated that she smelled alcohol on Racicot's breath before she asked him to perform the other tests.

requesting a driver to submit to a PBT is a question of law which we review without deference to the circuit court. *See* ***State v. Nordness***, 128 Wis.2d 15, 36, 381 N.W.2d 300, 308-09 (1986).

Probable Cause to Administer the PBT.

Racicot does not dispute that his performance on the heel-to-toe test, combined with his erratic driving and the odor of intoxicants, would supply probable cause to arrest him for OMVWI. However, he contends that the arresting officer improperly requested that he submit to the PBT *before* the other sobriety tests were performed, and that absent the results of those subsequent tests, the officer lacked statutory and constitutional authority to request the breath sample. Racicot further reasons that the administration of the PBT without sufficient cause exceeded the permissible scope of his traffic detention and rendered any subsequently obtained evidence inadmissible. *See* ***State v. Smith***, 131 Wis.2d 220, 243-44, 388 N.W.2d 601, 611 (1986). However, Racicot's theory rests upon an erroneous understanding of the level of suspicion required to request a breath sample from a suspected drunk driver.

Racicot correctly notes that taking a breath sample from a suspected drunk driver constitutes a search and seizure under the United States and Wisconsin constitutions. ***Milwaukee County v. Proegler***, 95 Wis.2d 614, 623, 291 N.W.2d 608, 612 (Ct. App. 1980). However, consent constitutes a well-recognized exception to the rule against admitting evidence seized from a warrantless search. *See* ***State v. Douglas***, 123 Wis.2d 13, 22, 365 N.W.2d 580, 584 (1985). In this case, Racicot voluntarily gave Neitzke the breath sample which she requested, thus eliminating any constitutional warrant concerns. Therefore, the only questions before this court concerning the administration of

the PBT are whether Neitzke had the statutory authority to request the breath sample in the first place; and if not, whether the request itself [3] tainted the rest of the traffic stop.

By virtue of Wisconsin's regulatory scheme, a law enforcement officer may request an individual to submit to a PBT when the officer has probable cause to believe that the individual has violated § 346.63(1), STATS. The result of the PBT then becomes part of the totality of circumstances which the officer may consider in determining whether to arrest. Section 343.303, STATS.; ***State v. Beaver***, 181 Wis.2d 959, 969, 512 N.W.2d 254, 258 (Ct. App. 1994); ***County of Dane v. Sharpee***, 154 Wis.2d 515, 520, 453 N.W.2d 508, 511 (Ct. App. 1990).

Racicot attempts to equate the probable cause necessary to request a PBT under § 343.303, STATS., with the probable cause necessary to arrest a motorist for driving under the influence, citing cases such as ***State v. Krause***, 168 Wis.2d 578, 484 N.W.2d 347 (1992) and ***State v. Swanson***, 164 Wis.2d 437, 475 N.W.2d 148 (1991) to support his position that Neitzke lacked probable cause to believe that he had violated § 346.63(1), STATS.

No published appellate decision directly addresses the quantum of proof necessary to sustain the probable cause which § 343.303, STATS., requires prior to requesting a PBT. However, at least one decision of this court has held that the quantum of proof necessary to sustain probable cause at a refusal hearing is significantly less than that required to sustain probable cause at a suppression

[3] This case does not present the usual poisoned fruit scenario in which unlawfully obtained information leads to the recovery of otherwise admissible evidence, because here the PBT yielded no useful results whatsoever. The officer had no more cause to arrest after the administration of the breath test than before, and indeed had independent reasonable suspicion to administer the other sobriety tests.

hearing. ***State v. Wille***, 185 Wis.2d 673, 681, 518 N.W.2d 325, 328 (Ct. App. 1994).

When we are asked to apply a statute whose meaning is in dispute, our efforts are directed at determining legislative intent. ***Truttschel v. Martin***, 208 Wis.2d 361, 365, 560 N.W.2d 315, 317 (Ct. App. 1997). In so doing, we begin with the plain meaning of the language used in the statute. ***Id***. If the language of the statute clearly and unambiguously sets forth the legislative intent, our inquiry ends, and we must apply that language to the facts of the case. However, if the language used in the statute is capable of more than one meaning, we will determine legislative intent from the words of the statute in relation to its context, subject matter, scope, history, and the object which the legislature intended to accomplish. ***Id***. We will also look to the common sense meaning of a statute to avoid unreasonable and absurd results. ***DeMars v. LaPour***, 123 Wis.2d 366, 370, 366 N.W.2d 891, 893 (1985).

Following this methodology, we first note that an officer must have probable cause to arrest a driver for operating a motor vehicle in contravention of § 346.63(1), (2m), (5) or (7), STATS., before he or she can request a chemical test under § 343.305(3), STATS., the refusal of which sets the stage for a refusal hearing under § 343.305(9). At a refusal hearing, the State must simply show that the officer's belief is plausible. A court does not weigh evidence for and against probable cause or determine the credibility of witnesses, as is done at a suppression hearing. ***Wille***, 185 Wis.2d at 681, 518 N.W.2d at 328. Additionally, a court properly takes into account the officer's knowledge, training, and prior personal and professional experiences, when determining if his belief is plausible. *See* ***State v. DeSmidt***, 155 Wis.2d 119, 134-35, 454 N.W.2d 780, 787 (1990), *citing* ***United States v. Crozier***, 777 F.2d 1376, 1380 (9th Cir. 1985).

On the other hand, probable cause to arrest is not required before a PBT can be requested; rather, probable cause to believe that a driver has violated § 343.63(1), STATS., is all that is required. Therefore, we conclude that given the holding in ***Wille***, the quantum of proof required for an officer to have probable cause to believe, as those terms are used in § 343.303, STATS., in order to request a PBT, can be no greater than that level of proof required to sustain probable cause to arrest at a refusal hearing.

When Neitzke administered the PBT, she knew that Racicot had been driving extremely erratically and had difficulty parking his car and finding his driver's license. She had smelled alcohol on his breath over his cigarette smoke after he entered the squad car.[4] The totality of these circumstances make the officer's belief that Racicot had violated § 346.63, STATS., plausible. As the circuit court aptly observed, *something* was impairing Racicot's ability to operate a motor vehicle, and the odor of alcohol provided the most obvious explanation. Therefore, this court concludes Neitzke had the quantum of proof necessary to sustain probable cause to believe that Racicot was driving while intoxicated. She properly requested that he submit to a PBT under § 343.303, STATS.

[4] The circuit court's finding that Neitzke administered the alphabet test before the PBT was not clearly erroneous. *See* note 2, above.

CONCLUSION

A police officer investigating a suspected drunk driver is not required to administer field sobriety tests in inclement weather *before* administering a PBT in the squad car, so long as the officer's belief that the driver was intoxicated was plausible, based on the information already in the officer's possession. At the time of the PBT request in this case, the officer had already observed otherwise unexplained erratic driving and the odor of intoxicants on the driver's breath. This information was sufficient under § 343.303, STATS., for the officer to request a PBT. Therefore, the suppression motion was properly denied.

By the Court.—Judgment affirmed.

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