

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 25, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 97-2979

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PAUL MICHAEL DAVIS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Walworth County:
JOHN R. RACE, Judge. *Affirmed.*

NETTESHEIM, J. Paul Michael Davis challenges a circuit court determination that he improperly refused to submit to chemical testing as required under § 343.305, STATS.¹ On appeal, Davis argues that the police unlawfully stopped his vehicle and that the State failed to establish at the refusal hearing that

¹ Based on the circuit court's finding, Davis' operating privileges were revoked for a period of one year and Davis was ordered to complete an alcohol assessment program.

the intoxilyzer machine and the operator were not properly certified. We reject these arguments. We affirm the order.

On February 6, 1997, Officer David Gempler was at the intersection of West Whitewater Street and South Fremont Street in the city of Whitewater. At approximately 2:00 a.m., Gempler heard a car horn honking repeatedly. He suspected that the honking was coming from one of two vehicles he saw on Fremont Street. The first vehicle turned onto Whitewater Street and headed east. The second vehicle, a black Chevrolet Cavalier, pulled up to the intersection and stopped at the stop sign. Gempler observed that the Cavalier remained stopped in the crosswalk of the intersection for about two minutes, although there was very little vehicular traffic and no pedestrian traffic. Gempler proceeded across Whitewater Street, passed the vehicle, and made a turn behind it. As he did, the Cavalier, without signaling, turned right and headed east on Whitewater Street. Gempler followed the Cavalier which pulled over to the side of the road in front of a vehicle. When the Cavalier stopped, all the passengers exited the vehicle. Gempler then drove up next to the Cavalier and spoke with Davis, the driver.

Gempler asked Davis a couple of questions and noticed that his speech was slurred and his eyes were glassy and red. Gempler then asked Davis to exit his vehicle and walk on the sidewalk because he suspected that Davis might have been drinking. As Davis exited the vehicle, Gempler noticed him lean on the door frame for a moment. Davis also appeared unsteady and off balance when he walked to the sidewalk. Gempler detected a strong odor of intoxicants when he walked up beside Davis on the sidewalk. In response to Gempler's question, Davis admitted that he had been drinking. Upon Gempler's request, Davis then performed a series of sobriety tests which he failed. Gempler then asked Davis to submit to a preliminary breath test, but when Davis did so, it appeared that he did

not blow into the machine. After four such attempts, Gempler arrested Davis for operating a motor vehicle while under the influence of an intoxicant.

At the police department, Davis agreed to take an intoxilyzer test. However, Davis again seemed to be intentionally refusing to blow into the tube. Based on this observation, Gempler concluded that Davis was refusing to submit to the test. At the refusal hearing, the circuit court agreed and determined that Davis had improperly refused to submit to the test.

Davis appeals. He argues that Gempler unlawfully stopped him. He also claims that the State failed to establish that the intoxilyzer machine and the operator complied with the requirements of the statutes and the administrative code.

The legality of the initial stop is a question of law and this court is not bound by the lower court's decision on this question. *See State v. Wisumierski*, 106 Wis. 2d 722, 733, 317 N.W.2d 484, 489 (1982).

Section 345.22, STATS., provides that: "A person may be arrested without a warrant for the violation of a traffic regulation if the traffic officer has reasonable grounds to believe that the person is violating or has violated a traffic regulation." Implicit in the authority to arrest someone for violating a traffic regulation is the authority to stop the vehicle when the officer has reasonable grounds to believe a violation occurred. *See State v. Baudhuin*, 141 Wis.2d 642, 648, 416 N.W.2d 60, 62 (1987).

Davis argues that no traffic violations occurred and therefore Gempler had no right to stop him. We disagree. Davis clearly committed two traffic violations. In the event that other traffic may be affected by a vehicle's

turn, “no person may so turn any vehicle without giving an appropriate signal in the manner provided in s. 346.35.” Section 346.34(1)(b), STATS. It also is a violation of traffic regulations to temporarily stop on a crosswalk. *See* § 346.52(1)(b), STATS.² The facts, objectively viewed, demonstrated to Gempler that Davis had violated both of these rules of the road. Gempler was therefore entitled to stop and question Davis.

Next, Davis argues that his refusal to submit to the test was not improper because the State failed to establish that the intoxilyzer machine complied with the requirements of the statute. He also argues that the State failed to establish that the operator had been properly instructed as to the operation of the machine. Specifically, Davis claims that the State failed to prove: (1) that the department utilized approved techniques or methods for performing a chemical analysis of breath, (2) that trained technicians had maintained and regularly certified the intoxilyzer machine, (3) that the department utilized approved training manuals and courses instructing officers in the administration of the breath test, and (4) that the operator of the machine in this case was certified. *See* § 343.305(6)(b), STATS.

In support, Davis cites to the following language of *State v. Baldwin*, 212 Wis.2d 245, 264, 569 N.W.2d 37, 44-45 (Ct. App. 1997):

[W]here test results are obtained using an instrument not evaluated and approved as required in § 343.305(6)(b), STATS., and WIS. ADM. CODE § TRANS 311.04, the results are no longer entitled to automatic admissibility or to a prima facie presumption of accuracy to establish the

² Section 346.52, STATS., provides: “**Stopping prohibited in certain specified places.** (1) No person shall stop or leave standing any vehicle, whether attended or unattended and whether temporarily or otherwise, in any of the following places: ... (b) On a crosswalk”

defendant's blood alcohol level. In such cases, prosecutors who wish to rely upon the breath test results will be required to present evidence of the instrument's scientific accuracy and reliability and prove compliance with accepted scientific methods as a foundation for the admission of the test results.

Davis' reliance on *Baldwin* is misplaced. *Baldwin* speaks to the evidentiary foundation which must be laid when the results of a chemical test are sought to be admitted into evidence. Those requirements have no relevance in a refusal hearing under § 343.305, STATS. The issue in a refusal hearing is not whether the results of the test could have been admitted into evidence if the suspect had taken the test. Rather, the issue is whether the suspect improperly refused the test. Section 343.305(9)(a)5a-c delineates the issues at a refusal hearing. They are confined to (1) whether the officer had probable cause to believe the person was driving or operating a motor vehicle while intoxicated, (2) whether the officer properly advised the suspect pursuant to the implied consent law, and (3) whether the suspect refused the test. *See id.*

Davis' defenses are not recognized at a refusal hearing under the implied consent law. We affirm the order.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

